

§ 117.411 Missouri River.

(a) The draws of the bridges across the Missouri River from the mouth to Sioux City, Iowa, shall open on signal; except during the winter season between the date of closure and date of opening of the commercial navigation season as published by the Army Corps of Engineers, the draw need not open unless at least 24 hours advance notice is given.

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3. Section 117.687(a) is revised to read as follows:

§ 117.687 Missouri River.

(a) The draws of the bridges across the Missouri River from the mouth to St. Joseph shall open on signal; except during the winter season between the date of closure and date of opening of the commercial navigation season as published by the Army Corps of Engineers, the draw need not open unless at least 24 hours advance notice is given.

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4. Section 117.691 is revised to read as follows:

§ 117.691 Missouri River.

The draw of the Illinois Central Gulf railroad bridge, mile 618.3, at Omaha, shall open on signal; except during the winter season between the date of closure and date of opening of the commercial navigation season as published by the Army Corps of Engineers, the draw need not open unless at least 24 hours advance notice is given.

Dated: August 20, 1998.

Paul J. Pluta,

RADM, USCG, Commander, Eighth Coast Guard District.

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**FEDERAL EMERGENCY
MANAGEMENT AGENCY**
44 CFR Part 5**RIN 3067-AC75****Production or Disclosure of
Information**

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Proposed rule.

SUMMARY: This proposed rule would give the public access to government information and records maintained in an electronic format, provide for expedited processing of certain requests, establish an "electronic reading room,"

eliminate an agency backlog of work as a justification for delay in processing requests, require redacted material to be estimated or indicated in an agency's response, and require FEMA to make available an agency reference guide on the Freedom of Information Act (FOIA). This proposed rule would revise FEMA's existing regulations to reflect the provisions of the Electronic Freedom of Information Act Amendments of 1996.

DATES: We invite comments on this proposed rule on or before October 27, 1998.

ADDRESSES: Please submit your comments to the Rules Docket Clerk, Office of General Counsel, 500 C Street SW., room 840, Washington, DC 20472, (facsimile) 202-646-4536, or by email to rules@fema.gov.

FOR FURTHER INFORMATION CONTACT: Sandra Jackson, FOIA/PA Specialist, Office of General Counsel, 500 C Street SW., room 840, Washington, DC 20472, (202) 646-3840.

SUPPLEMENTARY INFORMATION: This proposed rule would revise FEMA's existing regulations to reflect the provisions of the Electronic Freedom of Information Act Amendments of 1996, Public Law 104-231, affecting the areas of electronic records, physical and electronic reading rooms, time limits and backlogs, records denial specification, reference guide, and annual reporting requirements.

According to the amended Act, the term "record" encompasses information, when maintained in any format, including an electronic format. The category of "reading room" records (5 U.S.C. 552(a)(2)) is expanded to include records that the agency discloses in response to a FOIA request that has become, or is likely to become, the subject of future requests. An index of those records that are the subject of multiple requests must be prepared and made available to the public by electronic means by December 31, 1999. Agencies must create an "electronic reading room" to contain those records created after November 1, 1996 that fall within the "reading room" category as defined by 5 U.S.C. 552(a)(2).

Additionally, agencies must make reasonable efforts to search for records, even when information is maintained in an electronic database, unless such efforts would significantly interfere with the operation of the agency's automated information system. If information is requested in a particular format, agencies must attempt to provide the record in that format if readily reproducible.

The general period for responding to requests has been changed from 10 workdays to 20 workdays, and requests for expedited processing must be accommodated when the requester has demonstrated a compelling need as defined by the statute. Agencies and requesters must discuss alternative time frames to process requests, or modifications to the requests, when the general 20 workday time for responding cannot be met. Moreover, multi-track processing may be established as a way to provide more timely responses.

The amount of information deleted on a record must be indicated, unless doing so would harm an interest protected by an exemption; and, if technically feasible, the indication shall be at the place in the record where the deletion is made. If whole pages or documents are withheld, an estimate of the volume of material withheld must be provided to the requester, unless doing so would harm an interest protected by an exemption. Also, a guide for requesting records, which is to include an index and description of major record systems, must be developed and made available by computer telecommunications.

Section 5.3 would clarify the definition of "record" to include information stored in an electronic format, and of "search" as defined in section 552(a)(3)(D) to mean review manually or by automated means.

Section 5.4 would be revised to refer to the availability of records and information from the FEMA website, FEMA FAX, and the FEMA/FOIA Handbook.

Section 5.10 would add the annual reporting requirements of FOIA activity.

Section 5.25(d) would add a new category to reading room records that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records." Section 5.25(e) refers to the indexing of the records under § 5.25(d).

Section 5.26 would refer to the "electronic reading room" pursuant to 5 U.S.C. 552(a)(2)(D). The statute envisions that each agency will ultimately have both a traditional reading room, and a new "electronic reading room" on the WorldWide Web. Section 5.26 would also update the mailing address of FEMA Regional Offices.

Section 5.28 would require FEMA to index records under the authority of 5 U.S.C. 552(a)(2)(E).

Section 5.43(a) would define the term "public interest" as interpreted by the U.S. Supreme Court in *Department of Justice v. Reporters Committee for*

Freedom of the Press, 445 U.S. 136 (1980).

Section 5.44(c) would change "10 workdays" to "20 workdays".

Section 5.50(a) would include the requirements concerning deleting information; § 5.50(b) would be revised to change "10-day" to "20 workdays".

Section 5.52(b) would include the requirements concerning aggregating requests received from one person or persons acting in concert.

Section 5.52(c) would require the office having custody of the records to determine within 20 workdays whether to comply with the request.

Section 5.52(d) would add the requirements concerning the "expedited access" provision of the Act.

Section 5.53 would add "(a)" before the existing paragraph. It would delete the sentence, "Copies may be furnished or the records may be inspected and copied as provided in § 5.26" and would insert "For records required to be made available under 5 U.S.C. 552(a)(2), public inspection and copying would be provided as provided in § 5.26. For records being made available under 5 U.S.C. 552(a)(3), records would be reviewed for disclosure suitability and provided as expeditiously as possible." A new paragraph "b" would refer to records being provided in any form or format requested, if readily reproducible, as required by the amendments.

Section 5.54(a)(10) would change "Comptroller" to "Chief Financial Officer".

Section 5.55(c) would modify the language to be used when requesters appeal to the agency under the FOIA; § 5.55(d) would be modified to change "Deputy Director" to "General Counsel"; § 5.55(e) would change titles of deciding officials indicated in this section; § 5.55(h) would change "Deputy Director" to "General Counsel".

Section 5.56 would insert "(a)" before the existing paragraph, and explanatory language would be deleted and replaced with language from the Act regarding the extension of time limits under "unusual circumstances."

Section 5.58 would be modified to insert "(a)" to precede the existing paragraph, and explanatory language in the section would be replaced with language from the Act regarding the exhaustion of administrative remedies and "exceptional circumstances."

Section 5.59 would delete the phrase, "by the Deputy Director."

Justification for 30-day Public Comment Period

FEMA has determined that good cause exists for a 30-day comment

period because this proposed rule would implement the Electronic Freedom of Information Act; the 30-day time frame is sufficient to provide the public with a meaningful opportunity to comment and would permit early compliance with the legislative provisions of the FOIA.

Executive Order 12866, Regulatory Planning and Review

This proposed rule is not a significant regulatory action within the meaning of § 2(f) of E.O. 12866 of September 30, 1993, 58 FR 51735, and has not been reviewed by the Office of Management and Budget. Nevertheless, this proposed rule adheres to the regulatory principles set forth in E.O. 12866.

Paperwork Reduction Act

This proposed rule does not contain a collection of information and is therefore not subject to the provisions of the Paperwork Reduction Act.

Regulatory Flexibility Act

The Director certifies that this proposed rule is exempt from the requirements of the Regulatory Flexibility Act because it relates to individuals' access to information under the Freedom of Information Act and not to small entities. A regulatory flexibility analysis has not been prepared.

List of Subjects in 44 CFR Part 5

Administrative practice and procedure, Freedom of information.

Accordingly, the Federal Emergency Management Agency proposes to revise 44 CFR Part 5 as follows:

PART 5—PRODUCTION OR DISCLOSURE OF INFORMATION

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- 5.80 Scope and applicability.
- 5.81 Statement of policy.
- 5.82 Definitions.
- 5.83 Authority to accept service of subpoenas.
- 5.84 Production of documents in private litigation.
- 5.85 Authentication and attestation of copies.
- 5.86 Production of documents in litigation or other adjudicatory proceeding in which the United States is a party.
- 5.87 Testimony of FEMA employees in private litigation.
- 5.88 Testimony in litigation in which the United States is a party.
- 5.89 Waiver.

Authority: 5 U.S.C. 552; 5 U.S.C. 301; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412.

Subpart A—General Provisions

§ 5.1 Scope and purposes of part.

This part sets forth policies and procedures concerning the availability of and disclosure of records and information held by the Federal Emergency Management Agency (FEMA) in accordance with 5 U.S.C. 552, popularly known as the "Freedom of Information Act" (FOIA).

§ 5.2 Application.

This part applies to all records and information materials generated, developed, or held by FEMA at Headquarters, in Regions, or in the field, or any component thereof.

§ 5.3 Definitions.

The following definitions shall apply to part 5:

(a) *Records* means all books, papers, maps, photographs, information stored in electronic format, or other documentary materials, regardless of physical form or characteristics made or received by FEMA in pursuance of Federal law or in connection with the transaction of public business and preserved, or appropriate for preservation, as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of FEMA or because of the information value of data contained therein. The term does not include:

(1) Material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents; or

(2) Objects or articles, such as structures, furniture, paintings, sculpture, models, vehicles or equipment; or

(3) Formulae, designs, drawings, research data, computer programs, technical data packages, and the like, which are not considered records within the Congressional intent of reference because of development costs, use, or value. These items are considered exploitable resources to be used in the best interest of the entire public and are not preserved for informational value or as evidence of agency functions. Requests for copies of such material shall be evaluated in accordance with policies expressly directed to the appropriate dissemination or use of these resources. Requests to inspect this material to determine its content for informational purposes shall normally be granted, unless inspection is inconsistent with the obligation to protect the property value of the

material, as, for example, may be true for patent information and certain formulae, or is inconsistent with another significant and legitimate governmental purpose.

(b) *Reasonably Described*. Reasonably described, when applied to a request record, means identifying it to the extent that it will permit the location of the particular document with a reasonable effort.

(c) *Agency*. Agency, as defined in 5 U.S.C. 552(f)(1), includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

(d) *Search*. Search, as defined in 5 U.S.C. 552(a)(3)(D) means to review, manually or by automated means, agency records for the purpose of locating records that are responsive to a request.

(d) *Headquarters FOIA Officer*. The FOIA/Privacy Act Specialist or his/her designee.

(e) *Regional FOIA Officer*. The Regional Director, or his/her designee.

§ 5.4 Availability of records.

(a) FEMA records are available to the greatest extent possible in keeping with the spirit and intent of FOIA and will be furnished promptly to any member of the public upon request addressed to the office designated in § 5.26. The person making the request need not have a particular interest in the subject matter, nor must the person justify the request.

(b) The requirement of 5 U.S.C. 552 that records be available to the public refers only to records in being when the requester asks for them. The Act imposes no obligation to compile a record in response to a request.

(c) Visit the FEMA website, <http://www.fema.gov/library>, for information about the Agency and activities, or contact FEMA FAX, (202) 646-FEMA, for access to a variety of information from the Office of Emergency Information and Media Affairs Master Document index. Any document(s) selected will be provided via facsimile.

(d) A FEMA/FOIA Handbook will be available to the public that will aid in requesting various types and categories of public information from the Agency, both through FOIA and through non-FOIA means.

§ 5.5 Exemptions.

Requests for FEMA records may be denied if disclosure is exempted under the provisions of 5 U.S.C. 552(b), as

outlined in subpart E. Except when a record is classified, or when disclosure would violate any other Federal statute, the authority to withhold a record from disclosure usually is permissive rather than mandatory. The authority for nondisclosure will not be invoked unless there is compelling reason to do so.

§ 5.6 Information to the Congress.

Nothing in this part authorizes withholding information from the Congress except when the President invokes executive privilege.

§ 5.7 Records of other agencies.

If a request is submitted to FEMA to make available current records that are the primary responsibility of another agency, FEMA will refer the request to the agency concerned for appropriate action. FEMA will advise the requester that the request has been forwarded to the responsible agency.

§ 5.8 Records involved in litigation or other judicial process.

Where there is reason to believe that any records requested may be involved in litigation or other judicial process in which the United States is a party, including discovery procedures pursuant to the Federal Rules of Civil Procedure or Federal Rules of Criminal Procedure, the request shall be referred to the General Counsel.

§ 5.9 Inconsistent issuances of FEMA and its predecessor agencies superseded.

Policies and procedures of any of FEMA's predecessor agencies inconsistent with this regulation are superseded to the extent of that inconsistency.

§ 5.10 Report on FOIA activity for the fiscal year.

(a) On or before February 1 of each year, the Agency shall submit a report of its activities with regard to freedom of information requests during the preceding fiscal year to the Attorney General of the United States.

(b) The annual report shall include:

(1) The number of determinations made by the agency not to comply with requests for records made to such agency under paragraph (a) of this section and the reasons for each such determination;

(2) The number of appeals made by persons, the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) A complete list of all statutes that the Agency relies upon to withhold information under such provisions, a description of whether a court has

upheld the decision of the Agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(4) The number of requests for records pending before the Agency as of September 30 of the preceding year, and the median number of days that such request had been pending before the Agency as of that date;

(5) The number of requests for records received by the Agency and the number of requests that the Agency processed;

(6) The median number of days taken by the Agency to process different types of requests;

(7) The total amount of fees collected by the Agency for processing requests; and

(8) The number of full-time staff of the Agency devoted to processing requests for records under such provisions, and the total amount expended by the Agency for processing such requests.

Subpart B—Publication of or Availability of General Agency Information, Rules, Orders, Policies, and Similar Material

§ 5.20 Publication of rules and general policies.

In accordance with 5 U.S.C. 552(a)(1), there are separately stated and currently published, or from time to time there will be published, in the **Federal Register** for the guidance of the public, the following general information concerning FEMA:

(a) Description of the organization of the Headquarters Office and regional and other offices and the established places at which, the employees from whom, and the methods whereby the public may obtain information, make submittals or requests, or obtain decisions.

(b) Statement of the general course and method by which FEMA functions are channeled and determined, including the nature and requirements of all formal and informal procedures available.

(c) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations.

(d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by FEMA.

(e) Each amendment, revision, or repeal of the materials described in this section. Much of this information will also be codified in this subchapter A.

§ 5.21 Effect of failure to publish.

5 U.S.C. 552(a)(1) provides that except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the **Federal Register** and not so published.

§ 5.22 Coordination of publication.

The General Counsel of FEMA is responsible for coordination of FEMA materials required to be published in the **Federal Register**.

§ 5.23 Incorporation by reference.

When deemed appropriate, matter covered by this subpart, which is reasonably available to the class of persons affected thereby may be incorporated by reference in the **Federal Register** in accordance with standards prescribed from time to time by the Director of the Federal Register (see 1 CFR part 51).

§ 5.24 Availability of opinions, orders, policies, interpretations, manuals, and instructions.

FEMA will make available for public inspection and copying the material described in § 5.25 and an index of those materials as described in § 5.28, at convenient places and times.

§ 5.25 Available materials.

FEMA materials that are available under this subpart are as follows:

(a) Final opinions and orders made in the adjudication of cases.

(b) Those statements of policy and interpretations that have been adopted by FEMA and are not published in the **Federal Register**.

(c) Administrative staff manuals and instructions to staff that affect a member of the public, unless such materials are promptly published and copies offered for sale.

(d) Copies of all records, regardless of form or format, that have been released to any person under 5 U.S.C. 552(a)(3), and which because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.

(e) A general index of the records referred to under paragraph (d) of this section.

§ 5.26 Rules for public inspection and copying.

(a) *Location.* Reading room materials are available for public inspection and copying at the following locations:

(1) Headquarters:

Federal Center Plaza, 500 C Street SW., Washington, DC 20472.

(2) Regional Offices

Region I, room 442, J. W. McCormack Post Office & Court House, Boston, MA 02109-4595;

Region II, room 1337, 26 Federal Plaza, New York, NY 10278-0002;

Region III, Liberty Square Bldg. (Second Floor), 105 South Seventh Street, Philadelphia, PA 19106-3316;

Region IV, 3003 Chamblee Tucker Road, Atlanta, GA 30341;

Region V, 175 W. Jackson Boulevard (Fourth Floor), Chicago, IL 60604-2698;

Region VI, Federal Regional Center, 800 North Loop, Denton, TX 76201-3698;

Region VII, Suite 900, 2323 Grand Avenue, Kansas City, MO 64108-2670;

Region VIII, Denver Federal Center, Building 710, Box 25267, Denver, CO 80225-0267;

Region XI, Building 105, The Presidio of San Francisco, CA 94129-1250;

Region X, Federal Regional Center, 130—228th Street, SW., Bothell, WA 98021-9796.

(b) *Time.* Materials will be made available for public inspection and copying during the normal hours of business.

(c) *Copying services.* FEMA will furnish reasonable copying services at fees specified in subpart C. Such reproduction services as are required will be arranged by the Office of Administrative Support in the headquarters or by regional offices as appropriate.

(d) *Handling of materials.* The unlawful removal or mutilation of materials is forbidden by law and is punishable by fine or imprisonment or both. FEMA personnel making materials available will ensure that all materials provided for inspection and copying are returned in the same condition as provided.

(e) *Availability.* All reading room materials that are created on or after November 1, 1996 will also be made available by computer telecommunications pursuant to 5 U.S.C. 552(a)(2).

§ 5.27 Deletion of identifying details.

To the extent required to prevent a clearly unwarranted invasion of personal privacy, FEMA may delete identifying details when making available or publishing an opinion, statement of policy, interpretation, or staff manual or instruction. However, the justification for each deletion will be explained fully in writing, and will require the concurrence of the General Counsel. A copy of the justification will be attached to the material containing the deletion and a copy will also be furnished to the Headquarters FOIA Officer or appropriate Regional Director.

§ 5.28 Indexes.

FEMA will maintain and make available for public inspection and copying current indexes arranged by subject matter providing identifying information for the public regarding any matter issued, adopted, or promulgated after July 4, 1967, and described in § 5.25. FEMA will publish quarterly and make available copies of each index or supplements thereto. The indexes will be maintained for public inspection at the location described in § 5.26. An index of documents referred to in § 5.25(e) will be made available by computer telecommunications by December 31, 1999.

§ 5.29 Effect of failure to make information materials available.

Materials requested to be made available under § 5.24 that affect a member of the public may be relied upon, used, or cited as precedent by FEMA against any private party only if (a) they have been indexed and either made available or published as required by 5 U.S.C. 552(a)(2), or (b) the private party has actual and timely notice of their terms.

Subpart C—Fees**§ 5.40 Copies of FEMA records available at a fee.**

One copy of FEMA records not available free of charge will be provided at a fee as provided in § 5.46. A reasonable number of additional copies will be provided for the applicable fee where reproduction services are not readily obtainable from private commercial sources.

§ 5.41 FEMA publications.

Anyone may obtain FEMA publications without charge from the FEMA Headquarters, Regional Offices and from FEMA, PO Box 8181, Washington, DC 20024 in accordance with standard operating procedures, including limitation on numbers of specific individual publications. FEMA films may be obtained on loan or certain of these films may be purchased, in which case fees will be charged as set out in a FEMA catalogue. Non-exempt FEMA research reports are available from the National Technical Information Service, United States Department of Commerce, which establishes its own fee schedule. Charges, if any, for these items and similar user charges are established in accordance with other provisions of law as, for example, 31 U.S.C. 9701, and are not deemed search and duplication charges hereunder.

§ 5.42 Fees to be charged—categories of requesters.

(a) There are four categories of FOIA requesters: Commercial use requesters; representatives of news media; educational and noncommercial scientific institutions; and all other requesters. The time limits for processing requests shall only begin upon receipt of a proper request that reasonably identifies records being sought. The Freedom of Information Reform Act of 1986 prescribes specific levels of fees for each of these categories:

(1) When records are being requested for commercial use, the fee policy of FEMA is to levy full allowable direct cost of searching for, reviewing for release, and duplicating the records sought. Commercial users are not entitled to two hours of free search time or to 100 free pages of reproduction of documents. The full allowable direct cost of searching for and reviewing records will be charged even if there is ultimately no disclosure of records. Commercial use is defined as a use that furthers the commercial, trade or profit interests of the requester or person on whose behalf the request is made. In determining whether a requester falls within the commercial use category, FEMA will look to the use to which a requester will put the documents requested. Where a requester does not explain his/her use, or where his/her explanation is insufficient to permit a determination of the nature of the use, FEMA shall require the requester to provide information regarding the use to be made of the information. If the explanation does not include an agreement to pay all appropriate fees FEMA will process the request only up to the \$30.00 threshold that FEMA has determined is the minimum cost to the Agency of routine collection and processing. Requesters must reasonably describe the records sought.

(2) When representatives of the news media request records, the fee policy of FEMA is to levy reproduction charges only, excluding charges for the first 100 pages. A representative of the news media is any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or information that would be of current interest to the public. Examples of the news media include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general

public. These examples are not intended to be all-inclusive. As methods of news delivery evolve (i.e., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. "Freelance" journalists, may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. For example, a publication contract would be the clearest proof, but FEMA may also look to the past publication record, press accreditation, guild membership, business registration, Federal Communications Commission licensing, or similar credentials of a requester in making this determination. To be eligible for inclusion in this category, requesters must meet the criteria specified in this section and his or her request must not be made for a commercial use as that term is defined under paragraph (a)(1) of this section. A request for records that supports the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. Requesters must reasonably describe the records sought.

(3) When records are being requested by an educational or noncommercial scientific institution whose purpose is scholarly or scientific research, the fee policy of FEMA is to levy reproduction charges only, excluding charges for the first 100 pages. "Educational institution" refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education and an institution of vocational education, which operates a program or programs of scholarly research. "Noncommercial scientific institution" refers to an institution that is not operated on a commercial basis as that term is defined under paragraph (a)(1) of this section and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. To be eligible for inclusion in this category, requesters must show that the request is being made under the auspices of a qualified institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a noncommercial scientific institution) research. Requesters must reasonably describe the records sought.

(4) For any other request that does not meet the criteria contained in paragraphs (a)(1) through (3) of this section, the fee policy of FEMA is to levy full reasonable direct cost of searching for and duplicating the records sought, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge. The first two hours of computer search time is based on the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of the computer search, including the operator time and the cost of operating the computer to process the request, equals the equivalent dollar amount of two hours of the salary of the person performing the search, i.e., the operator, FEMA shall begin assessing charges for computer search. Requests from individuals requesting records about themselves filed in FEMA's systems of records shall continue to be treated under the fee provisions of the Privacy Act of 1974 that permit fees only for reproduction. Requesters must reasonably describe the records sought.

(b) Except for requests that are for a commercial use, FEMA may not charge for the first two hours of search time or for the first 100 pages of reproduction. However, a requester may not file multiple requests at the same time, each seeking a portion of a document or documents, in order to avoid payment of fees. When FEMA believes that a requester or, on rare occasions, a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, FEMA may aggregate any such requests and charge accordingly. For example, it would be reasonable to presume that multiple requests of this type made within a 30-day period had been made to avoid fees. For requests made over a longer period, however, FEMA must have a solid basis for determining that aggregation is warranted in such cases. Before aggregating requests from more than one requester, FEMA must have a concrete basis on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees. In no case may FEMA aggregate multiple requests on unrelated subjects from one requester.

(c) In accordance with the prohibition of 5 U.S.C. 552(a)(4)(A)(iv) FEMA shall not charge fees to any requester, including commercial use requesters, if the costs of collecting a fee are likely to equal or exceed the amount of the fee.

(1) For commercial use requesters, if the direct cost of searching for, reviewing for release, and duplicating

the records sought would not exceed \$30.00, FEMA shall not charge the requester any costs.

(2) For requests from representatives of news media or educational and noncommercial scientific institutions, excluding the first 100 pages that are provided at no charge, if the duplication cost would not exceed \$30.00, FEMA shall not charge the requester any costs.

(3) For all other requests not falling within the category of commercial use requests, representatives of news media, or educational and noncommercial scientific institutions, FEMA shall not charge the requester any costs if the direct cost of searching for and duplicating the records sought would not exceed \$30.00, excluding the first two hours of search time and first 100 pages that are free of charge.

§ 5.43 Waiver or reduction of fees.

(a) FEMA may waive all fees or levy a reduced fee when disclosure of the information requested is deemed to be in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Federal Government and is not primarily in the commercial interest of the requester. Disclosure is considered in the "public interest" if it would shed light on how an agency performs its statutory duties; the identity of the requester or purpose for which the information is requested is not relevant.

(b) A fee waiver request shall indicate how the information will be used, to whom it will be provided, whether the requester intends to use the information for resale at a fee above actual cost, any personal or commercial benefits that the requester reasonably expects to receive by the disclosure, provide justification to support how release will benefit the general public, the requester's or intended user's identity and qualifications, expertise in the subject area and ability and intention to disseminate the information to the public.

§ 5.44 Prepayment of fees.

(a) When FEMA estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250.00, FEMA may require a requester to make an advance payment of the entire fee before continuing to process the request.

(b) When a requester has previously failed to pay a fee in a timely fashion (i.e., within 30 days of the date of the billing), FEMA may require the requester to pay the full amount owed plus any applicable interest as provided in § 5.46(d), and to make an advance

payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester.

(c) When FEMA acts under paragraphs (a) or (b) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., 20 workdays from the receipt of initial requests and 20 workdays from receipt of appeals from initial denial, plus permissible extensions of these time limits) will begin only after FEMA has received fee payments described under paragraphs (a) or (b) of this section.

§ 5.45 Form of payment.

Payment shall be by check or money order payable to the Federal Emergency Management Agency and shall be addressed to the official designated by FEMA in correspondence with the requester or to the Headquarters FOIA Officer or to the Regional FOIA Officer, as appropriate.

§ 5.46 Fee schedule.

(a) *Manual searches for records.* FEMA will charge at the salary rate(s), (i.e., basic hourly pay rate plus 16 percent) of the employee(s) conducting the search. FEMA may assess charges for time spent searching, even if the agency fails to locate the records or if records located are determined to be exempt from disclosure.

(b) *Computer searches for records.* FEMA will charge the actual direct cost of providing the service. This will include the cost of operating the central processing unit (CPU) for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary apportionable to the search. FEMA may assess charges for time spent searching, even if FEMA fails to locate the records or if records located are determined to be exempt from disclosure.

(c) *Duplication costs.* (1) For copies of documents reproduced on a standard office copying machine in sizes up to 8½ × 14 inches, the charge will be \$0.15 per page.

(2) The fee for reproducing copies of records over 8½ × 14 inches or whose physical characteristics do not permit reproduction by routine electrostatic copying shall be the direct cost of reproducing the records through government or commercial sources. If FEMA estimates that the allowable duplication charges are likely to exceed \$25.00, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his/her willingness to pay fees as high as those anticipated. Such a notice shall

offer a requester the opportunity to confer with agency personnel with the objective of reformulating the request to meet his/her needs at a lower cost.

(3) For copies prepared by computer, such as tapes or printouts, FEMA shall charge the actual cost, including operator time, of production of the tape or printout. If FEMA estimates that the allowable duplication charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his/her willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the objective of reformulating the request to meet his/her needs at a lower cost.

(4) For other methods of reproduction or duplication, FEMA shall charge the actual direct costs of producing the document(s). If FEMA estimates that the allowable duplication charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his/her willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the objective of reformulating the request to meet his/her needs at a lower cost.

(d) *Interest.* Interest may be charged to those requesters who fail to pay fees charged. FEMA may begin assessing interest charges on the amount billed starting on the 31st day following the day on which the billing was sent. Interest will be at the rate prescribed in 31 U.S.C. 3717 and will accrue from the date of the billing.

(e) *Methods to comply.* FEMA shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA. FEMA may choose to contract with private sector services to locate, reproduce and disseminate records in response to FOIA requests when that is the most efficient and least costly method. When documents responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs, such as but not limited to the Government Printing Office or the National Technical Information Service, FEMA will inform requesters of the steps necessary to obtain records from those sources.

§ 5.47 Appeals regarding fees.

A requester whose application for a fee waiver or a fee reduction is denied may appeal that decision to the General Counsel in the manner prescribed in subpart D.

Subpart D—Described Records

§ 5.50 General.

(a) Except for records made available pursuant to subpart B, FEMA shall promptly make records available to a requester pursuant to a request that reasonably describes such records unless FEMA invokes an exemption under subpart E. For information that is deleted from a record in part, the amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by an applicable exemption. When entire records, or entire pages, are withheld a reasonable effort is to be made to estimate the volume of what is withheld and provide any such estimate to the requester. Although the burden of reasonable description of the records rests with the requester, FEMA will assist in identification to the extent practicable. Where requested records may be involved in litigation or other judicial proceedings in which the United States is a party the procedures set forth under § 5.8 shall be followed.

(b) Upon receipt of a request that does not reasonably describe the records requested, FEMA may contact the requester to seek a more specific description. The 20-workday time limit set forth in § 5.52 will not start until a request reasonably describing the records is received in the office of the appropriate official identified in § 5.51.

§ 5.51 Submission of requests for described records.

(a) For records located in the FEMA Headquarters, requests shall be submitted in writing, to the Headquarters FOIA Officer, Federal Emergency Management Agency, Washington, DC 20472. For records located in the FEMA Regional Offices, requests shall be submitted to the appropriate Regional FOIA Officer, at the address listed in § 5.26. Requests should bear the legend "Freedom of Information Request" prominently marked both on the face of the request letter and on the envelope. The 20-workday time limit for agency determinations set forth in § 5.52 shall not start until a request is received in the office of the appropriate official identified in this paragraph.

(b) The Headquarters FOIA Officer shall respond to questions concerning the proper office to which Freedom of Information requests should be addressed.

§ 5.52 Review of requests.

(a) Upon receipt of a request for information, the Headquarters FOIA

Officer, or the Regional FOIA Officer for a regional office, will forward the request to the FEMA office that has custody of the record. An information copy of region requests will be forwarded to the Headquarters FOIA Officer.

(b) Multiple requests from one requester or requesters acting in concert will be processed as one request when the Agency reasonably believes that such requests actually constitute a single request that will otherwise satisfy the unusual circumstances specified in § 5.56(c). Multiple unrelated requests will not be aggregated.

(c) Upon any request for records made pursuant to § 5.20, § 5.24, or § 5.51, the office having custody of the records shall determine within 20 workdays after receipt of any such request in the office of the appropriate official identified in § 5.51 whether to comply with the request. If the request is approved, the office having custody of the record shall notify the requester and the Headquarters FOIA Officer whether the request originated in Headquarters, a Region or the field.

(d) Requests for expedited processing and FOIA appeals will be taken out of order and given expedited treatment whenever it is determined that:

(1) Circumstances in which failure to expedite could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(2) There exists an urgency to inform the public about an actual or alleged Federal Government activity, and a person who is primarily engaged in disseminating information makes the request.

A requester whose request for expedited access is denied may appeal that decision to the General Counsel in the manner prescribed in subpart D.

§ 5.53 Approval of requests.

(a) When a request is approved, records will be made available promptly in accordance with the terms of the regulation. For records required to be made available under 5 U.S.C. 552(a)(2), public inspection and copying will be provided as provided in § 5.26. For records being made available under 5 U.S.C. 552(a)(3), records will be reviewed and provided as expeditiously as possible.

(b) In making a record available under 5 U.S.C. 552(a)(3), the record shall be provided in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.

§ 5.54 Denial of request for records.

(a) Each of the following officials within FEMA, any official designated to act for the official, or any official delegated authority by such officials shall have the authority to make initial denials of requests for disclosure of records in his or her custody, and shall, in accordance with 5 U.S.C. 552(a)(6)(C) be the responsible official for denial of records under this part.

- (1) Deputy Director.
- (2) [Reserved].
- (3) Federal Insurance Administrator/Executive Administrator.
- (4) Associate Directors/Executive Associate Directors.
- (5) United States Fire Administrator/Executive Administrator.
- (6) Chief of Staff.
- (7) Office Directors.
- (8) Associate General Counsel for General Law.
- (9) Inspector General.
- (10) Chief Financial Officer.
- (11) Regional Directors.

(b) If a request is denied, the appropriate official listed in paragraph (a) of this section shall advise the requester within 20 workdays of receipt of the request by the official specified in § 5.51, except as provided in § 5.56, and shall furnish written reasons for the denial. The denial will describe the record or records requested, state the reasons for nondisclosure pursuant to subpart E, state the name and title or position of the official responsible for the denial of such request, and state the requester's appeal rights.

(c) If FEMA cannot locate requested records the appropriate official specified in paragraph (a) of this section will inform the requester that the agency has determined at the present time to deny the request because the records have not yet been found or examined, but that the agency will review the request within a specified number of days, when the search or examination is expected to be complete. The denial letter will state the name and title or position of the official responsible for the denial of such request. In such event, the requester may file an agency appeal immediately, pursuant to § 5.55.

§ 5.55 Appeal within FEMA of denial of request.

(a) A requester denied access, in whole or in part, to FEMA records may appeal that decision within FEMA. Address all appeals to the Headquarters FOIA Officer, Federal Emergency Management Agency, Washington, DC 20472, regardless of whether the denial being appealed was made at Headquarters, in a field office, or by a Regional Director.

(b) An appeal must be received in the Headquarters FOIA Office no later than thirty calendar days after receipt by the requester of the initial denial.

(c) An appeal must be in writing and should contain a brief statement of the requester's reason(s) challenging the cited exemption(s) as improper, and should enclose copies of the initial request and denial. The appeal letter should bear the legend, "FREEDOM OF INFORMATION APPEAL," conspicuously marked on both the face of the appeal letter and on the envelope. FEMA has 20 workdays after the receipt of an appeal to make a determination with respect to such appeal. The 20-workday time limit shall not begin to run until the Headquarters FOIA Officer receives the appeal. Misdirected appeals should be forwarded promptly to that office.

(d) The Headquarters FOIA Officer will submit the appeal to the General Counsel for final administrative determination.

(e) The General Counsel shall be the deciding official on all appeals except in those cases in which he or she made the initial denial. If the General Counsel made the initial denial, the Deputy Director will be the deciding official on any appeal from that denial. In the absence of the Deputy Director, or in case of a vacancy in that office, the Director may be the deciding official or designate another FEMA official to perform the Deputy's functions.

(f) If an appeal is filed in response to a tentative denial pending locating and/or examination of records, as described in § 5.53(c), FEMA will continue to search for or examine the requested records and will issue a response immediately upon completion of the search or examination. Such action in no way suspends the time for FEMA's response to the requester's appeal that FEMA will continue to process regardless of the response under this paragraph.

(g) If a requester files suit pending an agency appeal, FEMA nonetheless will continue to process the appeal, and will furnish a response within the 20 workday time limit set out in paragraph (c) of this section.

(h) If, on appeal, the denial of the request for records is upheld in whole or in part, the General Counsel will promptly furnish the requester a copy of the ruling in writing within the 20-workday time limit set out in paragraph (c) of this section except as provided in § 5.55. The notification letter shall contain:

- (1) A brief description of the record or records requested;

(2) A statement of the legal basis for nondisclosure;

(3) A statement of the name and title or position of the official or officials responsible for the denial of the initial request as described in § 5.54 and the denial of the appeal as described in paragraph (f) of this section, and

(4) A statement of the requester's rights of judicial review.

§ 5.56 Extension of time limits.

(a) In unusual circumstances as specified in this section, the time limits prescribed in §§ 5.52 and 5.55 may be extended by a written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than 10 workdays, except as provided in paragraph (b) of this section.

(b) With respect to a request for which a written notice under paragraph (a) of this section extends the time limits prescribed under §§ 5.52(b) and 5.55(c), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that section and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. Refusal by the requester to modify the request reasonably or to arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this section.

(c) "Unusual circumstances" means, but only to the extent reasonably necessary for the proper processing of the particular requests—

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

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

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

§ 5.57 Predisclosure notification procedures for confidential commercial information.

(a) *In general.* Business information provided to FEMA by a business submitter shall not be disclosed pursuant to a Freedom of Information Act request except in accordance with this section. For purposes of this section, the following definitions apply:

(1) *Confidential commercial information* means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) *Submitter* means any person or entity that provides confidential commercial information to the government. The term submitter includes corporations, State governments, and foreign governments.

(b) *Notice to business submitters.* FEMA shall provide a submitter with prompt notice of receipt of a Freedom of Information Act request encompassing its business information whenever required in accordance with paragraph (c) of this section, and except as provided in paragraph (g) of this section. The written notice shall either describe the exact nature of the business information requested or provide copies of the records or portions of records containing the business information.

(c) *When notice is required.* (1) For confidential commercial information submitted prior to January 1, 1988, FEMA shall provide a submitter with notice of receipt of a FOIA request whenever:

(i) The records are less than 10 years old and the information has been designated by the submitter as confidential commercial information;

(ii) FEMA has reason to believe that disclosure of the information could reasonably result in commercial or financial injury to the submitter; or

(iii) The information is subject to prior express commitment of confidentiality given by FEMA to the submitter.

(2) For confidential commercial information submitted to FEMA on or after January 1, 1988, FEMA shall provide a submitter with notice of receipt of a FOIA request whenever:

(i) The submitter has in good faith designated the information as commercially or financially sensitive information; or

(ii) FEMA has reason to believe that disclosure of the information could reasonably result in commercial or financial injury to the submitter.

(3) Notice of a request for confidential commercial information falling within paragraph (c)(2)(i) of this section shall be required for a period of not more than 10 years after the date of submission unless the submitter requests, and provides acceptable justification for, a specific notice period of greater duration.

(4) Whenever possible, the submitter's claim of confidentiality shall be supported by a statement or certification by an officer or authorized representative of the company that the information in question is in fact confidential commercial or financial information and has not been disclosed to the public.

(d) *Opportunity to object to disclosure.* (1) Through the notice described in paragraph (b) of this section, FEMA shall afford a submitter 7 workdays within which to provide FEMA with a detailed statement of any objection to disclosure. Such statement shall specify all grounds for withholding any of the information under any exemptions of the Freedom of Information Act and, in the case of Exemption 4, shall demonstrate why the information is contended to be a trade secret or commercial or financial information that is considered privileged or confidential. Information provided by a submitter pursuant to this paragraph might itself be subject to disclosure under the FOIA.

(2) When notice is given to a submitter under this section, FEMA shall notify the requester that such notice has been given to the submitter. The requester will be further advised that a delay in responding to the request, i.e., 10 workdays after receipt of the request by FEMA or 20 workdays after receipt of the request by FEMA if the time limits are extended under unusual circumstances permitted by the FOIA, may be considered a denial of access to records and the requester may proceed with an administrative appeal or seek judicial review, if appropriate.

(e) *Notice of intent to disclose.* FEMA shall consider carefully a submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose business information. Whenever FEMA decides to disclose business information over the objection of a submitter, FEMA shall forward to the submitter a written notice that shall include:

(1) A statement of the reasons why the submitter's disclosure objections were not sustained;

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

(3) A specified disclosure date, which is 7 workdays after the notice of the

final decision to release the requested information has been mailed to the submitter. FEMA shall inform the submitter that disclosure will be made by the specified disclosure date, unless the submitter seeks a court injunction to prevent its release by the date. When notice is given to a submitter under this section, FEMA shall notify the requester that such notice has been given to the submitter and the proposed date for disclosure.

(f) *Notice of lawsuit.* (1) Whenever a requester brings legal action seeking to compel disclosure of business information covered by paragraph (c) of this section, FEMA shall promptly notify the submitter.

(2) Whenever a submitter brings legal action seeking to prevent disclosure of business information covered by paragraph (c) of this section, FEMA shall promptly notify the requester.

(g) *Exception to notice requirement.* The notice requirements of this section shall not apply if:

(1) FEMA determines that the information shall not be disclosed;

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

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(4) The information was required in the course of a lawful investigation of a possible violation of criminal law.

§ 5.58 Exhaustion of administrative remedies.

(a) Any person making a request to FEMA for records under this part shall be deemed to have exhausted his administrative remedies with respect to the request if the agency fails to comply with the applicable time limit provisions set forth in §§ 5.52 and 5.55.

(b) "Exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(c) Refusal by a requester to modify the scope of a request reasonably or to arrange an alternative time frame for processing the request (or a modified request) under paragraph (a) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this paragraph.

§ 5.59 Judicial relief available to the public.

Upon denial of a requester's appeal, the requester may file a complaint in a

district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, pursuant to 5 U.S.C. 552(a)(4)(B).

§ 5.60 Disciplinary action against employees for "arbitrary or capricious" denial.

Pursuant to 5 U.S.C. 552(a)(4)(F), whenever the district court, described in § 5.59 orders the production of any FEMA records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether FEMA personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel in the Merit Systems Protection Board is required to initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who primarily was responsible for the withholding. The Special Counsel after investigation and consideration of the evidence submitted, submits findings and recommendations to the Director of FEMA and sends copies of the findings and recommendations to the officer or employee or his or her representative. The law requires the Director to take any corrective action that the Special Counsel recommends.

§ 5.61 Contempt for noncompliance.

In the event of noncompliance by FEMA with an order of a district court pursuant to § 5.60, the district court may punish for contempt the FEMA employee responsible for the noncompliance, pursuant to 5 U.S.C. 552(a)(4)(G).

Subpart E—Exemptions

§ 5.70 General.

The exemptions enumerated in 5 U.S.C. 552(b), under which the provisions for availability of records and informational materials will not apply, are general in nature. FEMA will decide each case on its merits in accordance with the FEMA policy expressed in subpart A.

§ 5.71 Categories of records exempt from disclosure under 5 U.S.C. 552.

5 U.S.C. 552(b) provides that the requirements of the statute do not apply to matters that are:

(a) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of

national defense or foreign policy and are, in fact, properly classified pursuant to such Executive Order;

(b) Related solely to the internal personnel rules and practices of an agency;

(c) Specifically exempted from disclosure by statute other than section 552(b) of title 5, provided that such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or establishes particular criteria for withholding or refers to particular types of matter to be withheld;

(d) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(e) Inter-agency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency;

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

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

(1) Could reasonably be expected to interfere with enforcement proceedings;

(2) Would deprive a person of a right to a fair trial or an impartial adjudication;

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(4) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution that furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(5) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

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

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

(i) Geological and geophysical information and data, including maps,

regarding wells. Any reasonably segregable portion of a record shall be provided to any person requesting the record after deletion of the portions that are exempt under this section; or

(j) Whenever a request is made that involves access to records described in paragraph (g)(1) of this section and the investigation or proceeding involves a possible violation of criminal law; and there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency, and disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, FEMA may, during only such time as that circumstance continues, treat the records as not subject to the requirements of 5 U.S.C. 552 and this subpart.

§ 5.72 Executive privilege exemption.

Where application of the executive privilege exemption is desired, the matter shall be forwarded to the Director for consideration. If the request for information is from a congressional source, only the President may invoke the exemption. Presidential approval is not necessarily required if the request for information is in connection with judicial or adjudicatory proceedings or otherwise. In connection with judicial proceedings, the response shall be coordinated with the Department of Justice.

Subpart F—Subpoenas or Other Legal Demands for Testimony or the Production or Disclosure of Records or Other Information

§ 5.80 Scope and applicability.

(a) This subpart sets forth policies and procedures with respect to the disclosure or production by FEMA employees, in response to a subpoena, order or other demand of a court or other authority, of any material contained in the files of the Agency or any information relating to material contained in the files of the Agency or any information acquired by an employee as part of the performance of that person's official duties or because of that person's official status.

(b) This subpart applies to State and local judicial, administrative and legislative proceedings, and federal judicial and administrative proceedings.

(c) This subpart does not apply to congressional requests or subpoenas for testimony or documents, or to an employee making an appearance solely in his or her private capacity in judicial or administrative proceedings that do not relate to the Agency (such as cases

arising out of traffic accidents, domestic relations, etc.).

§ 5.81 Statement of policy.

(a) It is the policy of FEMA to make its records available to private litigants to the same extent and in the same manner as such records are made available to members of the general public, except where protected from disclosure by litigation procedural authority (e.g., Federal Rules of Civil Procedure) or other applicable law.

(b) It is FEMA's policy and responsibility to preserve its human resources for performance of the official functions of the Agency and to maintain strict impartiality with respect to private litigants. Participation by FEMA employees in private litigation in their official capacities is generally contrary to this policy.

§ 5.82 Definitions.

For purposes of this subpart, the following terms have the meanings ascribed to them in this section:

(a) *Demand* refers to a subpoena, order, or other demand of a court of competent jurisdiction, or other specific authority (e.g., an administrative or State legislative body), signed by the presiding officer, for the production, disclosure, or release of FEMA records or information or for the appearance and testimony of FEMA personnel as witnesses in their official capacities.

(b) *Employee of the Agency* includes all officers and employees of the United States appointed by or subject to the supervision, jurisdiction or control of the Director of FEMA.

(c) *Private litigation* refers to any legal proceeding that does not involve as a named party the United States Government, or the Federal Emergency Management Agency, or any official thereof in his or her official capacity.

§ 5.83 Authority to accept service of subpoenas.

In all legal proceedings between private litigants, a subpoena *duces tecum* or subpoena *ad testificandum* or other demand by a court or other authority for the production of records held by FEMA Regional offices or for the oral or written testimony of FEMA Regional employees should be addressed to the appropriate Regional Director listed in § 5.26. For records or testimony of the Office of Inspector General, the subpoena should be addressed to the Inspector General, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472. For all other records or testimony, the subpoena should be addressed to the General Counsel,

Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472. No other official or employee of FEMA is authorized to accept service of subpoenas on behalf of the Agency.

§ 5.84 Production of documents in private litigation.

(a) The production of records held by FEMA in response to a subpoena *duces tecum* or other demand issued pursuant to private litigation, whether or not served in accordance with the provisions of § 5.83 of this subpart, is prohibited absent authorization by the General Counsel or, as to records of the Office of the Inspector General, by the Inspector General.

(b) Whenever an official or employee of FEMA, including any Regional Director, receives a subpoena or other demand for the production of Agency documents or material, he or she shall immediately notify and provide a copy of the demand to the General Counsel, unless the subpoena or demand seeks the production of documents or material maintained by the Office of Inspector General, in which case a copy of the demand shall be provided to the Inspector General.

(c) The General Counsel (or Inspector General), after consultation with other appropriate officials as deemed necessary, shall promptly determine whether to disclose the material or documents identified in the subpoena or other demand. Generally, authorization to furnish the requested material or documents shall not be withheld unless their disclosure is prohibited by relevant law or for other compelling reasons.

(d) Whenever a subpoena or demand commanding the production of any record is served upon any Agency employee other than as provided in § 5.83 of this subpart, or the response to a demand is required before the receipt of instructions from the General Counsel (or Inspector General), such employee shall appear in response thereto, respectfully decline to produce the record(s) on the ground that it is prohibited by this section and state that the demand has been referred for the prompt consideration of the General Counsel (or, where appropriate, the Inspector General).

(e) Where the release of documents in response to a subpoena *duces tecum* is authorized by the General Counsel (or, as to documents maintained by the Office of Inspector General, the Inspector General), the official having custody of the requested records will furnish, upon the request of the party seeking disclosure, authenticated copies of the documents. No official or

employee of FEMA shall respond in strict compliance with the terms of a subpoena *duces tecum* unless specifically authorized by the General Counsel (or Inspector General).

§ 5.85 Authentication and attestation of copies.

The Director, Deputy Director, Associate Directors, Executive Associate Directors, Administrators, Executive Administrators, the General Counsel, the Deputy General Counsel, the Rules Docket Clerk, Inspector General, Regional Directors, and their designees, and other heads of offices having possession of records are authorized in the name of the Director to authenticate and attest for copies or reproductions of records. Appropriate fees will be charged for such copies or reproductions based on the fee schedule set forth in § 5.46 of this part.

§ 5.86 Production of documents in litigation or other adjudicatory proceeding in which the United States is a party.

Subpoenas *duces tecum* issued pursuant to litigation or any other adjudicatory proceeding in which the United States is a party shall be referred to the General Counsel.

§ 5.87 Testimony of FEMA employees in private litigation.

(a) No FEMA employee shall testify in response to a subpoena or other demand in private litigation as to any information relating to material contained in the files of the Agency, or any information acquired as part of the performance of that person's official duties or because of that person's official status, including the meaning of Agency documents.

(b) Whenever a demand is made upon a FEMA employee, other than an employee of the Office of Inspector General, for the disclosure of information described in paragraph (a) of this section, that employee shall immediately notify the Office of General Counsel. Employees of the Office of Inspector General shall notify the Inspector General of such demands. The General Counsel (or Inspector General through designated legal counsel), upon receipt of such notice and absent waiver of the general prohibition against employee testimony at his or her discretion, shall arrange with the appropriate United States Attorney to take steps to quash the subpoena or to seek a protective order.

(c) If an immediate demand for testimony or disclosure is made that would preclude prior notice to and consultation with the General Counsel (or Inspector General), the employee shall respectfully request from the

demanding authority a stay in the proceedings to allow sufficient time to obtain advice of counsel.

(d) If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with paragraph (c) of this section pending consultation with counsel, or if the court or other authority rules that the demand must be complied with irrespective of instructions not to testify or disclose the information sought, the employee upon whom the demand has been made shall respectfully decline to comply with the demand, citing these regulations and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

§ 5.88 Testimony in litigation in which the United States is a party.

(a) Whenever, in any legal proceeding where the United States is a party, the attorney in charge of presenting the case for the United States requests it, the General Counsel shall arrange for an employee of the Agency to testify as a witness for the United States.

(b) The attendance and testimony of named employees of the Agency may not be required in any legal proceeding by the judge or other presiding officer, by subpoena or otherwise. However, the judge or other presiding officer may, upon a showing of exceptional circumstances (such as a case in which a particular named FEMA employee has direct personal knowledge of a material fact not known to the witness made available by the Agency) require the attendance and testimony of named FEMA personnel.

§ 5.89 Waiver.

The General Counsel (or, as to employees of the Office of Inspector General, the Inspector General) may grant, in writing, a waiver of any policy or procedure prescribed by this subpart, where waiver is considered necessary to promote a significant interest of the Agency or for other good cause. In granting such waiver, the General Counsel (or Inspector General) shall attach to the waiver such reasonable conditions and limitations as are deemed appropriate in order that a response in strict compliance with the terms of a subpoena *duces tecum* or the providing of testimony will not interfere with the duties of the employee and will otherwise conform to the policies of this part. The Director may, in his or her discretion, review any decision to authorize a waiver of any policy or procedure prescribed by this subpart.

Dated: July 30, 1998.

James L. Witt,

Director.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 600 and 648

[I.D. 081998C]

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Applications for Exempted Fishing Permits (EFPs) to Conduct Experimental Fishing

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notification of Two Proposals for EFPs; request for comments.

SUMMARY: NMFS issues this notification to announce that the Regional Administrator, Northeast Region, NMFS (Regional Administrator) is considering approval of two experimental fishing proposals that would permit vessels to conduct operations otherwise restricted by regulations governing the Fisheries of the Northeastern United States. The experimental fisheries would involve fishing for, retention, and landing of silver hake (whiting) with small mesh in the Gulf of Maine/Georges Bank (GOM/GB) Regulated Mesh Area. Regulations under the Magnuson-Stevens Fisheries Conservation and Management Act (Magnuson-Stevens Act) provisions require publication of this notification to provide interested parties the opportunity to comment on the proposed experimental fisheries.

DATES: Comments must be received by September 14, 1998.

ADDRESSES: Comments should be sent to Jon Rittgers, Acting Regional Administrator, NMFS, Northeast Regional Office, 1 Blackburn Drive, Gloucester, MA 01930. The envelope should be clearly marked "Comments on Proposed Experimental Fisheries."

FOR FURTHER INFORMATION CONTACT: Peter Christopher, Fishery Management Specialist, 978-281-9288.

SUPPLEMENTARY INFORMATION: The Maine Department of Marine Resources (MEDMR) submitted an application on July 1, 1998, to conduct the testing of modified trawl gears to supplement an existing experimental fishery. While the current experimental fishery is designed

to determine the effectiveness of a bycatch reduction device, or separator grate, in a GOM whiting small mesh trawl fishery, MEDMR's proposal would allow the testing of modifications to the separator grate and the trawl. Proposed modifications of the current gear include various bar spacing on the separator grate, various codend mesh size, and a raised footrope configuration on the otter trawl.

On July 14, 1998, the Massachusetts Division of Marine Fisheries (MADMF) requested the re-authorization of an experimental fishery for whiting for the 1998 fishing season. The re-authorization of the experiment would allow the MADMF to determine whether or not the modified gear known as the "raised footrope trawl" is an appropriate small mesh gear for various areas in the GOM/GB Regulated Mesh Area that have not been completely analyzed. In addition it would allow MADMF and NMFS to consider additional data on the bycatch of regulated multispecies in the experimental fishery.

EFPs would be issued to the participating vessels in both projects to exempt them from possession limit, mesh size, and days-at-sea restrictions of the Northeast Multispecies Fishery Management Plan.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 21, 1998.

Gary C. Matlock,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[I.D. 082098F]

New England Fishery Management Council; Public Meetings

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Public meetings.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Herring Committee to be held jointly with the Atlantic States Marine Fisheries Commission's (ASMFC) Herring Section to consider actions affecting New England fisheries in the