[4210-01]

[Docket No. FI-3347]

PART 1917—APPEALS FROM FLOOD ELEVATION DETERMINATION AND JUDICIAL REVIEW

Final Flood Elevation Determination for the Village of Woodstock, Windsor County, Vt.

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final rule.

SUMMARY: Final base (100-year) flood elevations are listed below for selected locations in the village of Woodstock, Windsor County, Vt. These base (100-year) flood elevations are the basis for the flood plain management measures that the community is required to either adopt or show evidence of being already in effect in order to qualify or remain qualified for participation in the national flood insurance program (NFIP).

EFFECTIVE DATE: The date of issuance of the flood insurance rate map (FIRM), showing base (100-year) flood elevations, for the village of Woodstock, Vt.

ADDRESS: Maps and other information showing the detailed outlines of the flood-prone areas and the final elevations for the village of Woodstock, are available for review at Town Hall, Route 4, Woodstock, Vt.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, Room 5270, 451 Seventh Street SW., Washington, D.C. 20410, 202-755-5581 or toll-free line 800-424-8872.

SUPPLEMENTARY INFORMATION: The Federal Insurance Administrator gives notice of the final determinations of flood elevations for the village of Woodstock, Vt.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973 (Pub. L. 93-234), 87 Stat. 980, which added section 1363 to the National Flood Insurance Act of 1968 (Title XIII of the Housing and Urban Development Act of 1968 (Pub. L. 90-448), 42 U.S.C. 4001-4128, and 24 CFR 1917.4(a)). An opportunity for the community or individuals to appeal this determination to or through the community for a period of ninety (90) days has been provided, and the Administrator has resolved the appeals presented by the community.

The Administrator has developed criteria for flood plain management in flood-prone areas in accordance with 24 CFR Part 1910.

The final base (100-year) flood elevations for selected locations are:

Source of flooding	Location	Elevation in feet, national geodetic vertical datum
Ottaquechee River.	U.S. Route 4 Bridge	696
	Union Street Covered Bridge.	691
	Elm Street Bridge	684
Kedron Brook	Cross Street Bridge	702
	Central Street Bridge	700
	Pleasant Street Bridge	692

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended (42 U.S.C. 4001-4128); and Secretary's delegation of authority to Federal Insurance Administrator, 43 FR 7719.)

Issued: August 9, 1978.

GLORIA M. JIMENEZ,
Federal Insurance Administrator.

[FR Doc. 78-24990 Filed 9-7-78; 8:45 am]

[4210-01]

[Docket No. FI-3603]

PART 1917—APPEALS FROM FLOOD ELEVATION DETERMINATION AND JUDICIAL REVIEW

Final Flood Elevation Determination for Cumberland County, Va.

AGENCY: Federal Insurance Administration, HUD.

ACTION: Final rule.

SUMMARY: Final base (100-year) flood elevations are listed below for selected locations in Cumberland County, Va. These base (100-year) flood elevations are the basis for the flood plain management measures that the community is required to either adopt or show evidence of being already in effect in order to qualify or remain qualified for participation in the national flood insurance program (NFIP).

EFFECTIVE DATE: The date of issuance of the flood insurance rate map (FIRM), showing base (100-year) flood elevations, for Cumberland County, Va.

ADDRESS: Maps and other information showing the detailed outlines of the flood-prone areas and the final elevations for Cumberland County, Va., are available for review at the Clerk's Office of Cumberland, Cumberland, Va.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, Assistant Administrator, Office of Flood Insurance, Room 5270, 451 Seventh Street SW., Washington, D.C. 20410, 202-755-5581 or toll-free line 800-424-8872.

SUPPLEMENTARY INFORMATION: The Federal Insurance Administrator gives notice of the final determinations of flood elevations for Cumberland County, Va.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973 (Pub. L. 93-234), 87 Stat. 980, which added section 1363 to the National Flood Insurance Act of 1968 (Title XIII of the Housing and Urban Development Act of 1968 (Pub. L. 90-448), 42 U.S.C. 4001-4128, and 24 CFR 1917.4(a)). An opportunity for the community or individuals to appeal this determination to or through the community for a period of ninety (90) days has been provided. No appeals of the proposed base flood elevations were received from the community or from individuals within the community.

The Administrator has developed criteria for flood plain management in flood-prone areas in accordance with 24 CFR Part 1910.

The final base (100-year) flood elevations for selected locations are:

Source of flooding	Location	Elevation in feet, national geodetic vertical datum
James River	Downstream corporate limits.	198
	State Route 45	200
	State Route 603	210
	State Route 690	215
	Upstream corporate limits.	224

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended (42 U.S.C. 4001-4128); and Secretary's delegation of authority to Federal Insurance Administrator, 43 FR 7719.)

Issued: August 10, 1978.

GLORIA M. JIMENEZ,
Federal Insurance Administrator.

[FR Doc. 78-24991 Filed 9-7-78; 8:45 am]

[4510-43]

Title 30—Mineral Resources

CHAPTER I—MINE SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR

PART 41—NOTIFICATION OF LEGAL IDENTITY

Deferral of Effective Date of Rule

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Final rule.

SUMMARY: The effective date of the rules for reporting the legal identity of mine operators is deferred to October 15, 1978. It appears that MSHA will be unable to supply form 2000-7 in time for operators to comply with the timetable set forth in the rule. The 40-day extension of the effective date will provide sufficient opportunity for MSHA to complete the necessary clearance process and to supply the forms to all operators and MSHA field offices.

EFFECTIVE DATES: This amendment is effective on September 8, 1978. The rules contained in part 41 are effective on October 15, 1978.

ADDRESS: Mine Safety and Health Administration, Ballston Tower No. 3, 4015 Wilson Boulevard, Arlington, Va. 22203, telephone 703-235-1910.

FOR FURTHER INFORMATION CONTACT:

Frank A. White, Office of Standards, Regulations and Variances, Room 631, Ballston Tower No. 3, 4015 Wilson Boulevard, Arlington, Va. 22203, telephone 703-235-1910.

SUPPLEMENTARY INFORMATION: On July 7, 1978, the Secretary of Labor published final rules in the FEDERAL REGISTER (43 FR 29510), which require each operator of a coal or other mine to file specified information with the Mine Safety and Health Administration (MSHA) and set forth the procedures for filing such notification of legal identity. Section 41.20 of those rules require each mine operator to file the notification of legal identity and any subsequent changes on MSHA form 2000-7, which was to be provided by MSHA for this purpose. The date upon which the rule was to become effective was September 5, 1978, and each operator was to have filed the first report within 30 days of that date under § 41.11(a).

It appears that MSHA will be unable to supply form 2000-7 in time for operators to comply with the timetable set forth in the rule. The 40-day extension of the effective date will provide sufficient opportunity for MSHA to complete the necessary clearance process and to supply the forms to all operators and MSHA field offices.

This amendment is issued under the authority of sections 103(h), 109(d), and 508 of the Federal Mine Safety and Health Act of 1977 (Pub. L. 91-173, as amended by Pub. L. 95-164). In view of the circumstances stated above, it is determined that good cause exists for omitting notice and comment rulemaking procedures. This amendment is effective on date of publication.

DRAFTING INFORMATION

The principal person responsible for drafting this document is Frank A. White, Office of Standards, Regulations and Variances, MSHA.

Dated: September 5, 1978.

ECKEHARD MUESSIG,
Deputy Assistant Secretary for Mine Safety and Health.

[FR Doc. 78-25342 Filed 9-7-78; 8:45 am]

[3810-70]

Title 32—National Defense

CHAPTER I—OFFICE OF THE SECRETARY OF DEFENSE

[DOD Directive 5200.24]

PART 42—INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS FOR LAW ENFORCEMENT PURPOSES

AGENCY: Office of the Secretary of Defense.

ACTION: Final rule.

SUMMARY: This rule revises and updates established policies, procedures, and restrictions governing interception of wire and oral communications, and the use of pen registers and related devices for law enforcement purposes, both in the United States and abroad.

EFFECTIVE DATE: July 1, 1978.

FOR FURTHER INFORMATION CONTACT:

Mr. Gil Kujovich, Special Assistant to the General Counsel, the Pentagon, Room 3E987, Washington, D.C. 20301, telephone 202-695-3657.

SUPPLEMENTARY INFORMATION: This part was previously published as a final rule in FR Doc. 67-11134 on September 22, 1967 (32 FR 13380). This revision expands and clarifies procedures.

MAURICE W. ROCHE,
Director, Correspondence and Directives, Washington Headquarters Services, Department of Defense.

SEPTEMBER 5, 1978.

Accordingly, title 32, chapter I, is amended by a revision of part 42, reading as follows:

Sec.
42.1 Reissuance and purpose.
42.2 Applicability and scope.
42.3 Policy.
42.4 Waivers.
42.5 Responsibilities.
42.6 Definitions.
42.7 Procedures, record administration, and reports.
42.8 Information to be included in reports of interceptions and pen register operations.

AUTHORITY: 5 U.S.C. 301.

§ 42.1 Reissuance and purpose.

This part reissues part 42 to update established policies, procedures, and restrictions governing interception of wire and oral communications and the use of pen registers and related devices for law enforcement purposes, both in the United States and abroad, in accordance with 47 U.S.C. 605 and 18 U.S.C. 2510-2520.

§ 42.2 Applicability and scope.

(a) The provisions of this part apply to the Office of the Secretary of Defense, the military departments, the Organization of the Joint Chiefs of Staff, the defense agencies, and the unified and specified commands (hereafter referred to collectively as "DOD components").

(b) This part does not affect status of forces or other specific agreements that may otherwise limit implementation of its provisions in any particular geographical area abroad.

§ 42.3 Policy.

(a) The interception of wire and oral communications for law enforcement purposes is prohibited unless conducted in accordance with this part and applicable law.

(b) The only DOD components authorized to intercept wire and oral communications and conducts pen register operations under this part are the Departments of the Army, Navy, and Air Force. Within these components, authority to use this technique shall be limited to those offices specifically designated in writing by the head of the component.

(c) Interception of wire and oral communications is a special technique which shall not be considered as a substitute for normal investigative procedures and shall be authorized only in

those circumstances where it is demonstrated that the information is necessary for a criminal investigation and cannot reasonably be obtained in some other, less intrusive manner.

(d) Nonconsensual interception of wire and oral communications is prohibited unless there exists probable cause to believe that:

(1) In the case of interceptions within the United States, a criminal offense listed in 18 U.S.C. 2516(1) has been, is being, or is about to be committed;

(2) In the case of interceptions abroad conducted pursuant to an order issued by a military judge under § 42.7(a)(1)(ii)(A), one of the following violations of the Uniform Code of Military Justice has been, is being, or is about to be committed by a person subject to the Uniform code of Military Justice under article 2, 10 U.S.C. 802:

(i) The offense of murder, kidnapping, gambling, robbery, bribery, extortion, espionage, sabotage, treason, fraud against the Government, or dealing in narcotic drugs, marihuana, or other dangerous drugs; or

(ii) Any other offense dangerous to life, limb, or property, and punishable by death or confinement for 1 year or more; or

(iii) Any conspiracy to commit any of the foregoing offenses.

(3) In the case of other interceptions abroad, one of the following offenses has been, is being, or is about to be committed:

(i) An offense listed in 18 U.S.C. 2516(1); or

(ii) Fraud against the Government or any other offense dangerous to life, limb, or property and punishable under Title 18 of the United States Code by death or confinement for more than 1 year; or

(iii) Any conspiracy to commit any of the foregoing offenses.

(e) Consensual interceptions of wire and oral communications shall be undertaken only when at least one of the parties to the conversation has consented to the interception and when the investigation involves:

(1) A criminal offense punishable, under the United States Code or Uniform Code of Military Justice, by death or confinement for 1 year or more; or

(2) A telephone call involving obscenity, harassment, extortion, bribery, bomb threat, or threat of bodily harm that has been made to a person authorized to use the telephone of a subscriber-user on an installation, building, or portion thereof, under Department of Defense jurisdiction or control, and when the subscriber-user has also consented to the interception.

(f) The prohibitions and restrictions of this part apply regardless of the official use or dissemination of the intercepted information. Any questions as to whether the use of a particular device may involve prohibited wire or oral interception shall be submitted with supporting facts through channels to the general counsel of the Department of Defense for resolution.

(g) No otherwise privileged wire or oral communication intercepted in accordance with this part shall lose its privileged character.

§ 42.4 Waivers.

Waivers of the requirements enunciated in this part will be authorized on a case-by-case basis only when directed in writing by the Secretary of Defense. Waivers will be authorized only under the most limited circumstances and when consistent with applicable law.

§ 42.5 Responsibilities.

(a) The Department of Defense General counsel or a single designee, shall:

(1) Determine whether to approve or deny requests for authorization to conduct nonconsensual interceptions under this part. (§ 42.7(a)(1) (i) and (ii).)

(2) Determine whether to seek Attorney General authorization for emergency nonconsensual interceptions. (§ 42.7(a)(1)(iii).)

(3) In the absence of the Secretary of the military department concerned, or a designee, determine whether to approve or deny requests to conduct consensual interceptions. (§ 42.7(a)(2)(i).)

(4) Provide overall policy guidance for the implementation of this part.

(b) The Assistant Secretary of Defense (Comptroller) (ASD(C)), or a designee, shall:

(1) In consultation with the DOD General Counsel, act for the Secretary of Defense to insure compliance with the provisions of this part.

(2) Receive, process, and transmit to the DOD General Counsel all requests from the heads of the DOD components, or their designees, for authority to conduct nonconsensual interception of wire and oral communications.

(3) Furnish to the Attorney General those reports required by § 42.7(f)(1) and provide a copy of such reports to the DOD General Counsel.

(4) Receive those reports required by § 42.7(f)(1) and provide a copy of such reports to the DOD General Counsel.

(c) The head of each DOD component or a designee shall insure compliance with the policies and procedures set forth or referenced in this part.

(d) The secretary of each military department, or a designee, shall:

(1) Determine whether to approve or deny requests to conduct consensual interceptions. (§ 42.7(a)(2)(i).) This approval authority shall not be delegated to an official below the level of assistant secretary or assistant to the secretary of the military department.

(2) Review requests for nonconsensual interception of wire or oral communications. (§ 42.7(a)(1).)

(3) Designate a control point of contact and so advise the DOD General Counsel and the ASD(C) for:

(i) Interception activities and related applications covered by this part.

(ii) Compilation of reports and forwarding other submissions to the ASD(C) as required by the provisions of this part.

(iii) Maintaining a file of information regarding all interceptions of wire and oral communications by any element of the Department.

(4) Furnish to the ASD(C) the reports required by § 42.7(f)(2).

(e) The judge advocate general of each military department shall assign military judges, certified in accordance with the provisions of article 26(b) of the Uniform Code of Military Justice, 10 U.S.C. 826(b):

(1) To receive applications for intercept authorization orders and to determine whether to issue such orders in accordance with § 42.7(a)(1)(ii)(A). The authorization of such military judges to issue intercept authorization orders shall be limited to interceptions occurring abroad and targeted against persons subject to the Uniform Code of Military Justice.

(2) To receive applications to conduct pen register operations and to issue orders authorizing such operations in accordance with § 42.7(b)(1). The authority of such military judges to issue orders authorizing pen register operations shall be limited to operations conducted on a military installation and targeted against persons subject to the Uniform Code of Military Justice.

§ 42.6 Definitions.

(a) *Abroad.* Outside the United States. An interception takes place abroad when the interception device is located and operated outside the United States and the target of the interception is located outside the United States.

(b) *Application for court order.* A document containing specified information prepared for and forwarded to a judge of the U.S. district court or the U.S. court of appeals, or a military judge.

(c) *Consensual interception.* An interception of a wire or oral communication after verbal or written consent for the interception is given by one or more of the parties to the communication.

(d) *Court order.* An order issued by a judge of a U.S. district court or a U.S. court of appeals or by a military judge authorizing a wire or oral interception or a pen register operation.

(e) *Electronic, mechanical, or other device.* Any device or apparatus that can be used to intercept a wire or oral communication other than any telephone equipment furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and used by the subscriber or user in the ordinary course of its business or used by an investigative or law enforcement officer in the ordinary course of duty. 18 U.S.C. 2510(5).

(f) *Interception.* The aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device. 18 U.S.C. 2510(4). The term "contents" includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication. 18 U.S.C. 2510(8).

(g) *Oral communication.* Any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception, under circumstances justifying such expectation. 18 U.S.C. 2510(2).

(h) *Pen register.* A device connected to a telephone instrument or line that permits the recording of telephone numbers dialed from a particular telephone instrument. "Pen register" also includes decoder devices used to record the numbers dialed from a touch-tone telephone. "Pen register" does not include equipment used to record the numbers dialed for and duration of long-distance telephone calls when the equipment is used to make such records for an entire telephone system and for billing or communications management purposes.

(i) *Telephone tracing.* A technique or procedure to determine the origin, by telephone number and location, of a telephone call made to a known telephone instrument. The terms "lockout" and "trapping" may also be used to describe this technique.

(j) *United States.* For the purposes of this part, the term "United States" includes the 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(k) *United States person.* For purposes of this part the term "United States person" means a United States citizen, an alien admitted to the United States for permanent residence, a corporation incorporated in the United States, an unincorporated association organized in the United States and substantially composed of United States citizens or aliens admitted to the United States for permanent residence.

(l) *Wire communication.* Any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications. 18 U.S.C. 2510(1).

§ 42.7 Procedures, record administration and reports.

(a) *Procedures governing interception of wire and oral communications*—(1) *Nonconsensual interception*—(i) *Nonconsensual interception in the United States.* When an interception is deemed necessary for a criminal investigation, the following procedures are applicable:

(A) The requesting component shall prepare and forward through channels a "request for authorization" to the Assistant Secretary of Defense (Comptroller), or an official designated by the ASD(C). This application shall be transmitted by expeditious means and protected to preclude unauthorized access or any danger to the officials or other persons cooperating in the case. Each request for authorization will contain the following information:

(*1*) The identity of the DOD investigative or law enforcement official making the application;

(*2*) A complete description of the facts and circumstances relied upon by the applicant to justify the intended interception, including:

(*i*) The particular offense that has been, is being, or is about to be committed;

(*ii*) A description of the nature and location of the facilities from which or the place where the communication is to be intercepted;

(*iii*) A description of the type of communication sought to be intercepted with a statement of the relevance of that communication to the investigation; and

(*iv*) The identity of the person, if known, committing the offense and whose communications are to be intercepted;

(*3*) A statement as to whether other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(*4*) An identification of the type of equipment to be used to make the interception;

(*5*) A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the interception will not terminate automatically when the described type of communication has been first obtained, a description of the facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(*6*) The procedures to minimize the acquisition, retention, and dissemination of information unrelated to the purpose of the interception;

(*7*) A complete statement of the facts concerning each previous application for approval of interceptions of wire or oral communications known to the applicant and involving any of the same persons, facilities or places specified in the application and the action taken thereon; and

(*8*) When the application is for an extension of an order, a statement setting forth the results thus far obtained from the interception, or an explanation of the failure to obtain such results.

(B) The ASD(C), or an official designated by the ASD(C), will recommend to the DOD General Counsel that the request be approved or disapproved. Approval or disapproval of all requests for authorization will be made in writing by the DOD General Counsel, or a single designee.

(C) If the request is approved by the DOD General Counsel, the official making the request will coordinate directly with an attorney from the Department of Justice or from a U.S. Attorney's office for preparation of documents necessary to obtain a court order in accordance with 18 U.S.C. 2518. These documents will be forwarded by the Department of Justice attorney to the Attorney General, or to the designated Assistant Attorney General, for approval in accordance with 18 U.S.C. 2516.

(D) Upon approval by the Attorney General, or the designated Assistant Attorney General, formal application for a court order will be made by the appropriate attorney from the Department of Justice, assisted by the appropriate military lawyer.

(ii) *Nonconsensual interceptions abroad.* Unless otherwise authorized by direction of the President or the Attorney General, the following procedures are applicable to interceptions for law enforement purposes when the interception takes place abroad and when a DOD component, or members thereof, conduct or participate in the interception; or when the interception takes place abroad, is targeted against a U.S. person, and is conducted pursuant to a request by a DOD component:

(A) When the target of the interception is a person subject to the Uniform Code of Military Justice under Article 2, U.S.C. 802.

(*1*) The request for authorization shall include the information required by § 42.7(a)(1)(i)(A), and shall be forwarded through channels to the Assistant Secretary of Defense (Comp-

troller), or the ASD(C)'s, designee. The ASD(C), or a designee, shall recommend to the DOD General Counsel that the request be approved or disapproved. Approval or disapproval of all Requests for Authorization shall be made in writing by the DOD General Counsel, or a single designee.

(2) Upon written approval of the DOD General Counsel, the DOD investigative or law enforcement officer shall prepare a formal application for a court order in accordance with the procedures of 18 U.S.C. 2518(1). The application shall be submitted to a military judge assigned to consider such applications pursuant to § 42.5(e).

(3) Only military judges assigned by the Judge Advocate General of their service to receive applications for intercept authorization orders shall have the authority to issue such orders. The authority of military judges to issue intercept authorization orders shall be limited to interceptions conducted abroad and targeted against persons subject to the Uniform Code of Military Justice.

(i) A military judge shall be ineligible to issue an order authorizing an interception if, at the time of application, the judge (A) is involved in any investigation under Article 32 of the Uniform Code of Military Justice, 10 U.S.C. 832; or (B) is engaged in any other investigative or prosecutorial function in connection with any case; or if the judge has previously been involved in any investigative or prosecutorial activities in connection with the case for which the intercept authorization order is sought.

(ii) No military judge who has issued an order authorizing interceptions may act as the accuser, be a witness for the prosecution, or participate in any investigative or prosecutorial activities in the case for which the order was issued. A military judge who has issued an order authorizing interceptions is not disqualified from presiding over the trial in the same case.

(iii) A military judge otherwise qualified under § 42.7(a)(1)(ii)(C)(i) and (ii) enclosure shall not be disqualified from issuing orders authorizing interceptions because the judge is a member for a service different from that of the target of the interception or from that of the investigative or law enforcement officers applying for the order.

(4) The military judge may enter an ex parte order, as requested or as modified, authorizing or approving an interception of wire or oral communications if the judge determines on the basis of the facts submitted by the applicant that:

(i) There is probable cause to believe that a person subject to the Uniform Code of Military Justice is committing, has committed, or is about to commit a particular offense enumerated in § 42.3(d)(2);

(ii) There is probable cause to believe that particular communications concerning that offense will be obtained through such interception;

(iii) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(iv) There is probable cause to believe that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person; and

(v) The interception will not violate the relevant status of forces agreement or the applicable domestic law of the host nation.

(5) Each order authorizing an interception shall specify:

(i) The identity of the person, if known, whose communications are to be intercepted;

(ii) The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(iii) A particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(iv) The identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(v) The period of time during which such interception is authorized, including a statement as to whether the interception shall terminate automatically when the described communication has been first obtained.

(6) Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this part, , and shall be terminated upon attainment of the authorized objective.

(7) No order entered by a military judge may authorize an interception for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than 60 days. Extensions of an order may be granted, but only upon application for an extension made in accordance with the procedures of 18 U.S.C. 2518(1), and after the military judge makes the findings required by § 42.7(a)(1)(ii)(A)(4). The period of extension shall be no longer than is necessary to achieve the purpose for which it was granted and in no event for longer than 60 days.

(8) The contents of communications intercepted pursuant to an order issued by a military judge shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of such communications shall be done in such a way as will protect the recording from editing or other alterations. Custody of the recording shall be wherever required by the regulations promulgated under § 42.7(e)(1) and it shall not be destroyed except pursuant to § 42.7(e)(4).

(a) The contents of a communication intercepted abroad, or evidence derived therefrom, shall be inadmissible in any court-martial proceeding, in any proceeding under Article 15 of the Uniform Code of Military Justice, 10 U.S.C. 815, or in any other proceeding if the:

(i) Communication was intercepted in violation of this part or applicable law;

(ii) Order of authorization under which it was intercepted is insufficient on its face; or

(iii) Interception was not made in conformity with the order of authorization.

(B) When the target of an interception conducted abroad is a person who is not subject to the Uniform Code of Military Justice:

(1) The request for authorization shall be prepared and forwarded for approval in accordance with the procedures in § 42.7(a)(1)(i) (A) and (B).

(2) The DOD General Counsel shall determine whether to approve the request and what further approval is required by law to conduct the interception.

(iii) *Emergency nonconsensual interceptions in the United States and abroad.* If, in the judgment of the head of the DOD component concerned, or a designee, the emergency need for a nonconsensual interception precludes obtaining the advance written approval and court order required by § 42.7(a)(1) (i) and (ii), the component head or designee shall notify the DOD General Counsel who shall determine whether to seek the authorization of the Attorney General for an emergency nonconsensual interception in accordance with the procedures of 18 U.S.C. 2518(7).

(iv) *Time limits.* Nonconsensual interceptions within the United States may be approved for a period not to exceed 30 days. Nonconsensual interceptions outside the United States may be approved for a period not to exceed 60 days. Renewal requests for specified periods of not more than 30 days each (60 days for interceptions outside the United States), may be submitted to the approving authority for consideration. The interception in all instances shall be terminated as soon as the desired information is ob-

tained, or when the interception proves to be nonproductive.

(2) *Consensual interceptions.* (i) The following procedures are applicable to all consensual interceptions of oral or wire communications:

(A) When one of the parties to the conversation consents to an intended interception of a communication, the DOD investigative or law enforcement official shall prepare a request containing the following information:

(*1*) A description of the facts and circumstances requiring the intended interception, the means by which it would be conducted, the place in which it would be conducted, and its expected duration;

(*2*) The names of all the persons whose conversations are expected to be intercepted and their roles in the crime being investigated. When the name of the nonconsenting party or parties is not known at the time the request is made, the official making the request shall supply such information within 30 days after termination of the interception. If such information is not known at the end of this period, it shall be supplied whenever it is later discovered;

(*3*) A statement that in the judgment of the person making the request the interception is warranted in the interest of effective law enforcement.

(B) An application for a court interception order is not necessary in this situation. Written approval of the request shall be made by the Secretary of a military department, or a designee, or, in their absence, the DOD General Counsel. This approval authority shall not be delegated to an official below the level of Assistant Secretary or Assistant to the Secretary of a military department.

(C) The Secretaries of the military departments shall designate an official to act upon telephonic requests when emergency needs preclude advance written approval. A written record of such requests shall be made.

(ii) The following restrictions are applicable to all consensual interceptions of oral or wire communications:

(A) Within the United States, approval shall be granted for a period of no more than 30 days. Abroad, approval may be granted for 60 days. Renewal requests for specified periods of not more than 30 days each (60 days for interception outside the United States) may be submitted to the approving authority for consideration. The interception in all instances shall be terminated as soon as the desired information is obtained, or when the interception proves to be nonproductive.

(B) The authorization for consensual interception of communications shall define clearly the manner in which the interception is to be accomplished. A "consensual interception" shall not involve the installation of equipment in violation of the constitutionally protected rights of any nonconsenting person whose communications will be intercepted.

(b) *Procedures governing the use of pen registers and similar devices or techniques.* The procedures of this section apply to the use of pen registers, touch-tone telephone decoders, and similar devices. Unless otherwise authorized by direction of the President or the Attorney General, pen register and similar operations shall be conducted only upon probable cause and pursuant to a court order.

(1) *Operations conducted on a military installation and targeted against persons subject to the Uniform Code of Military Justice.* Except as provided in § 42.7(b)(3), when a pen register operation is conducted on a military installation, in the United States or abroad, and when the target of the operation is a person subject to the Uniform Code of Military Justice, the following procedures apply:

(i) The application for a court order authorizing the operation shall be made in writing upon oath or affirmation and shall be submitted to a military judge assigned by the Judge Advocates General, pursuant to § 42.7(f)(5), to receive such applications. An application shall include the following information:

(A) The identity of the DOD investigative or law enforcement officer making the application;

(B) A complete statement of the facts and circumstances relied upon by the application to justify the applicant's belief that there exists probable cause to believe that the operation will produce evidence of a crime, including a description of the particular offense involved, a description of the nature and location of the facilities from which the intercepted information originates, and the identity of the person, if known, who has committed, is about to commit, or is committing the offense and who is the target of the operation;

(C) A statement of the period of time for which the operation is required to be maintained.

(ii) Subject to the limitations of § 42.7(a)(1)(ii)(C) (i), (ii), and (iii), a military judge assigned to receive applications for orders authorizing operations covered by this subsection may enter an order authorizing the operation upon finding that the target of the operation is a person subject to the Uniform Code of Military Justice, that the operation will be conducted on a military installation, and that there exists probable cause to believe that the operation will produce evidence of a crime. Each order shall specify the:

(A) Identity of the person, if known, who is the target of the operation;

(B) Location of the facilities from which the intercepted information originates and of the facilities on which the operation will take place;

(C) Period of time during which such operation is authorized.

(iii) When the application is for an operation conducted abroad, the military judge may not authorize the operation if it would violate the relevant Status of Forces Agreement or the applicable domestic law of the host nation.

(2) *Other pen register operations.* (i) When the target of a pen register operation abroad is a person who is not subject to the Uniform Code of Military Justice:

(A) The application for authority to conduct a pen register operation shall include the information in § 42.7(b)(1)(i) and shall be forwarded to the DOD General Counsel.

(B) The DOD General Counsel shall determine whether to approve the request and what further approval is required by law to conduct the pen register operation.

(ii) Except as provided in § 42.7(b)(3), all other pen register and similar operations in the United States shall be conducted pursuant to a search warrant (or other judicial order authorizing the operation) issued by a judge of competent jurisdiction.

(3) *Pen register operations which include nonconsensual interceptions of wire communications.* When an operation under this section is to be conducted in conjunction with a nonconsensual interception of a wire communication under § 42.7(a)(1), procedures of § 42.7(a)(1) shall apply to the entire operation.

(c) *Procedures governing telephone tracing.* When prior consent of one or more parties to a telephone tracing operation has been obtained, the use of telephone tracing equipment and techniques shall be authorized only after coordination with appropriate judge advocate personnel or other component legal counsel. The local military facility commander may approve consensual telephone tracing operations on military facilities. For use outside military jurisdiction, the local military commanders, in coordination with judge advocate personnel, shall coordinate with local civilian or host country authorities when appropriate. In all cases, use of this technique must comply with the provisions of DOD directive 5200.27.[1]

(d) *Interception equipment*—(1) *Control of interception equipment.* (i)

[1] Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, 5801 Tabor Ave., Philadelphia, Pa. 19120, attention code 301.

DOD Components other than the military departments are not authorized to procure or maintain equipment primarily useful for the interception of wire and oral communications described in this part. The heads of military departments shall establish controls to insure that only the minimum quantity of interception equipment required to accomplish assigned missions is procured and retained in inventories.

(ii) Interception equipment shall be safeguarded to prevent unauthorized access or use, with appropriate inventory records to account for all equipment at all times. Storage shall be centralized to the maximum extent possible consistent with operational requirements. When equipment is withdrawn from storage a record shall be made as to the times of withdrawal and of its return to storage. Equipment should be returned to storage when not in actual use, except to the extent that returning the equipment would interfere with its proper utilization. The individual to whom the equipment is assigned shall account fully, in a written report, for the use made of the equipment during the time it was removed from storage. Copies of the completed inventories of equipment, the times of withdrawal and return and the written reports of the agents specifying the uses made of the equipment shall be retained for at least 10 years.

(2) *Disposal of interception equipment.* (i) Federal law prohibits the sale or possession of any device by any person who knows or has reason to know that "the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications * * *." Accordingly, disposal outside the Government of such interception equipment is prohibited.

(ii) If there is any question as to what purpose an item of equipment is primarily useful for, then the officials involved should, in the exercise of due caution, prohibit its sale pending referral to the DOD General Counsel for a determination as to the proper classification of such devices under the law.

(e) *Records administration*—(1) *General.* All recordings and records of information obtained through interception activities conducted under the provisions of this part shall be safeguarded to preclude unauthorized access, theft, or use. Both the interest of the Government and the rights of private individuals involved shall be considered in the development of safeguarding procedures. The Secretaries of the military departments shall promulgate regulations specifying storage and access requirements for applications, orders, recordings, and other records of information obtained through interception activities. These regulations shall include provisions for storage and access while the case is active and after the case has become inactive and the records have been transferred to a centralized facility. Copies of all issuances and revisions shall be provided to the DOD General Counsel and the ASD(C) as promulgated.

(2) *Indexing*—(i) *Interceptions.* The records of consensual and nonconsensual interceptions shall be prepared and maintained to provide for centralized, readily accessible records or indices that include the following:

(A) Names, citizenship, and other available identifying data for each reasonably identifiable person intercepted (intentionally or otherwise), whether a case subject or not. If available, the social security account number and the date and place of birth of the individuals intercepted and identified;

(B) The telephone numbers of radio telephone call signs involved in the interception;

(C) The case number or other identifier for the interception;

(D) The address of the location of the interception;

(E) The inclusive dates of the interception.

(ii) *Denied interception applications.* Records of all applications submitted to and disapproved by a Federal or military judge for authorization to conduct a nonconsensual interception of a wire or oral communication shall be prepared and maintained in a separate, centralized index which shall include the following information:

(A) Names and other available identifying data for each reasonably identifiable target of the interception applied for;

(B) The telephone numbers or radio telephone call signs involved in the application;

(C) The address of the location of the interception applied for;

(D) The case number or other identifier for the application; and

(E) A statement of the other facts concerning the application and the reason that the application was refused.

(3) *Dissemination Controls.* (i) The index and records maintained pursuant to § 42.7(e)(2)(ii), shall be used only as required to satisfy the requirements of 18 U.S.C. 2518(1)(e), § 42.7(a)(1)(i) (A)(7), § 42.7(a)(1)(ii) (A) and (B) (statement of prior applications) and § 42.7(f) (1) and (2).

(ii) In all cases, access to information obtained by interception activities conducted under the provisions of this part shall be restricted to those individuals having a defined need-to-know clearly related to the performance of their duties.

(iii) The information may be disseminated outside the Department of Defense only when:

(A) Required for the purposes described in 18 U.S.C. 2517;

(B) Required by law (including the Privacy Act of 1974, as amended, and the Freedom of Information Act of 1967, as amended, or order of a Federal court;

(C) Requested by a committee of the Congress and approved for release by the DOD General Counsel; or

(D) Required by the provisions of Status of Forces or other international agreements.

(iv) Secretaries of the military departments shall promulgate regulations, policies and procedural controls and designate responsible officials for both internal and external dissemination of the information described above. Procedures shall include sufficient records reflecting dissemination of this information. Copies of all issuances and revisions for these purposes shall be provided the DOD General Counsel and the ASD(C) as promulgated.

(4) *Retention and disposition of records.* Records and recordings of interception shall be retained for 10 years after termination of the interception and then disposed of in accordance with component records retirement procedures. If the interception was conducted in the United States under the provisions of 18 U.S.C. 2516, the records may be destroyed only pursuant to order of the court involved.

(f) *Reports.*—(1) *By the Assistant Secretary of Defense (Comptroller).* The ASD(C), or a designee, shall submit the following reports to the Attorney General:

(i) *Quarterly.* For the quarters ending in March, June, September, and December, to be submitted by the end of each following month, a report of all consensual interceptions of oral communications by DOD components in the United States and abroad. This report shall specify for each interception the means by which the interception was conducted, the place in which it was conducted, its duration, and the use made of the information acquired. This report shall also contain the names and positions of persons authorized to approve consensual interceptions of oral communications, including those persons authorized to approve emergency, telephonic requests.

(ii) *Annually.* (A) By January 31, a report of all nonconsensual interceptions of wire or oral communications conducted for investigative or law enforcement purposes abroad by DOD components during the preceding year and of all unsuccessful applications for orders to conduct such interceptions during the preceding year. This

report shall contain the information required in 18 U.S.C. 2519(2).

(B) By July 31, an inventory of all DOD electronic or mechanical equipment primarily useful for interception of wire or oral communications.

(2) *By the Secretaries of the military departments.* The Secretaries of the military departments, or their designees, shall submit the following reports to the ASD(C):

(i) *Quarterly.* For the quarters ending in March, June, September, and December, to be received by the 15th day of each following month, a report of all interceptions of wire and oral communications, pen register operations, and unsuccessful applications for nonconsensual interceptions conducted by the military departments in the United States and abroad. This report shall include the information listed in § 42.8.

(ii) *Annually.* By July 15, a complete inventory of all devices in the DOD component that are primarily useful for interception of wire or oral communications or for operations covered by § 42.7(b). This report shall include a statement that the amount of equipment is being maintained at the lowest level consistent with operational requirements.

§ 42.8 Information to be included in reports of interceptions and pen register operations.

(a) *Consensual interceptions.* (1) Identity of DOD component making this report.

(2) Indicate whether the report is a wire or oral interception operation and whether the interception included the use of a pen register. (If more than one operation is authorized, a separate entry should be made for each.)

(3) Purpose or objective of operation. Specify offense being investigated and included a brief synopsis of the case.

(4) Investigative case number or identifier for the operation.

(5) Location of the operation.

(6) Type of equipment used and method of installation.

(7) Identity of the performing organizational unit. (Indicate if the interception was conducted for a DOD component other than the component making the report or for a non-DOD activity.)

(8) Identity of DOD investigative or law enforcement officer who requested or applied for the interception.

(9) Approval authority and date of approval.

(10) Length and dates for which operation was approved.

(11) Actual date operation was initiated, and date terminated.

(12) If operation was extended, state name of authority approving extension and dates to which extended.

(13) State where tapes, transcripts, and notes are stored.

(14) Evaluation of results of operations, including the use made of the information in subsequent investigation or prosecution.

(15) The names and positions of persons authorized to approve consensual interceptions, including those persons authorized to approve emergency, telephonic requests.

(16) Indicate whether the interception took place in the United States or abroad.

(b) *Nonconsensual interceptions in the United States.* In addition to items (1)-(14) in § 42.8(a), include the following:

(1) Identity of court and judge who issued the intercept authorization order and date of order.

(2) Nature and frequency of incriminating communications intercepted (specify dates and approximate duration of each communication).

(3) Nature and frequency of other communications intercepted.

(4) Number of persons whose communications were intercepted. Indicate number of U.S. persons known to have been intercepted and whether such persons were targets or incidentals.

(c) *Nonconsensual interceptions abroad.* In addition to items (1)-(14) in § 42.8(a) and (1)-(4) in § 42.8(b), include the following:

(1) Number of persons located in the United States whose communications were intercepted.

(2) In the report for the last quarter of each calendar year, include: (i) The number of arrests and trials resulting from each interception conducted during the year. Indicate the offense for each interception.

(ii) The number of convictions resulting from the interceptions conducted during the year and the offenses for which convictions were obtained.

(d) *Pen register operations.* Pen register operations conducted in conjunction with nonconsensual interceptions should be included in § 42.8 (a) and (b). For all other pen register operations include items (1)-(15) from § 42.8(a), items (1)-(4) from § 42.8(b), and indicate whether the operation was conducted in the United States or abroad.

(e) *Unsuccessful applications for nonconsensual interception authorization orders.* (1) Identity of applying organizational unit. (Indicate if the application was on behalf of a DOD component other than the component making the report or on behalf of a non-DOD activity.)

(2) Investigative case number or identifier for the application.

(3) Identity of applying DOD investigative or law enforcement officer.

(4) Approval authority and date of approval of DOD request.

(5) Identity of judge who denied the application and date of denial.

(6) Offense specified in the application.

(7) Whether the application was for a wire or oral interception order, and whether the application was for an interception in the United States or abroad.

(8) Purpose or object of the interception applied for. Include a brief synopsis of the case.

(9) If the application was for an extension, indicate the dates, duration, and results of the previous interception.

(10) Specific location of the interception applied for.

(11) Number of U.S. persons named as targets in the application.

(12) Reason why the application was denied.

[FR Doc. 78-25203 Filed 9-7-78; 8:45 am]

[4910-14]

Title 33—Navigation and Navigable Waters

CHAPTER I—COAST GUARD, DEPARTMENT OF TRANSPORTATION

[CGD 78-040b]

PART 161—VESSEL TRAFFIC MANAGEMENT

Puget Sound

AGENCY: Coast Guard, DOT.

ACTION: Extension of interim navigation rule.

SUMMARY: This amendment extends the Puget Sound interim navigation rule. The interim rule was issued on March 14, 1978, as a temporary emergency measure for 180 days pending Coast Guard rulemaking governing tanker operations in Puget Sound and surrounding waters. This amendment is necessary in order to keep the interim rule in effect until completion of the Coast Guard rulemaking proceeding.

EFFECTIVE DATE: This amendment is effective August 31, 1978.

FOR FURTHER INFORMATION CONTACT:

Lieutenant Commander James L. MacDonald, Office of Marine Environment and Systems (G-WLE/73), Room 7315, Department of Transportation, Nassif Building, 400 Seventh Street SW., Washington, D.C. 20590; 202-426-1934.

SUPPLEMENTARY INFORMATION: An opportunity to comment on the extension as a proposed rule has not been provided. A determination has been made that to provide notice and

public comment would be both impracticable and contrary to the public interest. The term of the extension was not decided until the Coast Guard was able to assess how much time was needed to complete the rulemaking process. Once the decision was made, there was not sufficient time to allow an opportunity to comment on the extension. Similarly, a determination has been made that good cause exists not to delay its effective date. Following either of these procedures would have caused the interim rule to lapse for a period of time after the end of its current 6-month term, and this circumstance would have thwarted the purpose of the interim navigation rule.

DRAFTING INFORMATION

The principal persons involved in drafting this amendment are Lieutenant Commander James L. MacDonald, Project Manager, Office of Marine Environment and Systems, U.S. Coast Guard, and Mr. Edward Gill and Mr. William Register, Project Attorneys, Office of the Chief Counsel, U.S. Coast Guard.

DISCUSSION AND BACKGROUND

On March 2, 1978, the U.S. Supreme Court, in the case of *Ray* v. *Atlantic Richfield Co., Inc.*, 46 U.S.L.W. 4200 (1978), declared portions of the State of Washington tanker law invalid based on constitutional grounds involving Federal preemption of State law. Part of the State law declared invalid was a provision banning tankers of over 125,000 deadweight tons in Puget Sound. An interim navigation rule prohibiting entry of oil tankers in excess of 125,000 deadweight tons into the U.S. waters of Puget Sound east of Discovery Island Light and New Dungeness Light was issued by the Secretary of Transportation on March 14, 1978 (43 FR 12257, March 23, 1978). The interim rule was to remain in effect until September 9, 1978. The rule was issued, pending possible preparation of additional navigation regulations, in order to provide a continuing scheme for controlling vessel operation in Puget Sound and to avert a reduction in environmental protection. The interim rule was based on the State provision. The Federal regulatory scheme, in conjunction with the State statute, while it remained valid, provided for protection of the waters of the Puget Sound area and its resources from environmental harm. The concern that invalidation of the State statute could diminish the effectiveness of the existing scheme for controlling vessel operation (and, thus, cause a reduction in environmental protection in Puget Sound) necessitated the taking of temporary action to avert this possibility.

When the interim navigation rule was issued, comments were requested on its contents to determine whether the rule should be modified or supplemented. Approximately 90 comments were received, most of which were in favor of the rule. A petition for rulemaking raising various legal questions concerning the interim navigation rule was also received. The petition was denied and copies of the action taken on the petition have been placed in the Coast Guard rulemaking dockets on the interim rule.

The Coast Guard was directed to institute rulemaking proceedings while the interim navigation rule remained in effect. The Coast Guard issued an advanced notice of proposed rulemaking (ANPRM) on March 22, 1978 (43 FR 12840, March 27, 1978), seeking public input concerning regulations governing the operation of tank vessels in the Puget Sound area. The Coast Guard set out several possible regulatory approaches and requested comments concerning these approaches, or any others that would provide an equivalent level of safety and environmental protection. Interested persons were given until May 12, 1978, to submit comments. Public hearings were held on April 20 and 21, 1978 in Seattle, Wash.

The Coast Guard is presently analyzing the comments received concerning the ANPRM and the interim rule. In conjunction with the analysis of the comments, the Coast Guard is conducting simulator tests and actual tests using tank vessels in order to determine a suitable regulatory approach. Additionally, a draft Environmental Impact Statement (EIS) is being prepared. Due to the time required to prepare and publish the EIS for public comment, as well as the complexity of issues and the volume of comments received, it is expected that the Coast Guard rulemaking proceeding will not be completed until June 1979. An extension of the interim navigation rule is necessary to maintain the current de facto level of protection of the navigable waters of Puget Sound pending completion of the Coast Guard rulemaking proceeding. Thus, the interim navigation rule is extended until June 30, 1979, so that the Coast Guard may have adequate time to complete the rulemaking process.

Accordingly, paragraph (c) of Appendix A to Part 161 of Title 33 of the Code of Federal Regulations is amended to read as follows:

APPENDIX A—PUGET SOUND INTERIM NAVIGATION RULE

* * * * *

(c) This rule is effective immediately and shall remain in effect until June 30, 1979.

(33 U.S.C. 1224.)

Dated: August 31, 1978.

BROCK ADAMS,
Secretary.

[FR Doc. 78-25288 Filed 9-7-78; 8:45 am]

[7710-12]

Title 39—Postal Service

CHAPTER I—UNITED STATES POSTAL SERVICE

PART 111—GENERAL INFORMATION ON POSTAL SERVICE

Bulk-Rate Third Class Presort Requirements

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This rule amends the Postal Service Manual to give mailers of bulk-rate third class a simplified presorting option for certain parcels that can be processed on bulk mail center parcel sorters. For mailings of parcels that qualify, the rule will permit mailers to sort first to five-digit ZIP Code and then to bulk mail center destinations, in place of the more demanding five-stage presorting process generally required.

EFFECTIVE DATE: September 7, 1978. Written comments should be received on or before October 11, 1978.

ADDRESS: Comments on these regulations are solicited and will be considered with a view toward making any changes that may be needed. Comments should be sent to the Director, Office of Mail Classification, Rates and Classification Department, U.S. Postal Service, Room 1610, 475 L'Enfant Plaza SW., Washington, D.C. 20260. Copies of all written comments received will be available for public inspection and photocopying between 9 a.m. and 4 p.m., Monday through Friday, in the Office of Mail Classification, Room 1610, 475 L'Enfant Plaza SW., Washington, D.C. 20260.

FOR FURTHER INFORMATION CONTACT:

Mr. Ashley Lyons, 202-245-4767.

SUPPLEMENTARY INFORMATION: Presort requirements for third-class bulk-rate mail currently provide that mailers must separate and wrap or tie together 10 or more individually addressed pieces directed to the same five-digit ZIP Code delivery unit. The same requirements applies, in successive stages, to 10 or more remaining pieces directed to a multi-ZIP Coded post office, then to a sectional center facility, and then to a State. The remainer is combined in a mixed-State

package. See Postal Service Manual 134.436.

A number of mailers have suggested that a simplified form of presorting should be permitted for those parcels that can be proceeds on parcel sorters at the Postal Service bulk mail centers. The Postal Service believes that this adjustment is appropriate. Accordingly, this rule adopts a new section 134.437 of the Postal Service Manual to authorize the simplified presorting option.

The new section specifies the kinds of machinable parcels that will be eligible for the simplified presorting treatment. For eligible pieces, mailers will be authorized to substitute sorts to bulk mail centers destinations for the generally required sorts to multi-ZIP Coded post offices, sectional center facilities, and States. In addition, the quantity necessitating sacking at each stage will be 20 pounds or 1,000 cubic inches of mail, rather than 10 or more individually addressed pieces. Each separation will be sacked but the pieces will not have to be wrapped or tied together.

Although exempt from the notice and comment requirement of the Administrative Procedure Act (5 U.S.C. 553(b), (c)) regarding proposed rulemaking by 39 U.S.C. 410(a), the Postal Service ordinarily invites comments from the public whenever it proposes a new or amended regulation such as this, which would or might have a substantial effect on the public. In this case, however, publishing these rules as proposals, with a comment period of 30 days, would delay implementation of an optional provision which will permit some mailers to choose simplified and less burdensome mail preparation procedures.

Accordingly, the Postal Service finds it unnecessary and contrary to the public interest to follow its customary practice by publishing these rules are proposed rules for comments before they become effective. See 5 U.S.C. 553(d). However, we reiterate that comments are welcomed on the published rules (which we anticipate may be interim rules), and that any proposed changes will be considered and acted upon as appropriate.

In view of the considerations discussed above, the Postal Service hereby adopts the following revision of the Postal Service Manual:

PART 134—THIRD CLASS

In 134.4, add new .437 reading as follows:

§ 134.4 Preparation—Payment of Postage.

* * * * *

.437 Optional Preparation Procedures Machinable (Regular) Third-Class Parcels.

a. *General.* Mailers may, at their option, sort machinable (regular) parcels to 5-digit and BMC destinations rather than the destinations prescribed in 134.436. Third-class parcels meeting the following criteria can be processed on bulk mail center parcel sorters and are referred to as machinable (regular) parcels.

(1) Weight: At least 8 ounces. Exception: Pieces weighing between 6 and 8 ounces are machinable if all sides are rectangular in shape.

(2) Length: At least 6 inches, but not over 34 inches.

(3) Width: At least 3 inches, but not over 17 inches.

(4) Height/Thickness: At least 1/4 inch, but not over 17 inches.

The following items are not considered machinable:

(1) Rolls and tubes.

(2) Unwrapped, paper wrapped, or sleeve wrapped articles.

(3) Merchandise samples that are not individually addressed.

(4) Enveloped materials not reinforced with tape.

(5) Articles not securely wrapped.

In some instances sackable parcels which do not meet all of the machinable (regular) parcel criteria may be successfully sorted on BMC parcel sorters. When this occurs the BMC general manager may notify the mailer that the subject parcels are machinable and may be entered under the optional preparation procedures of 134.437 b, c, and d, sorted to five-digit and BMC destinations.

b. *Five-digit sacks.* Pieces addressed to the same five-digit ZIP Code area must be sacked when there are 20 pounds or sufficient pieces to fill one-third of a No. 2 postal sack (1,000 cubic inches). These sacks must be labeled in the following manner:

```
PHILADELPHIA PA  19118      .....City, State and 5-Digit
                                   Destination
3C REG P                    .....Contents
FR JC COMPANY BOSTON MA     .....Mailer, Office of Mailing
```

c. *Destination bulk mail center (BMC) sacks.* After the required five-digit ZIP Code area sacks have been prepared, the remaining pieces must be placed in sacks labeled to destination BMC areas, when there are 20 pounds or sufficient pieces to a BMC area to fill one-third of a No. 2 postal sack (1,000 cubic inches). These sacks must be labeled in the following manner:

```
BMC CHICAGO IL  605         .....Destination BMC
3C REG P                    .....Contents
FR RD MAILINGS ATLANTA GA   .....Mailer, Office
                                   of Mailing
```

d. Mixed BMC sacks. After the required five-digit ZIP Code area and destination BMC sacks have been prepared, the remaining pieces must be placed in sacks labeled to the origin BMC in the following manner:

```
BMC KANSAS CITY MO  647      .....Origin BMC
3C REG P                     .....Contents
FR WRIGHT CO TOPEKA KS       .....Mailer, Office
                                  of Mailing
```

A post office services (domestic) transmittal letter making these changes in the pages of the Postal Service Manual will be published and will be transmitted to subscribers automatically. These changes will be published in the FEDERAL REGISTER as provided in 39 CFR 111.3.

(39 U.S.C. 401(2), 403.)

ROGER P. CRAIG,
Deputy General Counsel.

[FR Doc. 78-25265 Filed 9-5-78; 2:19 pm]

[6560-01]

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

[FRL 947-3]

PART 2—PUBLIC INFORMATION

General Provisions; Confidential Business Information

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This rule makes changes in the Environmental Protection Agency (EPA) procedures for handling requests under the Freedom of Information Act and for treatment of business information submitted to EPA. In particular, the rule sets forth specific modifications to the basic procedures for treatment of business information under specific statutes, including the Toxic Substances Control Act and the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976. This rule makes no changes in EPA's basic policy concerning treatment of business information that is determined to be confidential or claimed as confidential by the submitter.

DATE: This rule is effective October 10, 1978.

FOR FURTHER INFORMATION CONTACT:

James Nelson, Office of General Counsel, Contracts and General Administration Branch (A-134), Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, telephone 202-426-8830.

SUPPLEMENTARY INFORMATION: On September 1, 1976, the Environmental Protection Agency (EPA) published its regulations for handling requests under the Freedom of Information Act (FOIA) and for the treatment of business information claimed as confidential (41 FR 36902). On January 18, 1978, EPA published proposed amendments to those regulations (43 FR 2637). In response to the proposed amendments EPA has received comments from 21 persons. Appendix A of this notice summarizes and responds to the significant issues raised in these comments. The general changes in the final regulations in response to the comments are discussed below.

CHANGES TO SUBPART A

Subpart A of the regulations sets forth the basic rules that apply to the handling of FOIA requests by EPA. Several changes have been made to these procedures in response to comments.

During the development of the inventory reporting regulations for the Toxic Substances Control Act (TSCA) in 40 CFR Part 710, EPA realized that if the mere existence of certain records is a confidential trade secret, a denial of a FOIA request which acknowledged the existence of the records might itself be a disclosure of confidential information. In responding to comment 101 in the final inventory regulations (December 23, 1977, 42 FR 64592), EPA indicated that it would develop a method of responding to FOIA requests that would not disclose the existence of certain information if its existence were confidential. Accordingly, §§ 2.113 and 2.116 are amended to require that a denial of a FOIA request or a denial of a FOIA appeal not reveal the existence or nonexistence of records when that existence or nonexistence is confidential. The Agency anticipates that very few types of records will qualify for this type of denial. The only known example is the confidential chemical substance identities that will be included under the TSCA inventory reporting regulations. EPA will rely upon each affected business to identify specific records whose mere existence is claimed as confidential. If this type of claim is not made, EPA will not consider the existence of the records to be confidential. EPA believes that this approach to making FOIA denials is legal because it gives a requester a final denial that can be reviewed by a Federal court.

Sections 2.115 and 2.120 are amended to reflect the change in title from the Office of Public Affairs to the Office of Public Awareness. Section 2.118 is amended to reflect the change in the language of 5 U.S.C. 552(b)(3).

Section 2.120 is amended to provide that requesters who fail to pay fees generated by responses to FOIA requests will be placed on a delinquent list after 60 days. FOIA requests from a person on the delinquent list will not be honored until the overdue fees are paid. Under the proposal, a requester specifying an affiliation with an organization would have bound that organization. In response to comment, this provision has been modifed to allow an organization to show that the request was not in fact a request on behalf of the organization. If this can be shown, the organization would be removed from the delinquent list; the individual would remain on the list.

CHANGES TO SUBPART B

The amendments to subpart B of the regulations do not change EPA's basic approach to the treatment of confidential business information. EPA's policy remains that it will not disclose business information that has been determined to be entitled to confidential treatment except as specifically required or authorized by statute under which the information was or could have been acquired.

Four new sections are being added to subpart B. New § 2.214 sets forth the policy and procedures EPA will follow when a suit is filed by a requester under FOIA for information which EPA has denied on the basis that it is confidential business information. Under these procedures, when EPA is sued it will inform each affected business within 10 days after service of the complaint. EPA will not oppose a motion by an affected business to intervene in the suit. In some cases EPA may ask the business to assist in preparation of materials for the defense of the suit. EPA expects that affected businesses will cooperate to the fullest extent possible since EPA is defending the business' interests. EPA will defend its final confidentiality determination.

New § 2.215 specifies that no EPA officer, employee, contractor, or subcontractor can make any promises to an affected business about confidentaility

unless those promises are consistent with subpart B. In addition, it provides a mechanism for EPA to enter into agreements with other agencies that would require EPA to keep information furnished by the other agency confidential. This may be necessary as a condition of EPA's being able to acquire confidential business information from another agency. This section is discussed more fully in the January 18, 1978, proposal (43 FR 2638).

New § 2.305 provides special rules for certain business information under the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976. These rules provide for disclosure to authorized representatives, when relevant in proceedings under the act, and discuss the applicability of the general rules in subpart B to this information. This section is similar to existing §§ 2.301 and 2.302, makes no major changes in approach, and is discussed in detail in the January 18, 1978, notice.

New § 2.306 provides special rules for confidential business information under TSCA. These rules provide for the following specific authorized disclosures set forth in section 14 of TSCA (15 U.S.C. 2613): To other Federal agencies; to contractors and subcontractors performing work under TSCA; when relevant in proceedings under TSCA; when necessary to protect health or the environment against an unreasonable risk of injury; and to Congress and its committees. The new section also defines "health and safety data" for the purposes of section 14(b) of TSCA. Under section 14(b) health and safety data may not be withheld from disclosure as confidential business information. Changes have been made in paragraph (h) to reflect changes made in § 2.209. Section 2.306 is discussed in more detail in the January 18, 1978 notice.

Some of the definitions in paragraph (a) of § 2.306 have been changed from the proposed version. Several definitions have been eliminated as unnecessary. The new definition of "manufacture or process for commercial purposes" replaces the two separate definitions in the proposal. This new definition is intended to clarify the scope of the definition of "health and safety data."

Under section 14(b) of TSCA, "data from health and safety studies" for chemical substances or mixtures "offered for commercial distribution" or for which testing is required under section 4 or notification is required when section 5 may not be withheld from disclosure by EPA as confidential business information under 5 U.S.C. 552(b)(4). The Agency interprets the term "offer for commercial distribution" to include the term "manufactured or processed for commercial purposes." The congressional policy behind section 14(b) of TSCA is that the public must have access to data about health and safety for those chemicals that are in commerce because the public may be exposed to those substances. Any chemical substance included in the inventory of chemical substances under TSCA section 8(b) can be distributed in commerce, and, therefore, the public may be exposed to it. Accordingly, the definition "manufactured or processed for commercial purposes" in these regulations combines the definitions in the inventory regulations (42 FR 64592). In this way, data about health and safety of any substance appearing on the inventory will be available to the public. Health and safety data for some chemical substances which are not included on the inventory will also be made available to the public under this section. The term "manufactured or processed for commercial purposes" in these regulations includes distribution in commerce for use in research and development. The definition has been expanded to include data for these types of chemical substances because once the chemical substance is distributed in commerce for any purpose it is covered by section 14(b). EPA has no reason to believe Congress intended any other definition for section 14(b).

A number of persons commented that EPA should notify any affected business before confidential business information is disclosed outside of EPA and proposed various methods of notice. The Agency's confidentiality regulations, published September 1, 1976, recognized that affected businesses should have notice before a public disclosure of information claimed as confidential. The regulations provided for 10 days notice before any public disclosure (§§ 2.204(d)(2) and 2.205(f)). In addition, in the case of disclosures to contractors, § 2.301(h)(2)(iii) provided for notice to affected businesses at least 5 days in advance of disclosure unless the program office determined that notice would seriously hamper the conduct of EPA activities. The regulations also provided for notice of contemplated disclosures in proceedings under several of EPA's specific statutes (see § 2.301(g)) and in certain circumstances of disclosures to State and local government agencies (see § 2.301(h)(3)(ii)). Sections 2.301 (g) and (h) have been incorporated by reference into other sections.

The September 1, 1976, regulations did not require any notice when EPA furnished confidential information to another Federal agency, to Congress or the Comptroller General, or to any other person pursuant to the order of a Federal court. Since disclosures to Congress or other Federal agencies are not public disclosures, EPA believes that notice prior to disclosure is not required. TSCA is the only statute where Congress specifically considered notice requirements. Section 14(c)(2)(B) of TSCA states that no notice is required prior to disclosure to other Federal agencies. Section 14 does not require any notice prior to disclosures to Congress.

Notwithstanding EPA's position that notice is not legally required in these situations, EPA has decided as a matter of policy to give notice in the case of disclosures to other Federal agencies and Congress, and pursuant to Federal court orders. Accordingly, § 2.209 has been amended to provide advance notice of at least 10 days to each affected business prior to disclosure to Congress or other Federal agencies. In the case of disclosures pursuant to Federal court order, EPA will give advance notice providing such notice does not violate the terms of the court order or other directive of the court.

Other comments urged a change in the EPA position reflected in § 2.209 that when another Federal agency obtains confidential business information from EPA it must agree not to disclose the information further unless it has EPA's consent, the consent of the affected business, or its own statutory authority both to compel production of the information and to make the proposed disclosure. The position of EPA remains that, if the other agency could have acquired the information itself under statutory authority even if EPA had not furnished the information, the other agency should be allowed to treat the information as if acquired under its own statutory authority, and, therefore, subject to the disclosure provisions of its own statute. However, since other agencies may have policies concerning notice to affected businesses that are different from those at EPA, § 2.209 has been amended to provide that the other agency, prior to making a disclosure under its own statutory authority, must give each affected business at least the same notice that would be required under EPA's regulations. This will assure that no information obtained by EPA is disclosed by another agency without the affected business receiving at least the same notice that EPA would have provided.

In providing for notice to affected businesses prior to disclosure to other Federal agencies or Congress, or pursuant to Federal court orders, EPA has reserved a certain flexibility. Comments received suggested many methods and types of notices. Since notice is not legally required but is provided as a courtesy, the type of notice re-

quired by these amendments is less rigid than the notice used in the case of a public disclosure under §§ 2.204 and 2.205. To avoid undue administrative burden on EPA and its program activities and after considering different types and contents of notices, § 2.209 has been amended to specify the contents of the notice and to provide some discretion for the program office answering a request from another Federal agency, Congress, or a Federal court to choose the appropriate method of notice. For example, if EPA entered an interagency agreement to provide a certain type of confidential business information to another Federal agency on a continuing basis, EPA could publish a notice in the FEDERAL REGISTER describing the agreement and the type of information to be provided. This type of notice would be used when there are large numbers of affected businesses and would refer to categories of information. In other cases where only a few affected businesses are involved, notice might be given by a certified letter.

In addition, in certain cases disclosure to employees of another Federal agency is essentially the same as disclosure to EPA employees. This occurs when the employees of the other agency are performing a function on behalf of EPA. For example, when the Department of Justice represents EPA in legal matters or investigates criminal or civil violations of Federal laws relating to EPA activities, it is acting on behalf of EPA. Also, EPA sometimes enters into interagency agreements with other agencies under which the other agency performs a function for EPA under an EPA statute. Since disclosure of information in these types of activities is essentially the same as a disclosure to an EPA employee, no notice will be provided in these situations. This is consistent with the policy that an agency does not have to inform an affected business each time information is made available to a different employee or office within the agency.

The September 1, 1976, regulations did not require notice in all cases where EPA furnished confidential business information to contractors or where EPA disclosed confidential business information to contractors or where EPA disclosed confidential business information because of its relevance in proceedings under particular statutes. EPA believes that notice prior to disclosure to contractors or in proceedings is not required. TSCA is the only statute where Congress specifically considered notice requirements. Section 14(c)(2)(B) of TSCA states that no notice is required prior to disclosure in proceedings or disclosure to contractors.

Notwithstanding EPA's position that notice is not legally required in these situations, EPA has decided as a matter of policy to give notice prior to disclosure in proceedings and disclosure to contractors. The September 1, 1976, regulations already provided for some notice in these situations. These regulations have been modified to provide notice in all such situations. First, § 2.301(g) has been amended to provide notice prior to disclosure of information relevant in proceedings under various EPA statutes. Section 2.301(h)(2)(iii) has been amended to provide notice prior to all disclosures of information to contractors and subcontractors under various EPA statutes. Sections 2.301 (g) and (h) are incorporated by reference into other sections in subpart B.

The additional notice requirements in these regulations will result in additional administrative burdens on EPA's programs. If these burdens begin to hamper the effective implementation of EPA's statutory mandates, the Agency may have to reconsider these notice requirements and further amend these regulations after rulemaking and public comment.

Section 2.301(h) has also been amended to clarify its applicability to both contractors and subcontractors. Section 2.301 has been amended to reflect the recodification of the Clean Air Act as 42 U.S.C. 7401 et seq. and amendments in 1977. Section 2.302 has been amended to include the new name "Clean Water Act."

The remaining changes in subpart B are designed to make the cross-references within the regulations consistent with these amendments.

NOTE.—The Environmental Protection Agency has determined that this document does not contain a major proposal requiring preparation of an economic impact analysis statement under Executive Order 12044.

Dated: September 1, 1978.

DOUGLAS M. COSTLE,
Administrator.

Part 2 is amended as follows:

1. By adding new §§ 2.214 and 2.215 to the Table of Sections, Subpart B, and by revising §§ 2.302, 2.305, and 2.306, to read as follows:

Subpart B—Confidentiality of Business Information

Sec.

* * * * *

2.214 Defense of Freedom of Information Act suits; participation by affected business.

2.215 Confidentiality agreements.

* * * * *

2.302 Special rules governing certain information obtained under the Clean Water Act.

* * * * *

2.305 Special rules governing certain information obtained under the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976.

2.306 Special rules governing certain information obtained under the Toxic Substances Control Act.

* * * * *

2. By revising "Authority" to read as follows:

AUTHORITY: 5 U.S.C. 301, 552, 553; secs. 114, 208, 301, and 307 of the Clean Air Act, as amended, 42 U.S.C. 7414, 7542, 7601, 7607; secs. 308, 501, and 509(a) of the Clean Water Act, as amended, 33 U.S.C. 1318, 1361, 1369(a); sec. 13 of the Noise Control Act of 1972, 42 U.S.C. 4912; secs. 1445 and 1450 of the Safe Drinking Water Act, 42 U.S.C. 300j-4, 300j-9; secs. 2002 and 3007 of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912, 6927; sec. 14 of the Toxic Substances Control Act, 15 U.S.C. 2613; secs. 10, 12, and 25 of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. 136h, 136j, 136v; sec. 408(f) of the Federal Food, Drug, and Cosmetic Act, as amended, 21 U.S.C. 346(f); and secs. 104(f) and 108 of the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1414(f), 1418.

3. By adding three new sentences to the end of § 2.113(d) to read as follows:

§ 2.113 Initial denials of requests.

* * * * *

(d) * * * However, no initial determination shall reveal the existence or nonexistence of records if identifying the mere fact of the existence or nonexistence of those records would reveal confidential business information, confidential personal information, or a confidential investigation. Instead of identifying the existence or nonexistence of the records, the initial determination shall state that the request is denied because either the records do not exist or they are exempt from mandatory disclosure under the applicable provision of 5 U.S.C. 552(b). No such determination shall be issued without the concurrence of the appropriate EPA legal office.

* * * * *

4. By revising paragraph (b) of § 2.115 to read as follows:

§ 2.115 Appeal determination; by whom made.

* * * * *

(b) Whenever the General Counsel has determined under paragraph (a)(3) of this section that a record is

exempt from mandatory disclosure but legally may be disclosed and the record has not been disclosed by EPA, the matter shall be referred to the Director of the EPA Office of Public Awareness. If the Director of the EPA Office of Public Awareness determines that the public interest would not be served by disclosure, a determination denying the appeal shall be issued by the General Counsel. If the Director of the EPA Office of Public Awareness determines that the public interest would be served by disclosure, the record shall be disclosed unless the Administrator (upon a review of the matter requested by the appropriate Assistant Administrator, Regional Administrator, or the Director of a Headquarters Staff Office) determines that the public interest would not be served by disclosure, in which case the General Counsel shall issue a determination denying the appeal.

* * * * *

5. By adding two new sentences to the end of § 2.116 to read as follows:

§ 2.116 Contents of determination denying appeal.

* * * However, no determination denying an appeal shall reveal the existence or nonexistence of records if identifying the mere fact of the existence or nonexistence of those records would reveal confidential business information, confidential personal information, or a confidential investigation. Instead of identifying the existence or nonexistence of the records, the determination shall state that the appeal is denied because either the records do not exist or they are exempt from mandatory disclosure under the applicable provision of 5 U.S.C. 552(b).

6. By revising paragraph (a)(3) of § 2.118 to read as follows:

§ 2.118 Exemption categories.

(a) * * *

(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)): *Provided,* That such statute:

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

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

* * * * *

7. By revising § 2.120 by changing the last sentence of paragraph (d) and by adding a new paragraph (e) to read as follows:

§ 2.120 Fees; payment; waiver.

* * * * *

(d) * * * The Director of the EPA Office of Public Awareness, or the Director's designee in an EPA regional office, shall decide such appeals.

(e) The EPA Freedom of Information Officer shall maintain a record of all fees charged requesters for searching for and reproducing requested records under this section. If after the end of 60 calendar days from the date on which request for payment was made the requester has not submitted payment to the EPA Freedom of Information Officer, the Freedom of Information Officer shall place the requester's name on a delinquent list. If a requester whose name appears on the delinquent list makes a request under this part, the EPA Freedom of Information Officer shall inform the requester that EPA will not process the request until the requester submits payment of the overdue fee from the earlier request. Any request made by an individual who specifies an affiliation with or representation of a corportion, association, law firm, or other organization shall be deemed to be a request by the corporation, association, law firm, or other organization. If an organization placed on the delinquent list can show that the person who made the request for which payment is overdue did not make the request on behalf of the organization, the organization will be removed from the delinquent list but the name of the individual shall remain on the list. A requester shall not be placed on the delinquent list if a request for a reduction or for a waiver is pending under paragraph (d) of this section.

8. By revising paragraph (a) and the first sentence of paragraph (c) of § 2.202 to read as follows:

§ 2.202 Applicability of subpart; priority where provisions conflict; records containing more than one kind of information.

(a) Sections 2.201 through 2.215 establish basic rules governing business confidentiality claims, the handling by EPA of business information which is or may be entitled to confidential treatment, and determinations by EPA of whether information is entitled to confidential treatment for reasons of business confidentiality.

* * * * *

(c) The basic rules of §§ 2.201 through 2.215 govern except to the extent that they are modified or supplanted by the special rules of §§ 2.301 through 2.309. * * *

* * * * *

9. By revising paragraph (e)(4)(viii) of § 2.204 to read as follows:

§ 2.204 Initial action by EPA office.

* * * * *

(e) * * *

(4) * * *

(viii) Whether the business asserts that disclosure of the information would be likely to result in substantial harmful effects on the business' competitive position, and if so, what those harmful effects would be, why they should be viewed as substantial, and an explanation of the causal relationship between disclosure and such harmful effects; and

* * * * *

10. By revising paragraphs (a), (b), (c), and (d) of § 2.209 to read as follows:

§ 2.209 Disclosure in special circumstances.

(a) *General.* Information which, under this subpart, is not available to the public may nonetheless be disclosed to the persons, and in the circumstances, described by paragraphs (b) through (g) of this section. (This section shall not be construed to restrict the disclosure of information which has been determined to be available to the public. However, business information for which a claim of confidentiality has been asserted shall be treated as being entitled to confidential treatment until there has been a determination in accordance with the procedures of this subpart that the information is not entitled to confidential treatment.)

(b) *Disclosure to Congress or the Comptroller General.* Upon receipt of a written request by the Speaker of the House, President of the Senate, chairman of a committee or subcommittee, or the Comptroller General, as appropriate, EPA will disclose business information to either House of Congress, to a committee or subcommittee of Congress, or to the Comptroller General, unless a statute forbids such disclosure. If the request is for information claimed as confidential or determined to be confidential, the EPA office processing the request shall provide notice to each affected business of the type of information to be disclosed and to whom it is to be disclosed. At the discretion of the office, such notice may be given by notice published in the FEDERAL REGISTER at least 10 days prior to disclosure, or by letter sent by certified mail return receipt requested or telegram either of which must be received by the affected business at least 10 days prior to disclosure. At the time EPA discloses the business information, EPA will inform the requesting body of any unresolved business confidentiality claim known to cover the information and of

any determination under this subpart that the information is entitled to confidential treatment.

(c) *Disclosure to other Federal agencies.* EPA may disclose business information to another Federal agency if—

(1) EPA receives a written request for disclosures of the information from a duly authorized officer or employee of the other agency or on the initiative of EPA when such disclosure is necessary to enable the other agency to carry out a function on behalf of EPA;

(2) The request, if any, sets forth the official purpose for which the information is needed;

(3) When the information has been claimed as confidential or has been determined to be confidential, the responsible EPA office provides notice to each affected business of the type of information to be disclosed and to whom it is to be disclosed. At the discretion of the office, such notice may be given by notice published in the FEDERAL REGISTER at least 10 days prior to disclosure, or by letter sent by certified mail return receipt requested or telegram either of which must be received by the affected business at least 10 days prior to disclosure. However, no notice shall be required when EPA furnishes business information to another Federal agency to perform a function on behalf of EPA, including but not limited to—

(i) Disclosure to the Department of Justice for purposes of investigation or prosecution of civil or criminal violations of Federal law related to EPA activities;

(ii) Disclosure to the Department of Justice for purposes of representing EPA in any matter; or

(iii) Disclosure to any Federal agency for purposes of performing an EPA statutory function under an interagency agreement.

(4) EPA notifies the other agency of any unresolved business confidentiality claim covering the information and of any determination under this subpart that the information is entitled to confidential treatment, and that further disclosure of the information may be a violation of 18 U.S.C. 1905; and

(5) The other agency agrees in writing not to disclose further any information designated as confidential unless—

(i) The other agency has statutory authority both to compel production of the information and to make the proposed disclosure, and the other agency has, prior to disclosure of the information to anyone other than its officers and employees, furnished to each affected business at least the same notice to which the affected business would be entitled under this subpart;

(ii) The other agency has obtained the consent of each affected business to the proposed disclosure; or

(iii) The other agency has obtained a written statement from the EPA General Counsel or an EPA Regional Counsel that disclosure of the information would be proper under this subpart.

(d) *Court-ordered disclosure.* EPA may disclose any business information in any manner and to the extent ordered by a Federal court. Where possible, and when not in violation of a specific directive from the court, the EPA office disclosing information claimed as confidential or determined to be confidential shall provide as much advance notice as possible to each affected business of the type of information to be disclosed and to whom it is to be disclosed, unless the affected business has actual notice of the court order. At the discretion of the office, subject to any restrictions by the court, such notice may be given by notice in the FEDERAL REGISTER, letter sent by certified mail return receipt requested, or telegram.

* * * * *

11. By revising the first sentence of paragraph (d) of § 2.211 to read as follows:

§ 2.211 Safeguarding of business information; penalty for wrongful disclosure.

* * * * *

(d) Each contractor or subcontractor with EPA, and each employee of such contractor or subcontractor, who is furnished business information by EPA under §§ 2.301(h), 2.302(h), 2.304(h), 2.305(h), 2.306(j), 2.307(h), or 2.308(i), shall use or disclose that information only as permitted by the contract or subcontract under which the information was furnished. * * *

12. By revising paragraphs (b)(6), (b)(7), and (c) of § 2.213 and adding a new paragraph (b)(8) to read as follows:

§ 2.213 Designation by business of addressee for notices and inquiries.

* * * * *

(b) * * *

(6) Notices concerning modifications or overrulings of prior determinations, under § 2.205(h);

(7) Notices to affected businesses under §§ 2.301(g) and 2.301(h) and analogous provisions in §§ 2.302, 2.303, 2.304, 2.305, 2.306, 2.307, and 2.308; and

(8) Notices to affected businesses under § 2.209.

(c) The Freedom of Information Officer shall, as quickly as possible, notify all EPA offices that may possess information submitted by the business to EPA, the Regional Freedom of Information Offices, the Office of General Counsel, and the offices of Regional Counsel of any designation received under this section. Businesses making designations under this section should bear in mind that several working days may be required for dissemination of this information within EPA and that some EPA offices may not receive notice of such designations.

13. By adding the following two new sections after § 2.213:

§ 2.214 Defense of Freedom of Information Act suits; participation by affected business.

(a) In making final confidentiality determinations under this subpart, the EPA legal office relies to a large extent upon the information furnished by the affected business to substantiate its claim of confidentiality. The EPA legal office may be unable to verify the accuracy of much of the information submitted by the affected business.

(b) If the EPA legal office makes a final confidentiality determination under this subpart that certain business information is entitled to confidential treatment, and EPA is sued by a requester under the Freedom of Information Act for disclosure of that information, EPA will:

(1) Notify each affected business of the suit within 10 days after service of the complaint upon EPA;

(2) Where necessary to preparation of EPA's defense, call upon each affected business to furnish assistance; and

(3) Not oppose a motion by any affected business to intervene as a party to the suit under rule 24(b) of the Federal Rules of Civil Procedure.

(c) EPA will defend its final confidentiality determination, but EPA expects the affected business to cooperate to the fullest extent possible in this defense.

§ 2.215 Confidentiality agreements.

(a) No EPA officer, employee, contractor, or subcontractor shall enter into any agreement with any affected business to keep business information confidential unless such agreement is consistent with this subpart. No EPA officer, employee, contractor, or subcontractor shall promise any affected business that business information will be kept confidential unless the promise is consistent with this subpart.

(b) If an EPA office has requested information from a State, local, or Federal agency and the agency refuses to furnish the information to EPA because the information is or may constitute confidential business information, the EPA office may enter into an agreement with the agency to keep the information confidential, notwith-

standing the provisions of this subpart. However, no such agreement shall be made unless the General Counsel determines that the agreement is necessary and proper.

(c) To determine that an agreement proposed under paragraph (b) of this section is necessary, the General Counsel must find:

(1) The EPA office requesting the information needs the information to perform its functions;

(2) The agency will not furnish the information to EPA without an agreement by EPA to keep the information confidential; and

(3) Either:

(i) EPA has no statutory power to compel submission of the information directly from the affected business, or

(ii) While EPA has statutory power to compel submission of the information directly from the affected business, compelling submission of the information directly from the business would—

(A) Require time in excess of that available to the EPA office to perform its necessary work with the information,

(B) Duplicate information already collected by the other agency and overly burden the affected business, or

(C) Overly burden the resources of EPA.

(d) To determine that an agreement proposed under paragraph (b) of this section is proper, the General Counsel must find that the agreement states—

(1) The purpose for which the information is required by EPA;

(2) The conditions under which the agency will furnish the information to EPA;

(3) The information subject to the agreement;

(4) That the agreement does not cover information acquired by EPA from another source;

(5) The manner in which EPA will treat the information; and

(6) That EPA will treat the information in accordance with the agreement subject to an order of a Federal court to disclose the information.

(e) EPA will treat any information acquired pursuant to an agreement under paragraph (b) of this section in accordance with the procedures of this subpart except where the agreement specifies otherwise.

14. By amending § 2.301 as follows:

(a) By substituting the citation "42 U.S.C. 7401 et seq." for "42 U.S.C. 1857 et seq." in paragraph (a)(1).

(b) By substituting the citation "42 U.S.C. 7542" for "42 U.S.C. 1857f-6" in paragraph (b)(1)(ii).

(c) By substituting the citations "42 U.S.C. 7607(a)" for "42 U.S.C. 1857h-5(a)" in paragraph (b)(1)(iii).

(d) By substituting the citations "42 U.S.C. 7413(a)" and "42 U.S.C. 7413(b)" for "42 U.S.C. 1857c-8(a)" and "42 U.S.C. 1857c-8(b)", respectively, in paragraph (b)(2).

(e) By substituting the citations "42 U.S.C. 7523" for "42 U.S.C. 1857f-3" in paragraph (b)(3).

(f) By substituting the citations "42 U.S.C. 7415(j)" and "42 U.S.C. 7545(b)" for "42 U.S.C. 1857d(j)" and "42 U.S.C. 1857f-6c(b)", respectively, in paragraph (b)(5).

(g) By revising paragraphs (a)(5), (b)(1)(i), (c), (d), and (h)(2) and adding a new sentence to the end of paragraphs (g)(2), (g)(3), and (g)(4) as follows:

§ 2.301 Special rules governing certain information obtained under the Clean Air Act.

(a) * * *

(5) "Manufacturer" has the meaning given it in section 216(1) of the Act, 42 U.S.C. 7550(1).

(b) * * *

(1) * * *

(i) Provided or obtained under section 114 of the Act, 42 U.S.C. 7414, by the owner or operator of any stationary source, for the purpose (A) of developing or assisting in the development of any implementation plan under section 110 or 111(d) of the Act, 42 U.S.C. 7410, 7411(d), any standard of performance under section 111 of the Act, 42 U.S.C. 7411, or any emission standard under section 112 of the Act, 42 U.S.C. 7412, (b) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (C) of carrying out section 303 of the Act, 42 U.S.C. 7603;

* * * * *

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207, § 2.209 and §§ 2.211 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

* * * * *

(g) * * *

(2) * * * Any affected business shall be given at least 5 days notice by the General Counsel prior to making the information available to the public.

(3) * * * Any affected business shall be given at least 5 days notice by the presiding officer prior to making the information available to the public or to one or more of the parties of record to the proceeding.

(4) * * * Any affected business shall be given at least 5 days notice by the presiding officer prior to making the information available to one or more of the parties of record to the proceeding.

(h) * * *

(2)(i) A person under contract or subcontract to EPA to perform work for EPA in connection with the Act or regulations which implement the Act may be considered an authorized representative of the United States for purposes of this paragraph (h). Subject to the limitations in this paragraph (h)(2), information to which this section applies may be disclosed to such a person if the EPA program office managing the contract or subcontract first determines in writing that such disclosure is necessary in order that the contractor or subcontractor may carry out the work required by the contract or subcontract.

(ii) No information shall be disclosed under the paragraph (h)(2), unless this contract or subcontract in question provides:

(A) That the contractor or subcontractor and the contractor's or subcontractor's employees shall use the information only for the purpose of carrying out the work required by the contract or subcontract, shall refrain from disclosing the information to anyone other than EPA without the prior written approval of each affected business or of an EPA legal office, and shall return to EPA all copies of the information (and any abstracts or extracts therefrom) upon request by the EPA program office, whenever the information is no longer required by the contractor of subcontractor for the performance of the work required under the contract or subcontract, or upon completion of the contract of subcontract;

(B) That the contractor or subcontractor shall obtain a written agreement to honor such terms of the contract of subcontract from each of the contractor's of subcontractor's employees who will have access to the information, before such employee is allowed such access; and

(C) That the contractor or subcontractor acknowledges and agrees that the contract or subcontract provisions concerning the use and disclosure of business information are included for the benefit of, and shall be enforceable by, both EPA and any affected business having an interest in information concerning it supplied to the contractor or subcontractor by EPA under the contract or subcontract.

(iii) No information shall be disclosed under this paragraph (h)(2) until each affected business has been furnished notice of the contemplated disclosure by the EPA program office and has been afforded a period found reasonable by that office (not less than 5 working days) to submit its comments. Such notice shall include a description of the information to be disclosed, the identity of the contractor or subcontractor, the contract or subcontract number, if any, and the

purposes to be served by the disclosure.

(iv) The EPA program office shall prepare a record of each disclosure under this paragraph (h)(2), showing the contractor or subcontractor, the contract or subcontract number, the information disclosed, the date(s) of disclosure, and each affected business. The EPA program office shall maintain the record of disclosure and the determination of necessity prepared under paragraph (h)(2)(i) of this section for a period of not less than 36 months after the date of the disclosure.

* * * * *

15. By revising the title and paragraphs (a)(1), (c), and (d) of § 2.302 to read as follows:

§ 2.302 Special rules governing certain information obtained under the Clean Water Act.

(a) * * *

(1) "Act" means the Clean Water Act, as amended, 33 U.S.C. 1251 et seq.

* * * * *

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207, § 2.209, §§ 2.211 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

* * * * *

16. By revising paragraphs (c) and (d) of § 2.303 to read as follows:

§ 2.303 Special rules governing certain information obtained under the Noise Control Act of 1972.

* * * * *

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and §§ 2.209 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

* * * * *

17. By revising paragraphs (c) and (d) of § 2.304 to read as follows:

§ 2.304 Special rules governing certain information obtained under the Safe Drinking Water Act.

* * * * *

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207, § 2.209, and §§ 2.211 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

* * * * *

18. By revising § 2.305 to read as follows:

§ 2.305 Special rules governing certain information obtained under the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976.

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

(1) "Act" means the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 et seq.

(2) "Person" has the meaning given it in section 1004(15) of the Act, 42 U.S.C. 6903(15).

(3) "Hazardous waste" has the meaning given it in section 1004(5) of the Act, 42 U.S.C. 6903(5).

(4) "Proceeding" means any rulemaking, adjudication, or licensing conducted by EPA under the Act or under regulations which implement the Act, except for determinations under this part.

(b) *Applicability.* This section applies only to information provided to or obtained by EPA under section 3007 of the Act, 42 U.S.C. 6927, by or from any person who generates, stores, treats, transports, disposes of, or otherwise handles hazardous wastes. Information will be considered to have been provided or obtained under section 3007 of the Act if it was provided in response to a request from EPA made for any of the purposes stated in section 3007, or if its submission could have been required under section 3007, regardless of whether section 3007 was cited as the authority for any request for the information or whether the information was provided directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and §§ 2.209 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(f) [Reserved]

(g) *Disclosure of information relevant in a proceeding.* (1) Under section 3007(b) of the Act (42 U.S.C. 6927(b)), any information to which this section applies may be disclosed by EPA because of the relevance of the information in a proceeding under the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Disclosure of information to which this section applies because of its relevance in a proceeding shall be made only in accordance with this paragraph (g).

(2–4) The provisions of § 2.301 (g)(2), (g)(3), and (g)(4) are incorporated by reference as paragraphs (g)(2), (g)(3), and (g)(4), respectively, of this section.

(h) *Disclosure to authorized representatives.* (1) Under section 3007(b) of the Act (42 U.S.C. 6927(b)), EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

(2–3) The provisions of § 2.301 (h)(2) and (h)(3) are incorporated by reference as paragraphs (h)(2) and (h)(3), respectively, of this section.

19. By revising § 2.306 to read as follows:

§ 2.306 Special rules governing certain information obtained under the Toxic Substances Control Act.

(a) *Definitions.* For the purposes of this section:

(1) "Act" means the Toxic Substances Control Act, 15 U.S.C. 2601 et seq.

(2) "Chemical substance" has the meaning given it in section 3(2) of the Act, 15 U.S.C. 2602(2).

(3)(i) "Health and safety data" means, with respect to any chemical substance or mixture that has been manufactured or processed for commercial purposes or any chemical substance or mixture for which testing is required under section 4 of the Act (15 U.S.C. 2603) or for which notification is required under section 5 of the Act (15 U.S.C. 2604)—

(A) Any study of any effect of a chemical substance or mixture on health, on the environment, or on both, including underlying data and epidemiological studies; studies of occupational exposure to a chemical substance or mixture; and toxicological, clinical, and ecological studies of a chemical substance or mixture;

(B) Any test performed under the Act; and

(C) Any data reported to, or otherwise obtained by, EPA from a study described in paragraph (a)(3)(i)(A) of this section or a test described in paragraph (a)(3)(i)(B) of this section.

(ii) Notwithstanding paragraph (a)(3)(i) of this section, no information shall be considered to be "health and safety data" if disclosure of the information would—

(A) In the case of a chemical substance or mixture, disclose processes used in the manufacturing or processing the chemical substance or mixture, or,

(B) In the case of a mixture, disclose the portion of the mixture comprised by any of the chemical substances in the mixture.

(4) "Manufacture or process for commercial purposes" means to manufacture, import, or process:

(i) For distribution in commerce, including for test marketing purposes and for use in research and development, or

(ii) For use by the manufacturer, importer, or processor, including for use as an intermediate.

(5) "Mixture" has the meaning given it in section 3(8) of the Act, 15 U.S.C. 2602(8).

(6) "Proceeding" means any rulemaking, adjudication, or licensing conducted by EPA under the Act or under regulations which implement the Act, except for determinations under this subpart.

(b) *Applicability.* This section applies to all information submitted to EPA for the purpose of satisfying some requirement or condition of the Act or of regulations which implement the Act, including information originally submitted to EPA for some other purpose and either relied upon to avoid some requirement or condition of the Act or incorporated into a submission in order to satisfy some requirement or condition of the Act or of regulations which implement the Act. Information will be considered to have been provided under the Act if the information could have been obtained under authority of the Act, whether the Act was cited as authority or not, and whether the information was provided directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.203, § 2.206, § 2.207, and §§ 2.210 through 2.215 apply without change to information to which this section applies.

(d) *Initial action by EPA office.* Section 2.204 applies to information to which this section applies, except that the provisions of paragraph (e)(3) of this section regarding the time allowed for seeking judicial review shall be reflected in any notice furnished to a business under § 2.204(d)(2).

(e) *Final confidentiality determination by EPA legal office.* Section 2.205 applies to information to which this section applies, except that—

(1) Notwithstanding § 2.205(i), the General Counsel (or his designee), rather than the regional counsel, shall make the determinations and take the actions required by § 2.205;

(2) In addition to the statement prescribed by the second sentence of § 2.205(f)(2), the notice of denial of a business confidentiality claim shall state that under section 20(a) of the Act, 15 U.S.C. 2619, the business may commence an action in an appropriate Federal district court to prevent disclosure.

(3) The following sentence is substituted for the third sentence of § 2.205(f)(2): "With respect to EPA's implementation of the determination, the notice shall state that (subject to § 2.210) EPA will make the information available to the public on the thirty-first (31st) calendar day after the date of the business' receipt of the wirtten notice (or on such later date as is established in lieu thereof under paragraph (f)(3) of this section), unless the EPA legal office has first been notified of the business' commencement of an action in a Federal court to obtain judicial review of the determination and to obtain preliminary injunctive relief against disclosure."; and

(4) Notwithstanding § 2.205(g), the 31 calendar day period prescribed by § 2.205(f)(2), as modified by paragraph (e)(3) of this section, shall not be shortened without the consent of the business.

(f) [Reserved]

(g) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies, except that health and safety data are not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(h) *Disclosure in special circumstances.* Section 2.209 applies to information to which this section applies, except that the following two additional provisions apply to § 2.209(c):

(1) The official purpose for which the information is needed must be in connection with the agency's duties under any law for protection of health or the environment or for specific law enforcement purposes; and

(2) EPA notifies the other agency that the information was acquired under authority of the Act and that any knowing disclosure of the information may subject the officers and employees of the other agency to the penalties in section 14(d) of the Act (15 U.S.C. 2613(d)).

(i) *Disclosure of information relevant in a proceeding.* (1) Under section 14(a)(4) of the Act (15 U.S.C. 2613(a)(4)), any information to which this section applies may be disclosed by EPA when the information is relevant in a proceeding under the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. However, any such disclosure shall be made in a manner that preserves the confidentiality of the information to the extent practicable without impairing the proceeding. Disclosure of information to which this section applies because of its relevance in a proceeding shall be made only in accordance with this paragraph (i).

(2-4) The provisions of §§ 2.301(g)(2), (g)(3), and (g)(4) are incorporated by reference as paragraphs (i)(2), (i)(3), and (i)(4), respectively, of this section.

(j) *Disclosure of information to contractors and subcontractors.* (1) Under section 14(a)(2) of the Act (15 U.S.C. 2613(a)(2)), any information to which this section applies may be disclosed by EPA to a contractor or subcontractor of the United States performing work under the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Subject to the limitations in this paragraph (j), information to which this section applies may be disclosed to a contractor or subcontractor if the EPA program office managing the contract or subcontract, or (in the case of contractors or subcontractors with agencies other than EPA) the General Counsel, determines in writing that such disclosure is necessary for the satisfactory performance by the contractor or subcontractor of the contract or subcontract.

(2-4) The provisions of §§ 2.301 (h)(2)(ii), (h)(2)(iii), and (h)(2)(iv) are incorporated by reference as paragraphs (j)(2), (j)(3), and (j)(4), respectively, of this section.

(5) At the time any information is furnished to a contractor or subcontractor under this paragraph (j), the EPA office furnishing the information to the contractor or subcontractor shall notify the contractor or subcontractor that the information was acquired under authority of the Act and that any knowing disclosure of the information may subject the contractor or subcontractor and its employees to the penalties in section 14(d) of the Act (15 U.S.C. 2613(d)).

(k) *Disclosure of information when necessary to protect health or the environment against an unreasonable risk of injury.* (1) Under section 14(a)(3) of the Act (15 U.S.C 2613(a)(3)), any information to which this section applies may be disclosed by EPA when disclosure is necessary to protect health or the environment against an unreasonable risk of injury to health or the environment. However, any disclosure shall be made in a manner that preserves the confidentiality of the information to the extent not inconsistent with protecting health or the environment against the unreasonable risk of injury. Disclosure of information to which this section applies because of the need to protect health or the environment against an unreasonable risk of injury shall be made only in accordance with this paragraph (k).

(2) If any EPA office determines that there is an unreasonable risk of

injury to health or the environment and that to protect health or the environment against the unreasonable risk of injury it is necessary to disclose information to which this section applies that otherwise might be entitled to confidential treatment under this subpart, the EPA office shall notify the General Counsel in writing of the nature of the unreasonable risk of injury, the extent of the disclosure proposed, how the proposed disclosure will serve to protect health or the environment against the unreasonable risk of injury, and the proposed date of disclosure. Such notification shall be made as soon as practicable after discovery of the unreasonable risk of injury. If the EPA office determines that the risk of injury is so imminent that it is impracticable to furnish written notification to the General Counsel, the EPA office shall notify the General Counsel orally.

(3) Upon receipt of notification under paragraph (k)(2) of this section, the General Counsel shall make a determination in writing whether disclosure of information to which this section applies that otherwise might be entitled to confidential treatment is necessary to protect health or the environment against an unreasonable risk of injury. The General Counsel shall also determine the extent of disclosure necessary to protect against the unreasonable risk of injury as well as when the disclosure must be made to protect against the unreasonable risk of injury.

(4) If the General Counsel determines that disclosure of information to which this section applies that otherwise might be entitled to confidential treatment is necessary to protect health or the environment against an unreasonable risk of injury, the General Counsel shall furnish notice to each affected business of the contemplated disclosure and of the General Counsel's determination. Such notice shall be made in writing by certified mail, return receipt requested, at least 15 days before the disclosure is to be made. The notice shall state the date upon which disclosure will be made. However, if the General Counsel determines that the risk of injury is so imminent that it is impracticable to furnish such notice 15 days before the proposed date of disclosure, the General Counsel may provide notice by means that will provide receipt of the notice by the affected business at least 24 hours before the disclosure is to be made. This may be done by telegram, telephone, or other reasonably rapid means.

20. By revising paragraphs (c) and (f) of § 2.307 to read as follows:

§ 2.307 Special rules governing certain information obtained under the Federal Insecticide, Fungicide, and Rodenticide Act.

* * * * *

(c) *Basic rules which apply without change.* Sections 2.201 through 2.203, § 2.206, § 2.207, and §§ 2.210 through 2.215 apply without change to information to which this section applies.

* * * * *

(f) [Reserved]

* * * * *

21. By revising paragraphs (c) and (g) of § 2.308 to read as follows:

§ 2.308 Special rules governing certain information obtained under the Federal Food, Drug and Cosmetic Act.

* * * * *

(c) *Basic rules which apply without change.* Sections 2.201, 2.202, 2.206, 2.207, and §§ 2.210 through 2.215 apply without change to information to which this section applies.

* * * * *

(g) [Reserved]

* * * * *

22. By revising paragraph (c) of § 2.309 to read as follows:

§ 2.309 Special rules governing certain information obtained under the Marine Protection, Research, and Sanctuaries Act of 1972.

* * * * *

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and §§ 2.209 through 2.215 apply without change to information to which this section applies.

* * * * *

APPENDIX A—SIGNIFICANT COMMENTS AND RESPONSES

Comment 1: The exemption under 5 U.S.C. 552(b)(4) concerns "trade secrets and commercial or financial information obtained from a person and privileged or confidential." EPA should address when information would qualify as "privileged" as opposed to "confidential."

Response: The Administrator disagrees with this comment. Trade secrets or commercial or financial information that is "privileged" should also be "confidential." The definition of "privileged" in the context of 5 U.S.C. 552(b)(4) is uncertain. No courts have yet addressed this problem. The current regulations do not preclude a finding that information is "privileged." Any submitter who believes that the information is "privileged" as opposed to "confidential" may make that claim at the time of submission to EPA. EPA will consider a claim of privilege in applying 5 U.S.C. 552(b)(4). "Confidential" has been defined in subpart B because of the specific needs of various EPA statutes.

Comments 2: Section 2.119(b) should be amended to limit discretionary release of documents exempt from disclosure under 5 U.S.C. 552(b)(4) and section 14 of TSCA.

Response: The Administrator disagrees with this comment. Discretionary release of documents that constitute confidential business information is constrained by §§ 2.301 through 2.308 of the regulations. No discretionary release of such information would be made except as authorized by the particular statute under which the information was obtained. Since the Office of General Counsel or Regional Counsel must approve any discretionary disclosure, they will assure that no disclosures take place that would be illegal under one or more of EPA's statutes.

Comment 3: Section 2.120(e) regarding overdues fees should provide that EPA verify an individual's affiliation with an organization prior to treating a request by an individual specifying such an affiliation as a request by the organization.

Response: The Administrator disagrees with this comment. Legally, the Agency cannot investigate persons who make requests under the Freedom of Information Act. If a person writes to EPA on stationery that indicates the person represents an organization, EPA assumes the person has authority to represent that organization. The Agency cannot restrict requests to only officers, directors, partners, associates, or persons designated by an organization to make requests. That would be contrary to the intent of the Freedom of Information Act that any person be entitled to make requests for information. Section 2.120(e) has been changed, however, to provide that if the organization can show that the person who made the request for which payment is overdue did not make the request on behalf of the organization, EPA will remove the organization from the delinquent list and leave the individual on the list until payment is made.

Comment 4: EPA should return the information it acquires from an affected business under § 2.204(e) to substantiate a claim of confidentiality after EPA has made its confidentiality determination. This information is often as confidential or more confidential than the original information. If a new request is made, EPA could request new substantiation.

Response: The Administrator disagrees with this comment. When EPA makes a final confidentiality determination, the legal office relies in part on the substantiating information submitted by the affected business. The final confidentiality determination will be that the information in question is either entitled to confidential treatment or not entitled to confidential treatment. If the information is entitled to confidential treatment, any FOIA request would be denied. If that denial were challenged by suit in Federal court, the Agency would need to be able to defend its decision by showing the court the basis of the finding of confidentiality. If confidentiality were denied, the affected business might bring suit to challenge that decision, and, as in the FOIA suit, the Agency would need to be able to defend its decision by showing the court the basis of the finding of no confi-

dentiality. In addition, EPA will not necessarily make a new determination each time there is a new FOIA request. EPA may continue to rely on the original determination for some time and, therefore, will need the substantiation to defend it. Of course, the regulations (§ 2.205(c)) already state that EPA will treat the substantiating comments as confidential if so claimed by the affected business and if the information in them is not otherwise in EPA's possession.

Comment 5: The present § 2.205(f) does not address advance notification to a submitter of termination of confidential or trade secret status. EPA should provide such a notice.

Response: The present regulations already provide such a notice. Section 2.205(f) provides that each affected business will receive advance notice when its claim of confidentiality is denied in whole or in part. Such a denial is the same as termination of the confidential status. If an affected business has claimed information as confidential, the regulations require that notice be sent to each affected business at least 10 days in advance of any disclosure (30 days in advance under TSCA and FIFRA). During this period, the affected business has the opportunity to seek judicial review. In no case would information that has been claimed as confidential be disclosed to the public or a competitor without advance notice to the submitter.

Comment 6: EPA should make advance confidentiality determinations under § 2.206 whenever requested by an affected business regardless of whether the information would be voluntarily submitted.

Response: The Administrator disagrees with this comment. EPA does not have the resources to make unnecessary confidentiality determinations. The Agency position is that if it can require submission of information it is not required to rule on its confidentiality in advance as a condition of receiving the information. The advance determination is designed to assist EPA in obtaining voluntarily submitted information which the affected business cannot be compelled to supply.

Comment 7: Section 2.208(e) should be eliminated because these substantive criteria for granting confidentiality are too restrictive.

Response: The Administrator disagrees with this comment. The two tests set forth in § 2.208(e) are derived from *National Parks & Conservation Association* v. *Morton*, 498 F. 2d 765 (D.C. Cir. 1974). The Agency follows this case in making judgments whether information is entitled to confidential treatment. This case has been followed by courts and other agencies and has not been overruled. These tests have been applied by courts and other agencies, and EPA has been able to apply them successfully in making final confidentiality determinations under its regulations.

Comment 8: EPA should not confine the use of the test that disclosure of information would impair the Government's ability to get necessary information in the future, in *National Parks & Conservation Association* v. *Morton*, 498 F 2d 765 (D.C. Cir. 1974), to cases where information is voluntarily submitted.

Response: The Administrator disagrees with this comment. The two tests under *National Parks* are set forth in § 2.208(e) as EPA will apply them. The test in paragraph (e)(1) goes to the business' interest where disclosure of the information in question would be likely to cause substantial harm to the business' competitive position. The second test in paragraph (e)(2) goes to the Government's interest in obtaining necessary information in the future. EPA's position is that if it has statutory authority to require submission of business information, it is not pertinent to inquire whether disclosure of the information would impair EPA's ability to get similar information in the future.

Comment 9: Affected businesses should be given notice prior to disclosure by EPA of confidential business information to Congress, other Federal agencies, or Federal courts.

Response: The Administrator agrees with this comment. While there is no legal requirement that EPA notify an affected business prior to disclosing confidential business information to Congress, other Federal agencies, or Federal courts, EPA has decided as a matter of policy that an affected business should know where its confidential business information goes when it leaves EPA. Accordingly, § 2.209 has been amended to provide for 10 days advance notice to affected businesses prior to disclosure of confidential business information to Congress and other Federal agencies. In the case of disclosure under a Federal court order, § 2.209 states that EPA will give advance notice so long as giving advance notice does not violate the court order or some other restriction imposed by the court. Since no advance notice is legally required in these situations, EPA will not follow the restrictive notice procedures used in the case of proposed public disclosures under §§ 2.204 and 2.205. Instead, the EPA office responding to the request has discretion to choose the most appropriate method of notice depending upon the circumstances. This provides adequate notice to affected businesses while at the same time giving EPA administrative flexibility in the method of notification. Section 2.209(c) makes it clear that the notice provision does not apply to disclosures of information to other Federal agencies if those agencies are performing functions on behalf of EPA. In those cases, the other Federal agencies are treated as part of EPA, and no notice is provided.

Comment 10: A final confidentiality determination should be made for any business information that is requested by Congress or another Federal agency prior to disclosure of the information.

Response: The Administrator disagrees with this comment. When business information is furnished to another Federal agency or Congress under § 2.209, EPA informs the other Federal agency or congress which information, if any, has been determined to be confidential or for which there are any unresolved claims of confidentiality. There is no need to make final confidentiality determinations for this information because these are not public disclosures. In addition, under these regulations the affected business will be informed in advance of the proposed disclosure. The Agency has limited resources for making final confidentiality determinations and, accordingly, must reserve those resources for proposed public disclosures.

Comment 11: Section 2.211(d) should be amended to cite the specific criminal provisions that would apply to contractor violations of confidentiality.

Response: The Administrator disagrees with this comment. There are various provisions of the Federal criminal code that might apply to a contractor who violates the obligations of the contract concerning the treatment of confidential business information. Because the circumstances may vary from case to case, the provisions that would apply would vary. For example, 18 U.S.C. 1001 concerning the making of false statements to the Government might apply. In other cases, certain fraud or bribery provisions might apply. It is not possible to produce an exhaustive list of potential criminal provisions that might apply. To produce a partial list might improperly mislead contractors. Accordingly, the Agency believes that a general statement that willful violation of its contract may subject a contractor to criminal prosecution is sufficient to place the contractor on notice and serve as a further deterrent to any improper actions by the contractor.

Comment 12: Section 2.214 should provide that EPA will defend any FOIA suit for disclosure of confidential business information, but that EPA will seek the assistance of the affected business to help in the defense. In some cases it may be burdensome for EPA to require the affected business to intervene, or such intervention might reveal confidential information.

Response: The Administrator agrees with this comment, and § 2.214 has been rewritten accordingly. EPA expects the affected business to cooperate to the fullest extent possible in the defense of such suits.

Comment 13: When EPA proposes to obtain information from another agency under § 2.215, EPA should notify each affected business of the disclosure.

Response: The Administrator disagrees with this comment. Under the approach adopted in these amendments, the burden of notification should fall on the agency proposing to disclose the information, not the agency receiving it. EPA will rely on the agency from whom EPA obtains the information to notify the affected businesses in accordance with that agency's procedures. In general § 2.215 has been amended by adding a new paragraph (e) which states that EPA will treat in accordance with the procedures in these regulations any information obtained from another agency and identified as confidential except where the agreement specifies otherwise. Accordingly, any affected business would receive notice prior to any further disclosure by EPA. This will protect the interests of the affected business without added administrative burden to EPA.

Comment 14: Section 2.215(a) appears to give contractors of EPA authority to make confidentiality determinations. That role should be reserved to EPA.

Response: The Administrator agrees that confidentiality determinations must be reserved to EPA. Section 2.215 does not authorize contractors to make confidentiality determinations. It merely proscribes their ability to make promises of confidentiality that EPA cannot keep. Under § 2.301(h) any contract where EPA furnishes confidential business information to a contractor must include a clause that sets forth the contractor's obligations for handling that information. This clause does not give a contractor any authority to make confidentiality determinations. In addition, EPA has developed an additional clause for use in the situations where an EPA contractor acquires confidential business information directly from an affected business rather than through EPA.

This clause requires the contractor to give the affected business the same notice that EPA gives an affected business when EPA requests information (see § 2.203). Any information claimed as confidential is treated as such by the contractor. Both of these clauses have been published in the FEDERAL REGISTER (Mar. 7, 1978, 43 FR 9278, 41 CFR 15-7.350-1 and 15-7.350-2).

Comment 15: EPA should not ask another agency to submit confidential business information under § 2.215 to EPA unless EPA has legal authority to get that information.

Response: The Administrator disagrees with this comment. There may be occasions where EPA needs information for which it has not statutory authority to compel prodction. This information may be very relevant to EPA's work. Section 2.215 provides that EPA can ask another agency for information and, if that information is confidential, agree to certain restrictions on disclosure. It is up to the other agency to decide whether or not to honor EPA's request.

Comment 16: Section 2.301(g) concerning disclosure of confidential business information relevant in a proceeding should be amended to include the standard used in section 14(a)(4) of TSCA.

Response: The Administrator disagrees with this comment. The procedures as written provide that EPA must judge the relevance of information to a particular proceeding and whether the public interest would be served by disclosure. These provisions are adequate for a balancing of the public interests in a proceeding versus the confidentiality interests of an affected business. Since each affected business is given an opportunity to comment on the proposed disclosure and is given notice prior to actual disclosure, the interests of the affected business are adequately protected.

Comment 17: Any party seeking disclosure of confidential information in a proceeding should be required to seek a court order for disclosure with notice to the affected business so the affected business may oppose access.

Response: The Administrator disagrees with this comment. The purpose of provisions which authorize disclosure of information that is otherwise confidential when it is "relevant in a proceeding" under a particular EPA statute is to allow the Agency discretion to make these disclosures without having to seek Federal court intervention. Agency proceedings are supposed to be resolved before involvement by courts. Since under the amendments to § 2.301(g) each affected business will have an opportunity to comment on any proposed disclosure and will have notice in advance of any disclosure, the interests of the affected business are adequately protected.

Comment 18: Section 114 of the Clean Air Act and section 308 of the Clean Water Act do not authorize EPA to furnish confidential business information to contractors or subcontractors. The term "authorized respresentatives" does not include contractors and subcontractors.

Resonse: The Administrator disagrees with this comment. The Agency has always interpreted and continues to interpret the term "authorized representatives" in these statutes to include contractors and subcontractors. Each of these statutes uses the language "officers, employees, or authorized representatives of the United States" to describe those to whom confidential business information may be disclosed. Clearly, "authorized representatives" does not mean "employees" because that term is already used. It applies to authorized representatives who are not employees of the United States. In the case of these two statutes, authorized representatives include contractors, subcontractors, and State and local agencies.

Comment 19: Section 2.301(h)(2)(iii) should be changed to provide notice to the affected business prior to any disclosure to a contractor or subcontractor.

Response: The Administrator agrees with this comment, and while EPA is not legally required to give such notice, § 2.301(h)(2)(iii) has been changed accordingly.

Comment 20: Contractor, subcontractors, and their employees should be bonded before being allowed to handle confidential business information.

Response: The Administrator disagrees with this comment. First, the protections in the contract clause under § 2.301(h)(2)(ii) are adequate to protect against disclosure of information and to provide a cause of action to an affected business. Second, TSCA provides a specific criminal penalty for contractors, subcontractors, and their employees for unauthorized disclosure of TSCA confidential business information. Third, EPA has made inquires of bonding companies and has been told that they would not sell bonds necessary to bond Government contractors handling confidential business information from many affected businesses. Therefore, to impose such a requirement on contractors and subcontractors would be unnecessary and impractical.

Comment 21: The regulations should require that EPA contractors enter into independent confidentiality agreements with affected businesses when EPA furnishes confidential business information to the contractors.

Response: The Administrator disagrees with this comment. EPA only furnishes confidential business information when authorized by specific statutes such as the Clean Air Act, the Clean Water Act, or TSCA. Since there is legal authority to furnish the information to contractors and EPA places contractural limitations on the contractors' use and disclosure of the information, EPA will not require contractors to enter into independent confidentiality agreements with affected businesses as a condition of obtaining the information. The regulations do not preclude any EPA contractor entering into a confidentiality agreement with an affected business, and EPA contractors have voluntarily entered into such agreements. Section 2.215(a), however, makes it clear that a contractor cannot enter into an agreement that is inconsistent with its contract obligations and these regulations. Section 2.215(a) also provides notice to affected businesses that EPA contractors cannot bind EPA as to how EPA will treat confidential business information except to state that EPA will follow these regulations.

Comment 22: The term "authorized representatives" in section 3007 of the Solid Waste Disposal Act should not include contractors, subcontractors, and State and local government agencies.

Response: The Administrator disagrees with this comment. For the reasons set forth in comment 18 discussing the use of the same term under section 114 of the Clean Air Act and section 308 of the Clean Water Act, EPA's position is that the term "authorized representatives" includes contractors and subcontractors in the Solid Waste Disposal Act (SWDA). As to the inclusion of State and local government agencies, the SWDA has a scheme of State/Federal regulation similar to that in the Clean Air Act and the Clean Water Act. The statute assumes that EPA will work closely with States to regulate hazardous wastes. Accordingly, since there is joint State/Federal regulation and enforcement, EPA's position is that State and local government agencies are authorized representatives under SWDA the same as under the Clean Air Act and the Clean Water Act.

Comment 23: Under § 2.306 the definition of "proceeding" is too broad and should be narrowed to adjudicative proceedings.

Response: The Administrator disagrees with this comment. There is nothing in TSCA that indicates that Congress intended a narrow definition of proceeding. Under the Administrative Procedures Act (5 U.S.C. 551) an agency proceeding is defined as rulemaking, adjudication, or licensing. There is no basis in the statute or legislative history of TSCA to suggest that Congress intended to alter this accepted definition. The presiding officer at any hearing involving confidential information will be an EPA officer or employee who is subject to these regulations.

Comment 24: In § 2.306(i) EPA should define "relevancy" for disclosures of information relevant in a proceeding under TSCA.

Response: The Administrator disagrees with this comment. It is virtually impossible to set out a definition of what information may be relevant in a proceeding because it is impossible to anticipate all the contingencies that might occur. The finding of relevancy is made either by the General Counsel or a presiding officer, as appropriate, under § 2.301(g) which is incorporated into § 2.306(i). This finding will depend upon the particular circumstances of the proceeding. Since § 2.301(g) provides an opportunity for each affected business to comment upon a proposed disclosure in a proceeding and notice before any actual disclosure is made, the affected business has an adequate opportunity to challenge any decision to make such a disclosure.

Comment 25: EPA has no authority to make information available to the public because of its relevance in a proceeding under TSCA as is presently set forth in § 2.301(g)(2).

Response: The Administrator disagrees with this comment. If a public rulemaking proceeding made on the record without opportunity for a hearing and without identifiable parties, EPA interprets section 14(a)(4) of TSCA to allow EPA to make information relevant in the proceeding available to the public so long as the disclosure is made in a manner to preserve confidentiality to the extent practicable without impairing the proceeding. In applying this standard, EPA will weigh the concerns of confidentiality and the effective operation of the proceeding in question. Section 14(a)(4) is designed to allow EPA to use confidential information in proceedings so that EPA can make effective decisions on a complete record with the maximum practicable degree of public participation or participation by interested parties.

Comment 26: EPA should not include confidential business information in the record of a TSCA proceeding.

Response: The Administrator disagrees with this comment. When EPA makes a decision on the record, the record must include all information considered by the Agency in making the decision. If the decision is challenged, the Federal courts require a complete record in order to review the Agency's decision, and the Agency must provide the best possible record to support its decision. This does not mean that EPA will make public all information in a record. EPA may include confidential business information in the record without making the record public. EPA could maintain certain portions of the record in confidence. If the decision resulting from the record were challenged, EPA would make the complete record available to the reviewing Federal court in camera. In addition, if at any time EPA proposed to make confidential business information in the record available to the public, § 2.301(g) would require that EPA give each affected business an opportunity to comment and notice prior to actual disclosure.

Comment 27: Under the proposed special rules for TSCA and the Solid Waste Disposal Act, EPA states that no information covered by those sections is voluntarily submitted. Information can be voluntarily submitted under these statutes.

Response: The purpose of §§ 2.305 and 2.306 is to cover information that is or could have been acquired by EPA under statutory authority of the Solid Waste Disposal Act section 3007 of TSCA. If information is submitted to EPA under the statutory authority of either act, it is not "voluntarily submitted information" as defined in § 2.201(i). This does not mean that EPA would not receive information that relates to those statutes that is voluntarily submitted. However, if the information comes to EPA under statutory authority to compel its production, it is not voluntarily submitted. Information which is voluntarily submitted is covered by the general procedures in §§ 2.201 through 2.215, not the special rules in §§ 2.301 through 2.309.

Comment 28: To discourage unnecessary and spurious requests for complete health and safety studies under section 14(b) of TSCA, EPA should supply the following in response to requests: (1) On first request, a list of studies; (2) On the second request, a summary of the studies to be provided by the companies; (3) On the third request, the entire study.

Response: The Administrator disagrees with this comment. When EPA receives a request under FOIA it must either furnish the requested records or deny the request. Forcing a requester to write three times to obtain a health and safety study is contrary to the intent of FOIA and TSCA.

Comment 29: The definition of health and safety data should not include "any test performed under the Act" because this goes beyond health and safety.

Response: The Administrator disagrees with this comment. TSCA defines a health and safety study in section 3(6) (15 U.S.C. 2602(3)). This definition includes "and any test performed pursuant to this Act." Clearly, Congress intended "health and safety studies" to include all tests conducted under authority of TSCA. EPA will implement TSCA accordingly.

Comment 30: "Raw data" developed for a health and safety study are often trade secrets and should not be treated as disclosable under section 14(b) of TSCA.

Response: The Administrator disagrees with this comment. Section 14(b) states clearly that any study or any data reported to or otherwise obtained by EPA from a study must be disclosed. Congress intended that the term health and safety study be interpreted broadly. The definition in section 3(6) of TSCA includes "underlying data" which clearly would cover "raw data" when that information is submitted to EPA.

Comment 31: There should be a "grandfather" clause that would exempt from disclosure under section 14(b) of TSCA any health and safety data previously "voluntarily" submitted before any requirements such as TSCA existed.

Response: The Administrator disagrees with this comment. Section 14(b) of TSCA states explicitly that health and safety data on chemical substances offered for commercial distribution or subject to testing rules under section 4 or notification under section 5 may not be withheld from disclosure as confidential business information except information that discloses processes used in manufacturing or processing a chemical substance or mixture or the portion of the mixture comprised by any of the chemical substances in the mixture. There is no basis in either the statue or the legislative history to conclude that Congress intended different treatment for data developed at a different time or submitted under different circumstances once those data are covered by TSCA.

Comment 32: The statement in § 2.306(g) that "health and safety data are not eligible for confidential treatment" is inaccurate. Section 14(b) of TSCA states only that the exemption of 5 U.S.C. 552(b)(4) does not apply to health and safety data. Other exemptions under FOIA may apply.

Response: The statement "health and safety data are not eligible for confidential treatment" applies only to confidential treatment as confidential business information under 5 U.S.C. 552(b)(4). This statement appears in subpart B of the regulations that deals exclusively with the exemption for confidential business information. The statement does not limit EPA's ability to use other FOIA exemptions when appropriate. For example, some health and safety data will contain information of a personal nature about individuals the disclosure of which would be an invasion of privacy. This is especially true with medical information. If EPA obtains information of a personal nature in a health and safety study that relates to identifiable individuals, EPA will consider the application of 5 U.S.C. 552(b)(6) when disclosure would constitute "a clearly unwarranted invasion of personal privacy." In other cases, health and safety data may be obtained in the course of an investigation and disclosure of the information might interfere with enforcement proceedings. In that situation EPA might apply 5 U.S.C. 552(b)(7) for investigatory records compiled for law enforcement purposes.

Comment 33: Disclosures to congressional committees under TSCA should be limited to those committees whose official duties include protection of health or the environment and by the requirement that the information be used in connection with those duties. EPA should obtain the committee's written agreement not to disclose the information without the permission of the affected business.

Response: The Administrator disagrees with this comment. Section 14(e) of TSCA states that EPA shall make available upon written request of any duly authorized committee of the Congress any information submitted under TSCA. EPA cannot interpose its judgment for that of congressional committees as to their jurisdiction or need for information. Nor can EPA require a committee to make any promise as a condition of receiving the information. EPA has no reason to believe congressional committees will not respect the confidentiality of this information.

Comment 34: Disclosures to other Federal agencies under TSCA should be limited to those agencies having official duties concerning protection of health or the environment and that the information be used in connection with those duties.

Response: The Administrator disagrees with this comment. Section 14(a)(1) of TSCA states that EPA shall make available any information submitted under TSCA to any officer or employee of the United States in connection with duties under any law for protection of health or the environment or for specific law enforcement purposes. The regulations in § 2.306(h) reflect these requirements. It is clear that Congress did not consider "specific law enforcement purposes" to be a subset of "in connection with duties under any law for protection of health or the environment." The amended § 2.209(c) of these regulations does require that the other agency notify each affected business prior to disclosures of the information.

Comment 35: When EPA furnishes confidential business information to another Federal agency under TSCA, EPA should place limits on the use of that information by the other agency confining the use to the other agency's duties under a law protecting health or the environment.

Response: The Administrator disagrees with this comment. Section 2.306(h) creates a threshold test before another agency can acquire confidential business information from EPA. That test requires that the official purpose of the request must be in connection with the other agency's duties under any law protecting health or the environment or for specific law enforcement purposes. Once the other agency has obtained the information from EPA, EPA should not be required to police the other agency's use of the information and, as a practical matter, would be unable to do so. Any affected business is adequately protected by receiving notice from EPA under § 2.209(c) prior to EPA's disclosure to the other agency and by receiving notice from the other agency prior to any disclosure by the other agency.

Comment 36: TSCA does not allow EPA to disclose confidential information to contractors of other Federal agencies.

Response: The Administrator disagrees with this comment. Section 14 of TSCA states that EPA shall disclose confidential business information under TSCA "to contractors with the United States and employees of such contractors if in the opinion of the Administrator such disclosure is necessary for satisfactory performance by the contractor of a contract with the United States * * * for the performance of work in connection with this act * * *." The Agency interprets this language to mean Congress did not limit disclosures to EPA contractors. The restriction is that disclosure must be to contractors performing work under TSCA.

EPA will give notice prior to these disclosures.

Comment 37: Section 14(a)(2) of TSCA requires the Administrator to make the determination to furnish confidential business information to a contractor.

Response: The Administrator disagrees with this comment. The Administrator has authority under TSCA to delegate functions to officers or employees of EPA. These regulations delegate certain responsibilities to program offices or the General Counsel, including the determinations required by section 14(a)(2).

Comment 38: Before disclosure of confidential business information to contractors under TSCA section 14(a)(2), EPA should require a written request from the contractor setting forth the official purpose of the request.

Response: The Administrator disagrees with this comment. The relationship between the EPA program office and its contractor is such that the EPA project officer will make any decisions concerning the contractor's need for confidential business information. The contractor does not formally request the information. Section 2.301(h) already provides that the program office must make a written determination that disclosure to the contractor is necessary for the contractor to perform its contract work. The contract must include a clause which requires the contractor to treat the information as confidential and disclose it only as permitted by EPA. The clause also provides a third party right of action between any affected business and EPA's contractor if the contractor violates the contract. All information is returned to EPA at the end of performance of the contract. Section 2.306(j) requires that the program office determine in writing that the information is necessary for satisfactory performance of a contract under TSCA. Section 2.301(h) has been amended to provide notice to the affected business prior to any disclosure to a contractor.

Comment 39: These regulations should provide for investigation of violations of the procedures and notification to the affected business of such violations.

Response: The Administrator disagrees with this comment. Violations of EPA regulations are investigated in accordance with EPA's internal procedures. These regulations are not for the purpose of setting out these investigation procedures. Affected businesses will not be notified of violations of these procedures if such notification would interfere with EPA's investigation or prosecution of the violation. In no case is notification to an affected business necessary if no confidential business information has been disclosed to the public. If EPA determines that confidential business information has been or may have been wrongfully disclosed to the public or a competitor, EPA will notify the affected business of the fact of disclosure, the specific information disclosed, and the date of disclosure, if known. This notification will enable the affected business to know that information has been disclosed and to take steps to react to that disclosure. EPA will supply any other information concerning the disclosure, except to the extent that the information would interfere with the ability of EPA or the Department of Justice to successfully investigate and prosecute any violations of Federal statutes or a contract or other agreement.

Comment 40: The regulations should require that EPA assure that contractors, subcontractors, other Federal agencies, Congress and Federal courts have adequate security procedures in place before EPA furnishes them confidential business information.

Response: The Administrator disagrees with this comment.There is no legal requirement that EPA review the security of any person authorized to receive confidential business information. EPA is aware that security is a concern especially with confidential business information submitted under TSCA. EPA is looking at the problem of data security and these issues will be addressed in that context.

Comment 41: Each affected business should be notified every time there is a request by anyone for its confidential business information.

Response: The Administrator disagrees with this comment. The regulations as amended provide for notice to each affected business prior to disclosure of confidential business information outside of EPA. If information is not disclosed in response to a request, a notice to the affected business serves no purpose. The affected business is protected by notice prior to disclosure. Furthermore, once information has been determined not to be entitled to confidential treatment and the affected business has been given advance notice of that determination, the information becomes available to the public. From that point on, notice to the affected business of further requests would also serve no purpose and would unnecessarily burden EPA.

Comment 42: The regulations should include a provision authorizing adoption of "third party" collection procedures whereby a neutral third party would hold confidential business information rather than EPA or its contractors.

Response: The Administrator disagrees with this comment. If EPA has statutory authority to require submission of information, it does not have to agree to have a third party hold the information. The regulations as presently written do not prohibit use of a third party arrangement; however, EPA is not prepared to endorse this approach for general use at this time. EPA will explore use of this approach in specific situations, especially those where information would be voluntarily submitted.

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[6560-01]

SUBCHAPTER C—AIR PROGRAMS

[FRL 962-5]

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

PART 52—APPROVAL AND PROMULGATION OF STATE IMPLEMENTATION PLANS

Prevention of Significant Air Quality Deterioration; Correction

AGENCY: Environmental Protection Agency.

ACTION: Correction to rulemaking.

SUMMARY: On June 29, 1978, the Environmental Protection Agency published final regulations for the prevention of significant air quality deterioration (PSD). Requirements for the preparation, adoption, and submittal of State implementation plans for State PSD programs were published at 43 FR 26380, FR Doc. 78-16889. The EPA also amended its regulations regarding the approval and promulgation of State implementation plans as regarding the EPA-managed PSD programs, 43 FR 26388, FR Doc. 16890. These regulations were published together as a separate part V in the June 19, 1978, issue of the FEDERAL REGISTER. This action makes two corrections to the first document and two corrections to the second document.

EFFECTIVE DATE: September 8,1978.

FOR FURTHER INFORMATION CONTACT:

Darryl D. Tyler, Chief, Standards Implementation Branch, Control Programs Development Division, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711; phone 919-541-5497.

SUPPLEMENTARY INFORMATION: Correction 1. Section 51.24(h) now states that such stack height as exceeds good engineering practice and any other dispersion techniques utilized before 1970 shall not affect State implementation plan controls. To properly reflect the requirements of section 123 of the Clean Air Act, as amended August 1977, § 51.24(h) is corrected to read that such stack height as exceeds good engineering practice and any other dispersion techniques not in existence or implemented before December 31, 1970, shall not be credited in determining emission limits for required State implementation plan revisions for PSD. The similar § 52.21(h), in part 52, is properly written and needs no change.

Correction 2. Section 51.24(n)(2) incorrectly reads that the determination of the adequacy of monitoring data shall be made by the EPA Administrator. With State regulations for a State PSD program, such a determination shall be made by the State, and that paragraph is so corrected. The similar