

playing season was shorter than the one-year period covered by the contract, X had the option to receive his salary over a twelve-month period. X elected this option. In addition, during the period of this employment contract, X, as an employee of Team, was required to practice at the direction of the Team as well as to participate in games. During 2008, X participated in all practices and games of Team and received a salary. Team qualified for postseason games in 2008. X also received in 2008 additional amounts for playing in preseason and postseason games for the Team.

(ii) *Analysis.* The salary paid to X by the Team is considered to be personal services compensation of X that X received as an employee of the Team. The source of this compensation within the United States is determined under the time basis method described in paragraph (b)(2)(ii)(A) of this section and accordingly is determined based upon the number of days X performed services for the Team within the United States during 2008 over the total number of days that X performed services for the Team during 2008. The source of the additional amounts X received for playing in preseason and postseason games is determined under the event basis method described in paragraph (b)(2)(ii)(G) of this section and accordingly is determined based on the location where each such preseason or postseason game was played.

Example 11. * * *

* * * * *

(e) *Effective/applicability date.* * * * The revisions in paragraphs (b)(1), (b)(2)(i), and (b)(2)(ii)(C)(1)(i) and (ii) of this section which refer to the event basis; the revisions of paragraphs (b)(2)(ii)(C)(3), (b)(2)(ii)(E), (b)(2)(ii)(F), (b)(2)(ii)(G), and (c) of this section; and *Examples 7 through 11* of paragraph (c) of this section apply to taxable years beginning after the date final regulations are published in the **Federal Register**.

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

[FR Doc. E7-20496 Filed 10-16-07; 8:45 am]

BILLING CODE 4830-01-P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2702

Freedom of Information Act Procedural Rules

AGENCY: Federal Mine Safety and Health Review Commission.

ACTION: Proposed rule.

SUMMARY: The Federal Mine Safety and Health Review Commission (the "Commission") is an independent adjudicatory agency that provides hearings and appellate review of cases arising under the Federal Mine Safety

and Health Act of 1977 (the "Mine Act"). Hearings are held before the Commission's Administrative Law Judges, and appellate review is provided by a five-member Review Commission appointed by the President and confirmed by the Senate. The Commission is proposing to revise its rules implementing the Freedom of Information Act ("FOIA") in light of its experience under the rules, the need to update its fee schedules, and changes in implementing the FOIA mandated by Executive Order 13,392.

DATES: Comments must be submitted on or before November 16, 2007.

ADDRESSES: Comments and questions may be mailed to Michael A. McCord, General Counsel, Office of the General Counsel, Federal Mine Safety and Health Review Commission, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001, or sent via facsimile to 202-434-9944.

FOR FURTHER INFORMATION CONTACT:

Michael A. McCord, General Counsel, Office of the General Counsel, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001; telephone 202-434-9935; fax 202-434-9944.

SUPPLEMENTARY INFORMATION:

I. Background

The Commission last made substantive changes to its rules implementing the FOIA in 1997. 62 FR 55,332, Oct. 24, 1997. Since those last rule revisions, the Commission has expanded its use of electronic records, making more relevant the amendments to the FOIA in 1996 that addressed electronic recordkeeping in federal agencies. Additionally, on December 14, 2005, President George W. Bush signed Executive Order 13,392, which mandated changes in practices among federal agencies to ensure timely and effective responses to the public's requests for information. 70 FR 75,373. Further, based on its years of experience in implementing the FOIA, the Commission determined that certain changes in its FOIA rules were also necessary to better reflect agency practice under the rules and to maximize the Commission's utilization of the internet to disseminate information. Finally, there had not been a comprehensive review of the Commission's fee schedule in over ten years, and the present rulemaking is an appropriate time to update and revise those fees.

II. Section-by-Section Analysis

Set forth below is an analysis of proposed changes to the Commission's rules.

Part 2702—Regulations Implementing the Freedom of Information Act

29 CFR 2702.1

The Commission is proposing to clarify 29 CFR 2702.1. First, 29 CFR 2702.1 explains that "all designated information" be made readily available to the public, but it is not clear by whom and under what authority the information would be "designated." The Commission proposes revising this language to clarify that the type of information that would be made available to the public is information subject to disclosure pursuant to FOIA and the Commission's FOIA rules and not otherwise protected by law.

Secondly, the last sentence in 29 CFR 2702.1 states that the scope of the Commission's FOIA regulations may be limited to requests for information that is not presently the "subject of litigation before the Commission." 29 CFR 2702.1. As currently written, the rule could be read to exclude discovery records from the Commission's disclosure obligation under FOIA. In fact, however, such records could be subject to disclosure pursuant to FOIA, unless they fall under one of the nine exemptions provided in the statute.

The Commission proposes revising 29 CFR 2702.1 to clarify that the scope of its FOIA rules is limited to records or information of the agency or within its custody. The proposed rule also includes language stating that the Commission's FOIA rules do not affect discovery in adversary proceedings before the Commission, which are governed by the Commission's Rules of Procedure, 29 CFR part 2700.

Finally, the Commission proposes amending 29 CFR 2702.1 to include a reference to the Commission's Web site as an alternative means of obtaining the Commission's FOIA Guide.

29 CFR 2702.3

Initial Requests

On December 14, 2005, the President issued Executive Order 13,392, which contained several statements of government-wide FOIA policy as well as several additional planning and reporting requirements. The Executive Order requires agencies to appoint a Chief FOIA Officer who has "agency-wide responsibility for efficient and appropriate compliance with the FOIA." See Executive Order 13,392, sec. 2(b)(I). Under the Commission's current rule, the Executive Director makes the initial determination on a FOIA request with the consent of a majority of the Commissioners. 29 CFR 2702.3(b). Pursuant to the Executive Order, the

Commission's current practice is that the Chief FOIA Officer, instead of the Executive Director, responds to initial FOIA requests without consulting with the Commissioners. The Commission's designation of a Chief FOIA Officer and the transfer of FOIA responsibilities to that titled position complies with the requirements of Executive Order 13,392.

Accordingly, the Commission proposes revising paragraphs (a) and (b) to conform with these administrative changes, reflecting the current practice of initial requests being handled by the Chief FOIA Officer instead of the Executive Director. In addition, the Commission proposes revising paragraph (b) to delete the requirement that a majority of the Commission must consent to the Chief FOIA Officer's initial determination of a request.

Appeals

FOIA refers to "the right of [a] person to appeal to the head of the agency any adverse determination." 5 U.S.C. 552(a)(6)(A)(I). Under the Commission's current FOIA rules, appeals are to be made to the Chairman, who independently makes a determination on appeal. As previously noted, under the Commission's current FOIA rules, initial determinations of FOIA requests are made with the consent of the Commissioners. Thus, under the current rules, the Chairman would be involved in both the initial determination and the determination on appeal.

The Commission believes that the statutory language of 5 U.S.C. 552(a)(6)(A)(I) does not mandate that FOIA appeals be decided only by the Commission's Chairman. The House Committee on Government Reform has noted that while "an appeal is filed by sending a letter to the head of the agency, * * * [a]t most agencies, decisions on FOIA appeals have been delegated to other agency officials." House of Representatives Committee on Government Reform, *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records* (Second Report), H.R. Rep. No. 226, at 21 & n.32, 109th Cong. (2005).

Accordingly, the Commission proposes revising paragraph (b) to reflect that appeals from the Chief FOIA Officer's initial determinations on FOIA requests should go to the Commission, with a majority vote of the sitting Commissioners determining the disposition of the appeal. The Commission does not believe that FOIA mandates that a quorum of Commissioners is required to consider and decide appeals of FOIA requests, as is required for adjudication under the

Mine Act. 30 U.S.C. 823(c). The proposed rule provides that, in the event of a tie vote, the Chief FOIA Officer's determination would be affirmed.

Denials

The Commission also proposes revising paragraph (f), which currently states only that when a request is denied, the Commission will attempt to provide an estimate of the volume of records denied. When an agency denies a record request, it must comply with additional statutory requirements: First, after denying a FOIA appeal, the agency must notify the requester of his or her right to judicial review, 5 U.S.C. 552(a)(6)(A)(ii); and second, the agency must state the names and titles or positions of each person responsible for the denial of a FOIA request. 5 U.S.C. 552(a)(6)(C)(I).

The Commission's current regulations do not address these two requirements. The Commission proposes revising its paragraph (f) to state that a denial of a request include a requester's right to judicial appeal and the names and titles or positions of each person denying the FOIA request.

Other Revisions

The Commission proposes adding headings to the paragraphs of 29 CFR 2702.3 to make it easier for a reader to locate important information governing the Commission's processing of FOIA requests.

29 CFR 2702.4

Under FOIA, each agency must make available for public inspection and copying (without the need for a formal FOIA request) in a reading room the following items: Final opinions and orders issued in the adjudication of administrative cases; policy statements and interpretations that have been adopted by the agency but which were not published in the **Federal Register**; administrative staff manuals that affect members of the public; and records processed and disclosed in response to a FOIA request that the agency determines have or will become the subject of similar requests for substantially the same records (often referred to as "FOIA-processed records"). See 5 U.S.C. 552(a)(2). Records in all four categories must be indexed in order to facilitate the public's access to them. The index must be published and distributed at least quarterly unless an agency determines by order published in the **Federal Register** that the publication would be unnecessary and impracticable. Any records that are "promptly published

and offered for sale" do not need to be included in the reading room. 5 U.S.C. 552(a)(2).

The E-FOIA amendments of 1996 require each agency to make the records created by it on or after November 1, 1996, in all four categories described above, available to the public by electronic means. 5 U.S.C. 552(a)(2). The index of the FOIA-processed records must be made available electronically. Electronic reading rooms must be operational by November 1, 1997.

The Commission proposes revising 29 CFR 2702.4 to refer to a Commission on-site reading room, to state that the four categories of documents as described in 5 U.S.C. 552(a)(2) of the FOIA may be made available at that reading room, and to refer to the Commission's electronic reading room available on its Web site at <http://www.fmsihrc.gov>. A more detailed listing of materials available in the Commission's reading rooms is provided in the Commission's FOIA Guide, also available on its Web site.

29 CFR 2702.6

The fees the Commission charges for searching, reviewing, and duplicating records pursuant to FOIA requests are set forth in 29 CFR 2702.6. The Commission believes it is appropriate to update its fee schedule, which was last revised in 1997, to ensure that the fees represent "reasonable standard charges" as required by FOIA. 5 U.S.C. 552(a)(4)(A)(ii). Revisions are also necessary to comply with guidelines promulgated by the Office of Management and Budget, Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 FR 10,012, 10,018, Mar. 27, 1987 ("OMB Guidance"), which states that an agency must charge fees that recoup the full allowable direct costs that it incurs. Because salaries have changed significantly since 1997, the Commission concludes that an amendment of the fee schedule is clearly necessary.

Accordingly, the Commission proposes to revise its search and review fees to state that it will charge at the salary rates (basic pay plus 16 percent) of the employees making the search or providing the review. This is consistent with the language of the OMB Guidance. The Commission also proposes to include in the rule the address of its Web site, where the specific hourly rates will be listed.

The Commission's current fee regulation also states that if search charges are likely to be more than \$25, the Commission shall notify the

requester of the estimated amount of fees, unless the requester has indicated in advance a willingness to pay fees as high as those anticipated. 29 CFR 2704.6(a). This language originated in the Commission's 1988 interim FOIA rule, 53 FR 737, 739, Jan. 12, 1988, published almost twenty years ago. The Commission proposes increasing the \$25 figure to \$50.

In addition, the Commission proposes a revision to the statement in the current rule that "[t]ime spent on unsuccessful searches shall be fully charged." 29 CFR 2702.6(a). The term "unsuccessful" is ambiguous, and requires clarification. Pursuant to the OMB Guidance, the Commission proposes clarifying that fees shall be charged even if the documents are not located or if they are located but withheld on the basis of an exemption. Also, the Commission proposes that the reference in 29 CFR 2702.6(b) to the Executive Director should be changed to the Chief FOIA Officer for the reasons stated in the discussion above regarding proposed revisions to 29 CFR 2702.3.

The Commission also proposes inserting language in paragraph (c) which states that the Commission shall charge the actual cost, including operator time, of production for copies prepared by computer (such as tapes or printouts). This is consistent with language in the OMB Guidance and would replace the current language in paragraph (a) stating that the fee for computer printouts shall be \$.40 per page. The Commission proposes moving information about fees for computer copies to paragraph (c) (duplicating fee) from paragraph (a) (search fee) because it believes that a fee for computer copies is more similar to a duplicating fee than a search fee. The Commission also proposes adding language to paragraph (c) stating that for other methods of reproduction or duplication, it will charge the actual direct costs of producing the documents. This is also consistent with the OMB Guidance.

29 CFR 2702.7

The Committee proposes revising paragraph (a). That provision states that fees of less than \$10 shall be waived, in essence because it is not cost effective for the Commission to collect sums smaller than \$10. 29 CFR 2702.7(a). This figure was first utilized in an interim FOIA rule published by the Commission in 1988. 53 FR 737, 739, Jan. 12, 1988. Taking inflation into account, the Commission proposes amending this figure to \$20.

The Commission also proposes revising paragraph (b)(2) to reflect that the Chief FOIA Officer, rather than the

Executive Director, shall decide whether a waiver or reduction of fees is warranted. Similarly, the Commission proposes that the rule be amended to state that the Commission, rather than the Chairman, decide appeals regarding fee issues. This is consistent with the proposal that the language of 29 CFR 2702.3 be changed to require that an appeal from the Chief FOIA Officer's initial substantive determination should be decided by the full Commission, rather than the Chairman.

III. Matters of Regulatory Procedure

The Commission is an independent regulatory agency, and as such, is not subject to the requirement of Executive Order 12866, Sept. 30, 1993; 58 FR 51,735, Oct. 4, 1993.

The Commission has determined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that these rules will not have a significant economic impact on a substantial number of small entities. Therefore, a Regulatory Flexibility Statement and Analysis has not been prepared.

The Commission has determined that the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) does not apply because these rules do not contain any information collection requirements that require the approval of the OMB.

List of Subjects in 29 CFR Part 2702

Freedom of information.

For the reasons stated in the preamble, the Federal Mine Safety and Health Review Commission proposes to amend 29 CFR part 2702 as follows:

PART 2702—REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT

1. The authority citation for part 2702 continues to read as follows:

Authority: Sec. 113, Federal Mine Safety and Health Act of 1977, Pub. L. 95–164 (30 U.S.C. 801 *et seq.*); 5 U.S.C. 552; E.O. 13392, 70 FR 75373.

2. Revise section 2702.1 to read as follows:

§ 2702.1 Purpose and scope.

The Federal Mine Safety and Health Review Commission (Commission) is an independent agency with authority to adjudicate contests between the Mine Safety and Health Administration of the U.S. Department of Labor and private parties, as well as certain disputes solely between private parties, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* The purpose of these rules is to establish procedures for implementing the Freedom of Information Act, 5

U.S.C. 552, as amended by the Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104–231, 110 Stat. 3048; to provide guidance for those seeking to obtain information from the Commission; and to make all information subject to disclosure pursuant to this subchapter and FOIA and not otherwise protected by law readily available to the public. Additional guidance on obtaining information from the Commission can be found in the document entitled "Reference Guide for Obtaining Information from the Federal Mine Safety and Health Review Commission," which is available upon request from the Commission and on the Commission's Web site (<http://www.fmshrc.gov>). These rules apply only to records or information of the Commission or in the Commission's custody. This part does not affect discovery in adversary proceedings before the Commission. Discovery is governed by the Commission's Rules of Procedure in 29 CFR part 2700.

3. In section 2702.3, add paragraph headings to paragraphs (a) through (g), revise the first sentence of paragraph (a), revise paragraph (b), and revise paragraph (f) to read as follows:

§ 2702.3 Requests for information.

(a) *Content of Request.* All requests for information should be in writing and should be mailed or delivered to Chief FOIA Officer, Federal Mine Safety and Health Review Commission, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001–2021. * * *

(b) *Response to Request.* A determination whether to comply with the request will be made by the Chief FOIA Officer. Except in unusual circumstances, as described in paragraph (c) of this section the determination will be made within 20 working days of receipt. Appeals of adverse decisions may be made, in writing, to the Chairman of the Commission, at the same address, within 20 working days. Determination of appeals will be made by a majority vote of sitting Commissioners within 20 working days after receipt. In the event of a tie vote of those Commissioners, the Chief FOIA Officer's initial determination will be deemed approved by the Commission. If the records to be disclosed are not provided with the initial letter setting forth the determination as to the request, the records will be sent as soon as possible thereafter.

(c) *Processing of Request.* * * *

(d) *Additional Time to Respond to Request.* * * *

(e) *Expedited Processing of Request.* * * *

(f) *Denial of Request.* In denying a request for records, in whole or in part, the Commission shall state the reason for denial, set forth the name and title or position of the person responsible for the denial of the request, make a reasonable effort to estimate the volume of the records denied, and provide this estimate to the person making the request, unless providing such an estimate would harm an interest protected by the exemption pursuant to which the request is denied, and, if an appeal is denied, notify the requester of the right to obtain judicial review of the Commission's action under 5 U.S.C. 552(a)(4)(B)–(G).

(g) *Partial Response to Request.* * * *
4. In section 2702.4, remove the introductory text and paragraphs (c) and (d) and revise paragraphs (a) and (b) to read as follows:

§ 2702.4 Materials available.

(a) *FOIA Reading Room.* Materials which may be made publicly available for inspection and copying at the Commission's on-site FOIA Reading Room, 601 New Jersey Ave., NW., Suite 9500, Washington, DC, include, but are not limited to:

(1) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(2) Those statements of policy and interpretations which have been adopted by the agency and are not published in the **Federal Register**;

(3) Administrative staff manuals and instructions to staff that affect a member of the public;

(4) Copies of all records, regardless of form or format, which have been released to any person under this subpart and which, because of the nature of their subject matter, the Commission determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(5) A general index of records referred to under this paragraph.

(b) *E-FOIA Reading Room.* Materials created on or after November 1, 1996 under paragraphs (a)(1) through (5) of this section may also be accessed electronically through the Commission's Web site at <http://www.fmshrc.gov>.

5. Revise section 2702.6 to read as follows:

§ 2702.6 Fee schedule.

(a) *Search fee.* The fee for searching for information and records shall be the salary rate (that is, basic pay plus 16%) of the employee making the search. This

hourly rate is listed on the Commission's Web site at <http://www.fmshrc.gov>. Fees for searches of computerized records shall be the actual cost to the Commission but shall not exceed \$300 per hour. This fee includes machine time and that of the operator and clerical personnel. If search charges are likely to exceed \$50, the requester shall be notified of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Fees may be charged even if the documents are not located or if they are located but withheld on the basis of an exemption.

(b) *Review fee.* The review fee shall be charged for the initial examination by the Chief FOIA Officer of documents located in response to a request in order to determine if they may be withheld from disclosure, and for the deletion of portions that are exempt from disclosure, but shall not be charged for review by the Chairman or the Commissioners. See § 2702.3. The review fee is the salary rate (that is, basic pay plus 16%) of the employee reviewing the records. This hourly rate is listed on the Commission's Web site at <http://www.fmshrc.gov>.

(c) *Duplicating fee.* The copy fee for each page of paper up to 8½"x14" shall be \$.15 per copy per page. Any private sector services required will be assessed at the charge to the Commission. The fee for copying photographs and other nonstandard documents will be the actual direct cost incurred by the Commission. For copies prepared by computer, such as tapes or printouts, the Commission shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, the Commission will charge the actual direct costs of producing the document(s). If duplication charges are likely to exceed \$50, the requester shall be notified of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated.

6. In § 2702.7, revise paragraph (a) and paragraph (b)(2) to read as follows:

§ 2702.7 No fees; waiver or reduction of fees.

(a) No fees shall be charged to any requester, including commercial use requesters, if the anticipated cost of processing and collecting the fee would be equal or greater than the fee itself. Accordingly, the Commission has determined that fees of less than \$20 shall be waived.

(b) * * *

(2) The Chief FOIA Officer, upon request, shall determine whether a waiver or reduction of fees is warranted. Requests shall be made concurrently with requests for information under Sec. 2702.3. In accordance with the procedures set forth in Sec. 2702.3, appeals of adverse decisions may be made to the Commission within 5 working days. Determination of appeals will be made by the Commission within 10 working days of receipt.

Dated: October 11, 2007.

Michael F. Duffy,
Chairman, Federal Mine Safety and Health Review Commission.

[FR Doc. E7–20380 Filed 10–16–07; 8:45 am]

BILLING CODE 6735–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AU84

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Berberis nevinii* (Nevin's barberry)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period, revisions to proposed critical habitat, notice of availability of draft economic analysis, and amended Required Determinations.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on the proposed designation of critical habitat for *Berberis nevinii* (Nevin's barberry) under the Endangered Species Act of 1973, as amended (Act). We are also using this comment period to announce revisions to proposed critical habitat subunits 1B, 1D, and 1E as described in the proposed rule published in the **Federal Register** on February 6, 2007, and announce the availability of the draft economic analysis for the proposed critical habitat designation and an amended Required Determinations section of the proposal. The draft economic analysis estimates potential costs to be approximately \$169,000 to \$172,000 in undiscounted dollars over a 20-year period in areas proposed as critical habitat and approximately \$1.7 to \$433.5 million in undiscounted dollars over a 20-year period (or 40-year period for impacts related to management of Vail Lake) in areas proposed for exclusion from critical habitat under section 4(b)(2) of