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November 12, 1976

Jerome Heckman, Esquire
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1150 17th Street, N.W.
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Dear Jerry:

As you may recall, in June 1975, we distributed to the members of SPI a memorandum on the "Policy and Procedures of the Environmental Protection Agency in Implementing the Freedom of Information Act." The latter half of the memorandum discussed the regulations proposed by EPA to protect the confidentiality of business information, consistent with the Agency's obligations under the Freedom of Information Act. On September 1, 1976, EPA promulgated its final regulations governing requests for business information, with an effective date of October 1. (41 Fed.Reg. 36902). The significance of these final regulations became a matter of discussion at the meeting of the SPI VCM/PVC Technical Committee in Washington on October 26 and, therefore, we thought it would be useful to update our original memorandum.

No material changes have been made in the regulations as discussed in our earlier memorandum, but the final regulations have been simplified and clarified to some degree. For example:

(1) The draft regulations imposed upon a business the responsibility of appropriately marking information it submits to EPA for which it desires to make a claim of confidentiality. Failure to do so would have resulted in an automatic waiver of the claim. Under the final regulations, a business still has the responsibility to appropriately mark information submitted to EPA. However, Section 2.203 has been revised to require the Agency to attach a form to any request it makes for information which may be confidential, which form will advise the business of this responsibility. Also, a claim of confidentiality may still be made after information has been submitted to the EPA, but the Agency makes no promise that the information will be protected.

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(2) The draft regulations provided that EPA could make a "class" determination with regard to certain types of information being collected by it from a number of businesses which, because of the common characteristics of the information, would necessarily result in identical treatment. A finding by the Agency that information falling within a class is not confidential would have been a final determination as to all companies for the purposes of these regulations. This is no longer true. As promulgated, Section 2.206(d) provides that the class determinations are simply informative, and if a request for information covered by the determination is made, a concerned business will still be provided an opportunity to object to disclosure as if no such determination had been made.

(3) The requirement in the draft regulations that businesses satisfy EPA that there is "substantial" likelihood that disclosure of information would substantially harm the competitive position of the business, or lessen the availability of information to EPA, has been amended. Businesses now need only show that there is a likelihood, not a "substantial" likelihood, of such a result. This change was made to reflect court decisions in this area.

A copy of the regulations is enclosed. Of particular interest is Appendix A thereto, where the most relevant comments received by EPA on the proposed regulations, and the Agency's response to them, are set forth. The responses are especially helpful in understanding the attitude which EPA will take in determining whether information submitted to it ought to be protected under the Freedom of Information Act.

If you have any questions, please advise.

Sincerely yours,



Harold Himmelman

HH/ap
Enclosure

cc: John R. Lawrence

Register Federal

WEDNESDAY, SEPTEMBER 1, 1976



PART IV:

ENVIRONMENTAL PROTECTION AGENCY

REQUESTS FOR INFORMATION

Confidentiality of Business Information

Title 40—Protection of Environment
(FRL 577-7)

CHAPTER I—ENVIRONMENTAL
PROTECTION AGENCY

Requests for Information; Confidentiality
of Business Information

On May 20, 1975, the Environmental Protection Agency (EPA) caused to be published in the *Federal Register* a document (40 FR 21687) proposing to amend 40 CFR Part 2 by adding a new Subpart B entitled "Confidentiality of Business Information." Certain corrections and revisions to that document were made by a document published in the *Federal Register* on July 9, 1975 (40 FR 27814). Interested persons were given until July 22, 1975, to submit written comments, suggestions, or objections. Some 60 comments were received; commenters included trade associations, business firms, environmental organizations, state agencies, and others. Full and careful consideration was given to all written comments received.

As promulgated below, the rule reflects a number of changes from the proposed rule. Many of these changes were suggested by comments on the proposed rule made by interested members of the public; others were found desirable in order to simplify and clarify various provisions, even though they were not specifically suggested by comments from the public. The changes do not introduce significant variations from the subject matter and issues presented in the May 20 and July 9, 1975, documents. A summary of the significant comments, the Administrator's responses to these comments, and the other changes that have been made appear as Appendix A. The Preamble to the May 20, 1975, document also discussed many of the issues presented by this rule-making proceeding.

The purpose of Subpart B is to establish and make known to the public the rules and procedures which EPA will use in handling information gathered by EPA which may be entitled confidential treatment for reasons of business confidentiality. The regulation represents EPA's attempt to devise a procedure which protects the interests of the businesses which furnish information to EPA, the interests of members of the public who request that EPA disclose such information, and the interests of EPA in carrying out its statutory missions. As stated more fully in the Preamble to the May 20 document, these various interests may from time to time be in conflict. Businesses have recently expressed concern that Federal agencies may disclose proprietary information the agencies possess and thereby harm the businesses. On the other hand, members of the public have asserted that understanding and criticizing Government proposals or decisions is difficult or impossible if the business data upon which the Government relied are unavailable for scrutiny. EPA understands the importance of both these arguments and, in addition, is aware that the continuing flow of information from businesses needed for sound EPA deci-

sionmaking may be affected adversely if businesses do not feel that EPA gives full and fair consideration to their confidentiality claims.

Subpart B, as promulgated below, establishes procedures and substantive rules designed to: Limit the likelihood of inadvertent disclosure of confidential business information; afford businesses a fair opportunity both to assert a confidentiality claim and to substantiate the claim prior to an EPA ruling on the claim; allow a business to seek judicial review of an EPA ruling unfavorable to it; protect the interests of members of the public who request disclosure of business information under the Freedom of Information Act, 5 U.S.C. 552; and furnish guidance to those EPA officers and employees who must deal with confidentiality claims and requests for information while carrying out other important Agency business.

Subpart B consists of a series of generally applicable rules (§§ 2.201-2.213) and certain special rules which modify the general rules when necessary to implement several statutes under which EPA operates and which contain special provisions governing the treatment of business information.

A revision of Subpart A of 40 CFR Part 2 is also promulgated below. (Subpart A contains the Agency's basic regulations concerning the treatment of requests for information under 5 U.S.C. 552). Many of the changes to Subpart A are merely matters of style designed to more clearly set forth procedural rules which were stated in the earlier version of the subpart. Former § 2.107 has been redesignated as § 2.106, and a new § 2.107 has been added, dealing with the treatment of misdirected written requests and oral requests. The subpart has been revised in several places to indicate more clearly that a discretionary decision to withhold exempt documents should be based on a finding that the public interest would not be served by disclosure. Section 2.119(b) has been revised to indicate that matters exempt under 5 U.S.C. 552 (b)(8) or (b)(9) normally will not be disclosed as a matter of policy. Section 2.120 has been extensively revised to state additional examples of search and duplication efforts for which the fee will be the actual direct cost to EPA, to indicate items for which no charge shall be made, and to clarify the procedure to be used in considering requests for reduction of waiver of fees. Former § 2.121, which recited a statutory requirement concerning an annual report to Congress, has been deleted as unnecessary. Because the changes to Subpart A consist of rules of agency organization, procedure, or practice, and because public comment on these changes is unnecessary and would not serve the public interest, good cause is hereby found for promulgating the revision of Subpart A without use of the proposed rulemaking procedure of 5 U.S.C. 553(c).

Finally, minor changes to other parts in Chapter I of 40 CFR are also being made for the purpose of conforming

these parts to the newly promulgated Subpart B of Part 2.

Accordingly, Chapter I of 40 CFR is amended as set forth below.

Effective date: These regulations shall become effective on October 1, 1976.

Dated: August 12, 1976.

RUSSELL E. TRAIN,
Administrator.

Chapter I of 40 CFR is amended as follows:

1. Part 2 is amended by revising Subpart A and by adding a new Subpart B, so that the Part reads as follows:

PART 2—PUBLIC INFORMATION

Subpart A—Requests for Information

- Sec.
- 2.100 Definitions.
- 2.101 Policy on disclosure of EPA records.
- 2.102 [Reserved].
- 2.103 Partial disclosure of records.
- 2.104 Requests to which this subpart applies.
- 2.105 Existing records.
- 2.106 Where requests for agency records shall be filed.
- 2.107 Misdirected written requests, oral requests.
- 2.108 Form a request.
- 2.109 Requests which do not reasonably describe records sought.
- 2.110 Responsibilities of Freedom of Information Officers.
- 2.111 Action by office responsible for responding to request.
- 2.112 Time allowed for issuance of initial determination.
- 2.113 Initial denials of requests.
- 2.114 Appeals from initial denials; manner of making.
- 2.115 Appeal determinations, by whom made.
- 2.116 Contents of determination denying appeal.
- 2.117 Time allowed for issuance of appeal determination.
- 2.118 Exemption categories.
- 2.119 Discretionary release of exempt documents.
- 2.120 Fees; payment; waiver.
- 2.121-2.200 [Reserved].

Subpart B—Confidentiality of Business Information

- 2.201 Definitions.
- 2.202 Applicability of subpart; priority where provisions conflict; records containing more than one kind of information.
- 2.203 Notice to be included in EPA requests, demands, and forms; method of asserting business confidentiality claim; effect of failure to assert claim at time of submission.
- 2.204 Initial action by EPA office.
- 2.205 Final confidentiality determination by EPA legal office.
- 2.206 Advance confidentiality determinations.
- 2.207 Class determinations.
- 2.208 Substantive criteria for use in confidentiality determinations.
- 2.209 Disclosure in special circumstances.
- 2.210 Nondisclosure for reasons other than business confidentiality or where disclosure is prohibited by other statute.
- 2.211 Safeguarding of business information; penalty for wrongful disclosure.
- 2.212 Establishment of control offices for categories of business information.
- 2.213 Designation by business of addressee for notices and inquiries.

- Sec.
2.214-2.300 [Reserved].
2.301 Special rules governing certain information obtained under the Clean Air Act.
2.302 Special rules governing certain information obtained under the Federal Water Pollution Control Act.
2.303 Special rules governing certain information obtained under the Noise Control Act of 1972.
2.304 Special rules governing certain information obtained under the Safe Drinking Water Act.
2.305 [Reserved].
2.306 [Reserved].
2.307 Special rules governing certain information obtained under the Federal Insecticide, Fungicide, and Rodenticide Act.
2.308 Special rules governing certain information obtained under the Federal Food, Drug, and Cosmetic Act.
2.309 Special rules governing certain information obtained under the Marine Protection, Research and Sanctuaries Act of 1972.

AUTHORITY: 5 U.S.C. 301, 552, 553, secs. 114, 208, 301, and 307 of the Clean Air Act, as amended, 42 U.S.C. 1857c-9, 1857f-6, 1857g, 1857h-5; secs. 308, 501, and 509(a) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1318, 1361, 1369(a); sec. 13 of the Noise Control Act of 1972, 42 U.S.C. 4912; secs. 1445 and 1450 of the Safe Drinking Water Act, 42 U.S.C. 300j-4, 300j-9; secs. 10, 12, and 25 of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. 136h, 136j, 136v; sec. 408(f) of the Federal Food, Drug and Cosmetic Act, as amended, 21 U.S.C. 346a(f); and secs. 104(f) and 108 of the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1414 (f), 1418.

Subpart A—Requests for Information

§ 2.100 Definitions.

For the purposes of this part:

(a) "EPA" means the United States Environmental Protection Agency.

(b) "EPA record" or, simply, "record" means and document, writing, photograph, sound or magnetic recording, drawing, or other similar thing by which information has been preserved, from which the information can be retrieved and copied, and which is, was, or is alleged to be possessed by EPA. The term includes informal writings (such as handwritten notes, drafts, and the like), and also includes information preserved in a form which must be translated or deciphered by machine in order to be intelligible to humans. The term includes documents and the like which were created or acquired by EPA, its predecessors, its officers, and employees by use of Government funds or in the course of transacting official business. However, the term does not include materials which are legally owned by an EPA officer or employee in his or her purely personal capacity. Nor does the term include materials published by non-Federal organizations which are readily available to the public, such as books, journals, and periodicals available through reference libraries, even if such materials are in EPA's possession.

(c) "Request" means a request to inspect or obtain a copy of one or more records.

(d) "Requestor" means any person who has submitted a request to EPA.

§ 2.101 Policy on disclosure of EPA records.

(a) EPA will make the fullest possible disclosure of records to the public, consistent with the rights of individuals to privacy, the rights of persons in business information entitled to confidential treatment, and the need for EPA to promote frank internal policy deliberations and to pursue its official activities without undue disruption.

(b) All EPA records shall be available to the public unless they are exempt from the disclosure requirements of 5 U.S.C. 552.

(c) All nonexempt EPA records shall be available to the public upon request regardless of whether any justification or need for such records has been shown by the requestor.

§ 2.102 [Reserved]

§ 2.103 Partial disclosure of records.

If a requested record contains both exempt and nonexempt material, the nonexempt material shall be disclosed, after the exempt material has been deleted in accordance with § 2.119.

§ 2.104 Requests to which this subpart applies.

(a) This subpart applies to any written request (other than a request made by another Federal agency) received by any EPA office, whether or not the request cites the Freedom of Information Act, 5 U.S.C. 552. See § 2.107(a) and § 2.112(b) regarding the treatment of requests which are directed by the requestor to offices other than those listed in § 2.106.

(b) Any written request to EPA for existing records prepared by EPA for routine public distribution, e.g., pamphlets, copies of speeches, press releases, and educational materials, shall be honored. No individual determination under § 2.111 is necessary in such cases, since preparation of the records for routine public distribution itself constitutes a determination that the records are available to the public.

§ 2.105 Existing records.

(a) The Freedom of Information Act, 5 U.S.C. 552, does not require the creation of new records in response to a request, nor does it require EPA to place a requestor's name on a distribution list for automatic receipt of certain kinds of records as they come into existence. The Act establishes requirements for disclosure of existing records.

(b) All existing EPA records are subject to routine destruction according to standard record retention schedules.

§ 2.106 Where requests for agency records shall be filed.

(a) A request for records may be filed with the EPA Freedom of Information Officer, A-101, 401 M Street, SW., Washington, D.C. 20460.

(b) Should the requestor have reason to believe that the records sought may be located in an EPA regional office, he may

transmit his request to the appropriate regional Freedom of Information Office indicated below:

(1) Region I (Massachusetts, Connecticut, Maine, New Hampshire, Rhode Island, Vermont):

U.S. Environmental Protection Agency, Freedom of Information Officer, Room 1001, John F. Kennedy Federal Building, Boston, Mass. 02203

(2) Region II (New Jersey, New York, Puerto Rico, Virgin Islands):

U.S. Environmental Protection Agency, Freedom of Information Officer, Room 1001, Federal Plaza, New York, NY 10007.

(3) Region III (Delaware, Maryland, Pennsylvania, Virginia, West Virginia, District of Columbia):

U.S. Environmental Protection Agency, Freedom of Information Officer, Curtis Building, Sixth and Walnut Streets, Philadelphia, PA 19106.

(4) Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee):

U.S. Environmental Protection Agency, Freedom of Information Officer, Suite 504, 1421 Peachtree Street, NE, Atlanta, GA 30309.

(5) Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin):

U.S. Environmental Protection Agency, Freedom of Information Officer, 230 Dearborn Street, Chicago, IL 60604.

(6) Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, Texas):

U.S. Environmental Protection Agency, Freedom of Information Officer, Suite 1100, 1201 Patterson Street, Dallas, TX 75201.

(7) Region VII (Iowa, Kansas, Missouri, Nebraska):

U.S. Environmental Protection Agency, Freedom of Information Officer, 1735 Baltimore Avenue, Kansas City, MO 64103.

(8) Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming):

U.S. Environmental Protection Agency, Freedom of Information Officer, Suite 800, 1820 Lincoln Street, Denver, CO 80202.

(9) Region IX (Arizona, California, Hawaii, Nevada, American Samoa, Guam, Trust Territory of Pacific Islands, Wake Island):

U.S. Environmental Protection Agency, Freedom of Information Officer, 100 California Street, San Francisco, CA 94111.

(10) Region X (Alaska, Idaho, Oregon, Washington):

U.S. Environmental Protection Agency, Freedom of Information Officer, 1200 Second Avenue, Seattle, WA 98101.

§ 2.107 Misdirected written requests; oral requests.

(a) EPA cannot assure that a timely or satisfactory response under this subpart will be given to written requests that are addressed to EPA officers, or employees other than the Freedom of Information Officers listed in § 2.106. Any EPA officer or employee who receives a written request for inspection or disclosure of EPA records shall promptly

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forward a copy of the request to the appropriate Freedom of Information Officer, by the fastest practicable means, and shall, if appropriate, commence action under § 2.111.

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

§ 2.108 Form of request.

A request shall be made in writing, shall reasonably describe the records sought in a way that will permit their identification and location, and should be addressed to one of the addresses set forth in § 2.106, but otherwise need not be in any particular form.

§ 2.109 Requests which do not reasonably describe records sought.

(a) If the description of the records sought in the request is not sufficient to allow EPA to identify and locate the requested records, the EPA office taking action under § 2.111 will notify the requestor (by telephone when practicable) that the request cannot be further processed until additional information is furnished.

(b) EPA will make every reasonable effort to assist in the identification and description of records sought and to assist the requestor in formulating his request. If a request is described in general terms (e.g., all records having to do with a certain area), the EPA office taking action under § 2.111 may communicate with the requestor (by telephone when practicable) with a view toward reducing the administrative burden of processing a broad request and minimizing the fees payable by the requestor. Such attempts will not be used as a means to discourage requests, but rather as a means to help identify with more specificity the records actually sought.

§ 2.110 Responsibilities of Freedom of Information Officers.

(a) Upon receipt of a written request, the Freedom of Information Officer (whether at EPA Headquarters or at an EPA region) shall mark the request with the date of receipt, and shall attach to the request a control slip indicating the date of receipt, the date by which response is due, a unique Request Identification Number, and other pertinent administrative information. The request and control slip shall then be forwarded immediately to the EPA office believed to be responsible for maintaining the records requested. (If the records requested are believed to be located at two or more EPA offices, each such office shall be furnished a copy of the request and control slip, with instructions concerning which office shall serve as the lead office for coordinating the response.) The Freedom of Information Officer shall retain a file copy of the request and control slip, and shall monitor the handling of the request to ensure a timely response.

(b) The Freedom of Information Officer shall maintain a file concerning

each request received, which shall contain a copy of the request, initial and appeal determinations, and other pertinent correspondence and records.

(c) The Freedom of Information officer shall collect and maintain the information necessary to compile the reports required by 5 U.S.C. 552(d).

§ 2.111 Action by office responsible for responding to request.

(a) Whenever an EPA office becomes aware that it is responsible for responding to a request, the office shall:

(1) Take action under § 2.109, if required, to obtain a better description of the records requested;

(2) Locate the records as promptly as possible, or determine that the records are not known to exist, or that they are located at another EPA office, or that they are located at another Federal agency and not possessed by EPA;

(3) When appropriate, take action under § 2.120(c) to obtain payment of assurance of payment;

(4) If any located records contain business information, as defined in § 2.201(c), comply with subpart B of this part;

(5) Determine which of the requested records legally must be withheld, and why (see § 2.119(b));

(6) Of the requested records which are exempt from mandatory disclosure but which legally may be disclosed (see § 2.119(a)), determine which records will be withheld, and why;

(7) Issue an initial determination within the allowed period (see § 2.112), specifying (individually or by category) which records will be disclosed and which will be withheld, and signed by a person authorized to issue the determination under § 2.113(b). Denials of requests shall comply with § 2.113; and

(8) Furnish the appropriate Freedom of Information Officer a copy of the determination. If the determination denied a request for one or more existing, located records, the responding office shall also furnish the Freedom of Information Officer the name, address, and telephone number of the EPA employee(s) having custody of the records, and shall maintain the records in a manner permitting their prompt forwarding to the General Counsel upon request if an appeal from the initial denial is filed. See also § 2.204(f).

(b) If it appears that some or all of the requested records are not in the possession of the EPA office which has been assigned responsibility for responding to the request but may be in the possession of some other EPA office, the Freedom of Information officer who is monitoring the request shall be so informed immediately.

§ 2.112 Time allowed for issuance of initial determination.

(a) Except as otherwise provided in this section, not later than the tenth working day after the date of receipt by a Freedom of Information Office of a request for records, the EPA office responsible for responding to the request shall issue a written determination to the re-

questor stating which of the requested records will, and which will not, be released, and the reason for any denial of a request.

(b) The period of 10 working days shall be measured from the date the request is first received and logged in by the Headquarters or regional Freedom of Information Office.

(c) There shall be excluded from the period of 10 working days (or any extension thereof) any time which elapses between the date that a requestor is notified by EPA under § 2.109 that his request does not reasonably identify the records sought, and the date that the requestor furnishes a reasonable identification.

(d) There shall be excluded from the period of 10 working days (or any extension thereof) any time which elapses between the date that a requestor is notified by EPA under § 2.120 that prepayment of fees is required, and the date that the requestor pays (or makes suitable arrangements to pay) such charges.

(e) The EPA office taking action under § 2.111, after notifying the appropriate Freedom of Information Office, may extend the basic 10-day period established under subsection (a) of this section by a period not to exceed 10 additional working days, by furnishing written notice to the requestor within the basic 10-day period stating the reasons for such extension and the date by which the office expects to be able to issue a determination. The period may be so extended only when absolutely necessary, only for the period required, and only when one or more of the following unusual circumstances require the extension:

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

(3) There is a 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 EPA.

(f) Failure of EPA to issue a determination within the 10-day period or any authorized extension shall constitute final agency action which authorizes the requestor to commence an action in an appropriate Federal district court to obtain the records.

§ 2.113 Initial denials of requests.

(a) An initial denial of a request may be issued only for the following reasons:

(1) The record requested is not known to exist;

(2) The record is not in EPA's possession;

(3) The record has been published in the FEDERAL REGISTER or is otherwise published and available for sale;

(4) A statutory provision, provision of this part, or court order requires that the information not be disclosed;

(5) The record is exempt from mandatory disclosure under 5 U.S.C. 552(b) and EPA has decided that the public interest would not be served by disclosure;

(6) Section 2.204(d)(1) requires initial denial because a third person must be consulted in connection with a business confidentiality claim, or

(7) The record is believed to exist in EPA's possession but has not yet been located (see subsection (h) of this section).

(b) Assistant Administrators, heads of headquarters staff offices, and Regional Administrators are delegated the authority to issue initial determinations. This authority may be redelegated; provided, that the authority to issue initial denials of requests for existing, located records (other than denials based solely on § 2.204(d)(1)) may be redelegated only to persons occupying positions not lower than division director or equivalent.

(c) [Reserved]

(d) Each initial determination to deny a request shall be written, signed, and dated, shall contain a reference to the Request Identification Number, shall identify the records that are being withheld (individually, or, if the denial covers a large number of similar records, by described category), and shall state the basis for denial of each record or category of records being withheld.

(e) If the issuance of the determination to deny a request was directed by some EPA officer or employee other than the person signing the determination letter, that other person's identity and position shall be stated in the determination letter.

(f) Each initial determination which denies, in whole or in part, a request for one or more existing, located EPA records shall state that the requestor may appeal the initial denial by sending a written appeal to the address shown in § 2.106(a) within 30 days of receipt of the determination.

(g) A determination shall be deemed issued on the date the determination letter is placed in EPA mailing channels for first class mailing to the requestor, delivered to the U.S. Postal Service for mailing, or personally delivered to the requestor, whichever date first occurs.

(h) When a request must be denied because the record has not yet been located (although it is believed to exist in EPA's possession), the EPA office responsible for maintaining the record shall continue to search diligently until it is located or it appears that the record does not exist or is not in EPA's possession, and shall periodically inform the requestor of the office's progress.

§ 2.111 Appeals from initial denials; manner of making.

(a) Any person whose request has been denied in whole or in part by an initial determination may appeal that denial by addressing a written appeal to the address shown in § 2.106(a).

(b) An appeal should be mailed no later than 30 calendar days after the date the requestor received the initial

determination on the request. An untimely appeal may be treated either as a timely appeal or as a new request, at the option of the Freedom of Information Officer.

(c) The appeal letter shall contain a reference to the Request Identification Number (RIN), the date of the initial determination, and the name and address of the person who issued the initial denial. The appeal letter shall also indicate which of the records to which access was denied are the subjects of the appeal.

§ 2.115 Appeal determination; by whom made.

(a) The General Counsel shall make one of the following legal determinations in connection with every appeal from the initial denial of a request for an existing, located record:

(1) The record must be disclosed;

(2) The record must not be disclosed, because a statute or a provision of this part so requires; or

(3) The record is exempt from mandatory disclosure but legally may be disclosed as a matter of Agency discretion.

(b) Whenever the General Counsel has determined under paragraph (a)(3) of this section that a record is exempt from mandatory disclosure but legally may be disclosed, the matter shall be referred to the Director of the EPA Office of Public Affairs. If the Director of the EPA Office of Public Affairs determines that the public interest would not be served by disclosure, a determination denying the appeal shall be issued by the General Counsel. If the Director of the EPA Office of Public Affairs determines that the public interest would be served by disclosure, the record shall be disclosed unless the Administrator (upon a review of the matter requested by the appropriate Assistant Administrator, Regional Administrator, or the Director of a Headquarters Staff Office) determines that the public interest would not be served by disclosure, in which case the General Counsel shall issue a determination denying the appeal.

(c) The General Counsel may delegate his authority under paragraph (a) of this section to a Regional Counsel, or to any other attorney employed on a full-time basis by EPA, in connection with any category of appeals or any individual appeal.

§ 2.116 Contents of determination denying appeal.

A determination denying an appeal from an initial denial shall be in writing, shall state which of the exemptions in 5 U.S.C. 552(b) apply to each requested existing record, and shall state the reason(s) for denial of the appeal. A denial determination shall also state the name and position of each EPA officer or employee who directed that the appeal be denied. Such a determination shall further state that the person whose request was denied may obtain de novo judicial review of the denial by complaint filed with the district court of the United States in the district in which the complainant resides, or in which the Agency records are situated, or in the

District of Columbia, pursuant to 5 U.S.C. 552(a)(4).

§ 2.117 Time allowed for issuance of appeal determination.

(a) Except as otherwise provided in this section, not later than the twentieth working day after the date of receipt by the Freedom of Information Officer at EPA Headquarters of an appeal from an initial denial of a request for records, the General Counsel shall issue a written determination stating which of the requested records (as to which an appeal was made) shall be disclosed and which shall not be disclosed.

(b) The period of 20 working days shall be measured from the date an appeal is first received by the Freedom of Information Officer at EPA Headquarters except as otherwise provided in § 2.205(a).

(c) The Office of General Counsel, after notifying the Freedom of Information Officer at EPA Headquarters, may extend the basic 20-day period established under subsection (a) of this section by a period not to exceed 10 additional working days, by furnishing written notice to the requestor within the basic 20-day period stating the reasons for such extension and the date by which the office expects to be able to issue a determination. The period may be so extended only when absolutely necessary, only for the period required, and only when one or more of the following unusual circumstances require the extension:

(1) There is a need to search for and collect the records from field facilities or other establishments that are separate from the office processing the appeal.

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

(3) There is a 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 EPA.

(d) No extension of the 20-day period shall be issued under subsection (c) of this section which would cause the total of all such extensions and of any extensions issued under § 2.112(e) to exceed 10 working days.

§ 2.118 Exemption categories.

(a) 5 U.S.C. 552(b) establishes nine exclusive categories of matters which are exempt from the mandatory disclosure requirements of 5 U.S.C. 552(a). No request under 5 U.S.C. 552 for an existing, located record in EPA's possession shall be denied by any EPA officer or employee unless the record contains (or its disclosure would reveal) matters that are—

(1) 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;

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

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(3) Specifically exempted from disclosure by statute.

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential (see Subpart B):

(5) Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

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

(7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would: (a) interfere with enforcement proceedings; (b) deprive a person of a right to a fair trial or an impartial adjudication; (c) constitute an unwarranted invasion of personal privacy; (d) disclose the identity of a confidential source and, in the case of a record 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, confidential information furnished only by the confidential source; (e) disclose investigative techniques and procedures; or (f) endanger the life or physical safety of law enforcement personnel;

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

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

(b) The fact that the applicability of an exemption permits the withholding of a requested record (or portion thereof) does not necessarily mean that the record must or should be withheld. See § 2.119.

§ 2.119 Discretionary release of exempt documents.

(a) An EPA office may, in its discretion, release requested records despite the applicability of one or more of the exemptions listed in § 2.118 (a) (1), (a) (3), (a) (4), (a) (6), (a) (8), or (a) (9) applies to the record, except when ordered to do so by a Federal court or in exceptional circumstances under appropriate restrictions with the approval of the Office of General Counsel or a Regional Counsel.

(b) As a matter of policy, EPA will not release a requested record if EPA has determined that one or more of the exemptions listed in § 2.118 (a) (1), (a) (3), (a) (4), (a) (6), (a) (8), or (a) (9) applies to the record, except when ordered to do so by a Federal court or in exceptional circumstances under appropriate restrictions with the approval of the Office of General Counsel or a Regional Counsel.

§ 2.120 Fees; payment; waiver.

(a) *Fee schedule.* Fees will be charged requestors for searching for and reproducing requested records, in accordance with the following schedule:

Record search time (EPA employees), \$2.50 per half hour.

Computer programming time (EPA employees), \$4.50 per half hour.

Reproduction of documents (paper copy of paper original), \$0.20 per page.

Other costs of searching for or duplicating records (including such items as computer system time; contractor computer programming time; reproduction of photographs, microforms, or magnetic tape; computer printouts, and transportation of records), actual direct cost to EPA.

No charge shall be made—

(1) For examination and evaluation of records which have been located and which are known to be among those requested;

(2) For the cost of preparing or reviewing letters of response to a request or appeal;

(3) If the total fee in connection with a request is less than \$10.00, or if the costs of collecting the fee would otherwise exceed the amount of the fee;

(4) For search time or computer programming time by EPA employees, if less than one half hour of such time was required in connection with the request;

(5) For responding to a request for one copy of the official personnel record of the requestor;

(6) For furnishing records requested by either House of Congress, or by a duly authorized committee or subcommittee of Congress, unless the records are requested for the benefit of an individual Member of Congress or for a constituent;

(7) For furnishing records requested by and for the official use of other Federal agencies; or

(8) For furnishing records needed by an EPA contractor or grantee to perform the work required by the EPA contract or grant.

(b) *Method of payment.* All fee payments shall be in the form of a check or money order payable to the order of the "U.S. Environmental Protection Agency" and shall be sent (accompanied by a reference to the pertinent Request Identification Number(s)) to the appropriate EPA Freedom of Information Officer.

(c) *Prepayment or assurance of payment.* If an EPA office determines or estimates that the unpaid fees attributable to one or more requests by the same requestor exceed or will exceed \$25.00, that office need not search for, duplicate or disclose records in response to any request by that requestor until the requestor pays, or makes acceptable arrangements to pay, the total amount of fees due (or estimated to become due) under this section. In such a case, the EPA office shall promptly inform the requestor (by telephone, if practicable) of the need to make payment or arrangements to pay. See also § 2.112(d).

(d) *Reduction or waiver of fee.* The fee chargeable under this section may be reduced or waived by EPA if the public interest would be served thereby. Reduction or waiver of fees shall be considered (but need not necessarily be granted) in connection with each request from a representative of the press or other communications medium, or from a public in-

terest group. A request for reduction or waiver of fees shall be addressed to the appropriate Freedom of Information Officer or to the EPA office which is responding to the request for records. The latter office shall initially determine whether the fee shall be reduced or waived, and shall so inform the requestor. The initial determination may be appealed by letter addressed to the appropriate Freedom of Information Officer. The Director of the EPA Office of Public Affairs, or the Director's designee in an EPA regional office, shall decide such appeals.

§ 2.121—§ 2.200 [Reserved]

Subpart B—Confidentiality of Business Information

§ 2.201 Definitions.

For the purposes of this subpart

(a) "person" means an individual, partnership, corporation, association, or other public or private organization or legal entity, including Federal, State or local governmental bodies and agencies and their employees.

(b) "Business" means any person engaged in a business, trade, employment, calling or profession, whether or not all or any part of the net earnings derived from such engagement by such person inure (or may lawfully inure) to the benefit of any private shareholder or individual.

(c) "Business information" (sometimes referred to simply as "information") means any information which pertains to the interests of any business, which was developed or acquired by that business, and (except where the context otherwise requires) which is possessed by EPA in recorded form.

(d) "Affected business" means, with reference to an item of business information, a business which has asserted (and not waived or withdrawn) a business confidentiality claim covering the information, or a business which could be expected to make such a claim if it were aware that disclosure of the information to the public was proposed.

(e) "Reasons of business confidentiality" include the concept of trade secrets and other related legal concepts which give (or may give) a business the right to preserve the confidentiality of business information and to limit its use or disclosure by others in order that the business may obtain or retain business advantages it derives from its rights in the information. The definition is meant to encompass any concept which authorizes a Federal agency to withhold business information under 5 U.S.C. 552(b)(4), as well as any concept which requires EPA to withhold information from the public for the benefit of a business under 18 U.S.C. 1905 or any of the various statutes cited in § 2.301 through § 2.309.

(f) [Reserved]

(g) Information which is "available to the public" is information in EPA's possession which EPA will furnish to any member of the public upon request and which EPA may make public, release or otherwise make available to any person

whether or not it is requested.

(h) "Business confidentiality claim" (or, simply, "claim") means a claim or allegation that business information is entitled to confidential treatment for reasons of business confidentiality, or a request for a determination that such information is entitled to such treatment.

(i) "Voluntarily submitted information" means business information in EPA's possession—

(1) The submission of which EPA had no statutory or contractual authority to require; and

(2) The submission of which was not prescribed by statute or regulation as a condition of obtaining some benefit (or avoiding some disadvantage) under a regulatory program of general applicability, including such regulatory programs as permit, licensing, registration, or certification programs, but excluding programs concerned solely or primarily with the award or administration by EPA of contracts or grants.

(j) "Recorded" means written or otherwise registered in some form for preserving information, including such forms as drawings, photographs, videotape, sound recordings, punched cards, and computer tape or disk.

(k) [Reserved]

(l) "Administrator," "Regional Administrator," "General Counsel," "Regional Counsel," and "Freedom of Information Officer" mean the EPA officers or employees occupying the positions so titled.

(m) "EPA office" means any organizational element of EPA, at any level or location. (The terms "EPA, office" and "EPA legal office" are used in this subpart for the sake of brevity and ease of reference. When this subpart requires that an action be taken by an "EPA office" or by an EPA legal office, it is the responsibility of the officer or employee in charge of that office to take the action or ensure that it is taken.)

(n) "EPA legal office" means the EPA General Counsel and any EPA office over which the General Counsel exercises supervisory authority, including the various Offices of Regional Counsel. (See paragraph (m) of this section.)

(o) A "working day" is any day on which Federal government offices are open for normal business. Saturdays, Sundays, and official Federal holidays are not working days; all other days are.

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

(a) Sections 2.201 through 2.213 establish basic rules governing business confidentiality claims, the handling by EPA of business information which is or may be entitled to confidential treatment, and determinations by EPA of whether information is entitled to confidential treatment for reasons of business confidentiality.

(b) Various statutes (other than 5 U.S.C. 552) under which EPA operates contain special provisions concerning

the entitlement to confidential treatment of information gathered under such statutes. Sections 2.301 through 2.309 prescribe special rules for treatment of certain categories of business information obtained under the various statutory provisions. Paragraph (b) of each of those sections should be consulted to determine whether any of those sections applies to the particular information in question.

(c) The basic rules of §§ 2.201 through 2.213 govern except to the extent that they are modified or supplanted by the special rules of §§ 2.301 through 2.309. In the event of a conflict between the provisions of the basic rules and those of a special rule which is applicable to the particular information in question, the provision of the special rule shall govern.

(d) If two or more of the sections containing special rules apply to the particular information in question, and the applicable sections prescribe conflicting special rules for the treatment of the information, the rule which provides greater or wider availability to the public of the information shall govern.

(e) For most purposes, a document or other record may usefully be treated as a single unit of "information," even though in fact the document or record is comprised of a collection of individual items of information. However, in applying the provisions of this subpart, it will often be necessary to separate the individual items of information into two or more categories, and to afford different treatment to the information in each such category. The need for differentiation of this type may arise, e.g., because a business confidentiality claim covers only a portion of a record, or because only a portion of the record is eligible for confidential treatment. EPA offices taking action under this subpart must be alert to this problem.

(f) In taking actions under this subpart, EPA offices should consider whether it is possible to obtain the affected business's consent to disclosure of useful portions of records while protecting the information which is or may be entitled to confidentiality (e.g., by withholding such portions of a record as would identify a business, or by disclosing data in the form of industry-wide aggregates, multi-year averages or totals, or some similar form).

(g) This subpart does not apply to questions concerning entitlement to confidential treatment or information which concerns an individual solely in his personal, as opposed to business, capacity.

§ 2.203 Notice to be included in EPA requests, demands, and forms; method of asserting business confidentiality claim; effect of failure to assert claim at time of submission.

(a) Notice to be included in certain requests and demands for information, and in certain forms. Whenever an EPA office makes a written request or demand that a business furnish information which, in the office's opinion, is likely to

be regarded by the business as entitled to confidential treatment under this subpart, or whenever an EPA office prescribes a form for use by businesses in furnishing such information, the request, demand, or form shall include or enclose a notice which—

(1) States that the business may, if it desires, assert a business confidentiality claim covering part or all of the information, in the manner described by paragraph (b) of this section, and that information covered by such a claim will be disclosed by EPA only to the extent, and by means of the procedures, set forth in this subpart;

(2) States that if no such claim accompanies the information when it is received by EPA, it may be made available to the public by EPA without further notice to the business; and

(3) Furnishes a citation of the location of this subpart in the Code of Federal Regulations and the Federal Register.

(b) Method and time of asserting business confidentiality claim. A business which is submitting information to EPA may assert a business confidentiality claim covering the information by placing on (or attaching to) the information, at the time it is submitted to EPA, a cover sheet, stamped or typed legend, or other suitable form of notice employing language such as "trade secret," "proprietary," or "company confidential." Allegedly confidential portions of otherwise non-confidential documents should be clearly identified by the business, and may be submitted separately to facilitate identification and handling by EPA. If the business desires confidential treatment only until a certain date or until the occurrence of a certain event, the notice should so state.

(c) Effect of failure to assert claim at time of submission of information. If information was submitted by a business to EPA on or after [the effective date of this subpart], in response to an EPA request or demand (or on an EPA-prescribed form) which contained the substance of the notice required by paragraph (a) of this section, and if no business confidentiality claim accompanied the information when it was received by EPA, the inquiry to the business normally required by § 2.204(c) (2) need not be made. If a claim covering the information is received after the information itself is received, EPA will make such efforts as are administratively practicable to associate the late claim with copies of the previously-submitted information in EPA files (see § 2.204(c) (1)). However, EPA cannot assure that such efforts will be effective, in light of the possibility of prior disclosure or widespread prior dissemination of the information.

§ 2.204 Initial action by EPA office.

(a) Situations requiring action. This section prescribes procedures to be used by EPA offices in making initial determinations of whether business information is entitled to confidential treatment for reasons of business confidentiality.

Action shall be taken under this section whenever an EPA office:

(i) learns that it is responsible for responding to a request under 5 U.S.C. 552 for the release of business information; in such a case, the office shall issue an initial determination within the period specified in § 2.112.

(ii) desires to determine whether business information in its possession is entitled to confidential treatment, even though no request for release of the information has been received; or

(iii) determines that it is likely that EPA eventually will be requested to disclose the information at some future date and thus will have to determine whether the information is entitled to confidential treatment. In such a case this section's procedures should be initiated at the earliest practicable time, in order to increase the time available for preparation and submission of comments and for issuance of determinations, and to make easier the task of meeting response deadlines if a request for release of the information is later received under 5 U.S.C. 552.

(b) *Previous confidentiality determination.* The EPA office shall first ascertain whether there has been a previous determination, issued by a Federal court or by an EPA legal office acting under this subpart, holding that the information in question is entitled to confidential treatment for reasons of business confidentiality.

(1) If such a determination holds that the information is entitled to confidential treatment, the EPA office shall furnish any person whose request for the information is pending under 5 U.S.C. 552 an initial determination (see § 2.111 and § 2.113) that the information has previously been determined to be entitled to confidential treatment, and that the request is therefore denied. The office shall furnish such person the appropriate case citation or EPA determination. If the EPA office believes that a previous determination which was issued by an EPA legal office may be improper or no longer valid, the office shall so inform the EPA legal office, which shall consider taking action under § 2.205(h).

(2) With respect to all information not known to be covered by such a previous determination, the EPA office shall take action under paragraph (c) of this section.

(c) *Determining existence of business confidentiality claims.*

(1) Whenever action under this paragraph is required by paragraph (b)(2) of this section, the EPA office shall examine the information and the office's records to determine which businesses, if any, are affected businesses (see § 2.201(d)), and to determine which businesses, if any, have asserted business confidentiality claims which remain applicable to the information. If any business is found to have asserted an applicable claim, the office shall take action under paragraph (d) of this section with respect to each such claim.

(2)(i) If the examination conducted under paragraph (c)(1) of this section

discloses the existence of any business claim, although it has not asserted a claim, might be expected to assert a claim if it knew EPA proposed to disclose the information, the EPA office shall contact a responsible official of each such business to learn whether the business asserts a claim covering the information. However, no such inquiry need be made to any business—

(A) which failed to assert a claim covering the information when responding to an EPA request or demand, or supplying information on an EPA form, which contained the substance of the statements prescribed by § 2.203(a);

(B) which otherwise failed to assert a claim covering the information after being informed by EPA that such failure could result in disclosure of the information to the public; or

(C) which has otherwise waived or withdrawn a claim covering the information.

(ii) If a request for release of the information under 5 U.S.C. 552 is pending at the time inquiry is made under this paragraph (c)(2), the inquiry shall be made by telephone or equally prompt means, and the responsible official contacted shall be informed that any claim the business wishes to assert must be brought to the EPA office's attention no later than the close of business on the third working day after such inquiry.

(iii) A record shall be kept of the results of any inquiry under this paragraph (c)(2). If any business makes a claim covering the information, the EPA office shall take further action under paragraph (d) of this section.

(3) If, after the examination under paragraph (c)(1) of this section, and after any inquiry made under paragraph (c)(2) of this section, the EPA office knows of no claim covering the information and the time for response to any inquiry has passed, the information shall be treated for purposes of this subpart as not entitled to confidential treatment.

(d) *Preliminary determination.* Whenever action under this paragraph is required by paragraph (c)(1) or (c)(2) of this section on any business's claim, the EPA office shall make a determination with respect to each such claim. Each determination shall be made after consideration of the provisions of § 2.203, the applicable substantive criteria in § 2.208 or elsewhere in this subpart, and any previously-issued determinations under this subpart which are applicable.

(1) If, in connection with any business's claim, the office determines that the information may be entitled to confidential treatment, the office shall—

(i) Furnish the notice of opportunity to submit comments prescribed by paragraph (e) of this section to each business which is known to have asserted an applicable claim and which has not previously been furnished such notice with regard to the information in question;

(ii) Furnish, to any person whose request for release of the information is pending under 5 U.S.C. 552, a determination (in accordance with § 2.113) that the information may be entitled to con-

fidential treatment under this subpart and 5 U.S.C. 552(b)(4), that further inquiry by EPA pursuant to this subpart is required before a final determination on the request can be issued, that the person's request is therefore initially denied, and that after further inquiry a final determination will be issued by an EPA legal office, and

(iii) Refer the matter to the appropriate EPA legal office, furnishing the information required by paragraph (f) of this section.

(2) If, in connection with all applicable claims, the office determines that the information clearly is not entitled to confidential treatment, the office shall take the actions required by § 2.205(f). However, if a business has previously been furnished notice under § 2.205(f) with respect to the same information, no further notice need be furnished to that business. A copy of each notice furnished to a business under this paragraph (c)(2) and § 2.205(f) shall be forwarded promptly, to the appropriate EPA legal office.

(e) *Notice to affected businesses, opportunity to comment.*

(1) Whenever required by paragraph (d)(1) of this section, the EPA office shall promptly furnish each business a written notice stating that EPA is determining under this subpart whether the information is entitled to confidential treatment, and affording the business an opportunity to comment. The notice shall be furnished by certified mail (return receipt requested), by personal delivery or by other means which allows verification of the fact and date of receipt. The notice shall state the address of the office to which the business's comments shall be addressed (the appropriate EPA legal office, unless the General Counsel has directed otherwise), the time allowed for comments, and the method for requesting a time extension under § 2.205(b)(2). The notice shall further state that EPA will construe a business's failure to furnish timely comments as a waiver of the business's claim.

(2) If action under this section is occasioned by a request for the information under 5 U.S.C. 552, the period for comments shall be 15 working days after the date of the business's receipt of the written notice. In other cases, the EPA office shall establish a reasonable period for comments (not less than 15 working days after the business's receipt of the written notice). In all cases, the notice shall call the business's attention to the provisions of § 2.205(b).

(3) At or about the time the written notice is furnished, the EPA office shall orally inform a responsible representative of the business (by telephone or otherwise) that the business should expect to receive the written notice, and shall request the business to contact the EPA office if the written notice has not been received within a few days so that EPA may furnish a duplicate notice.

(4) The written notice required by paragraph (e)(1) of this section shall invite the business's comments on the fol-

lowing points (subject to paragraph (e) (5) of this section):

(i) The portions of the information which are alleged to be entitled to confidential treatment;

(ii) The period of time for which confidential treatment is desired by the business (e.g., until a certain date, until the occurrence of a specified event, or permanently);

(iii) The purpose for which the information was furnished to EPA and the approximate date of submission, if known;

(iv) Whether a business confidentiality claim accompanied the information when it was received by EPA;

(v) Measures taken by the business to guard against undesired disclosure of the information to others;

(vi) The extent to which the information has been disclosed to others, and the precautions taken in connection therewith;

(vii) Pertinent confidentiality determinations, if any, by EPA or other Federal agencies, and a copy of any such determination, or reference to it, if available;

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

(ix) Whether the business asserts that the information is voluntarily submitted information as defined in § 2.201(b), and if so, whether and why disclosure of the information would tend to lessen the availability to EPA of similar information in the future.

(5) To the extent that the EPA office already possesses the relevant facts, the notice need not solicit responses to the matters addressed in paragraphs (e) (4) (i) through (e) (4) (ix) of this section, although the notice shall request confirmation of EPA's understanding of such facts where appropriate.

(6) The notice shall refer to § 2.205(c) and shall include the statement prescribed by § 2.203(a).

(f) *Materials to be furnished to EPA legal office.* When a matter is referred to an EPA legal office under paragraph (d) (1) of this section, the EPA office taking action under this section shall forward promptly to the EPA legal office the following items:

(1) A copy of the information in question, or (where the quantity or form of the information makes forwarding a copy of the information impractical) representative samples, a description of the information, or both;

(2) A description of the circumstances and date of EPA's acquisition of the information;

(3) The name, address, and telephone number of the EPA employee(s) most familiar with the information;

(4) The name, address and telephone number of each business which asserts

an applicable business confidentiality claim;

(5) A copy of each applicable claim (or the record of the assertion of the claim), and a description of when and how each claim was asserted;

(6) Comments concerning each business's compliance or noncompliance with applicable requirements of § 2.203;

(7) A copy of any request for release of the information pending under 5 U.S.C. 552;

(8) The office's comments concerning the appropriate substantive criteria under this subpart, and information the office possesses concerning the information's entitlement to confidential treatment; and

(9) Copies of other correspondence or memoranda which pertain to the matter.

§ 2.205 Final confidentiality determination by EPA legal office.

(a) *Role of EPA legal office.*

(1) The appropriate EPA legal office (see paragraph (i) of this section) is responsible for making the final administrative determination of whether or not business information covered by a business confidentiality claim is entitled to confidential treatment under this subpart.

(2) When a request for release of the information under 5 U.S.C. 552 is pending, the EPA legal office's determination shall serve as the final determination on appeal from an initial denial of the request.

(i) If the initial denial was issued under § 2.204(b) (1), a final determination by the EPA legal office is necessary only if the requestor has actually filed an appeal.

(ii) If the initial denial was issued under § 2.204(d) (1), however, the EPA legal office shall issue a final determination in every case, unless the request has been withdrawn. (Initial denials under § 2.204(d) (1) are of a procedural nature, to allow further inquiry into the merits of the matter, and a requestor is entitled to a decision on the merits.) If an appeal from such a denial has not been received by the EPA Freedom of Information Officer on the tenth working day after issuance of the denial, the matter shall be handled as if an appeal had been received on that day, for purposes of establishing a schedule for issuance of an appeal decision under § 2.117 of this part.

(b) *Comment period; extensions; untimeliness as waiver of claim.*

(1) Each business which has been furnished the notice and opportunity to comment prescribed by § 2.204(d) (1) and § 2.204(e) shall furnish its comments to the office specified in the notice in a manner reasonably calculated to result in receipt of the comments by that office not later than the date specified for receipt in the notice (or the date established in lieu thereof under this section).

(2) The period for submission of comments may be extended if, before the comments are due, a request for an extension of the comment period is made by the business and approved by the EPA

legal office. Except in extraordinary circumstances, the EPA legal office will not approve such an extension without the consent of any person whose request for release of the information under 5 U.S.C. 552 is pending.

(3) The period for submission of comments by a business may be shortened in the manner described in paragraph (g) of this section.

(4) If a business's comments have not been received by the specified EPA office on the date they are due, that office shall promptly inquire whether the business has complied with paragraph (b) (2) of this section. If the business has complied but the comments have been lost in transmission, duplicate comments shall be requested.

(c) *Confidential treatment of comments from business.* If information submitted to EPA by a business as part of its comments under this section pertains to the business's claim, is not otherwise possessed by EPA, and is marked when received in accordance with § 2.203(b), it will be regarded by EPA as entitled to confidential treatment and will not be disclosed by EPA without the business's consent, unless its disclosure is duly ordered by a Federal court, notwithstanding other provisions of this subpart to the contrary.

(d) *Types of final determinations, matters to be considered.*

(1) If the EPA legal office finds that a business has failed to furnish comments under paragraph (b) of this section in a manner reasonably calculated to result in receipt of the comments not later than the date the comments were due, it shall determine that the business has waived its claim. If, after application of the preceding sentence, no claim applies to the information, the office shall determine that the information is not entitled to confidential treatment under this subpart and, subject to § 2.210, is available to the public.

(2) In all other cases, the EPA legal office shall consider each business's claim and comments, the various provisions of this subpart, any previously-issued determinations under this subpart which are pertinent, the materials furnished it under § 2.204(f), and such other materials as it finds appropriate. With respect to each claim, the office shall determine whether or not the information is entitled to confidential treatment for the benefit of the business that asserted the claim, and the period of any such entitlement (e.g., until a certain date, until the occurrence of a specified event, or permanently), and shall take further action under paragraph (e) or (f) of this section, as appropriate.

(3) Whenever the claims of two or more businesses apply to the same information, the EPA legal office shall take action appropriate under the particular circumstances to protect the interests of all persons concerned (including any person whose request for the information is pending under 5 U.S.C. 552).

(e) *Determination that information is entitled to confidential treatment.* If the

EPA legal office determines that the information is entitled to confidential treatment for the full period requested by the business which made the claim, EPA shall maintain the information in confidence for such period, subject to paragraph (h) of this section, § 2.209, and the other provisions of this subpart which authorize disclosure in specified circumstances, and the office shall so inform the business. If any person's request for the release of the information is then pending under 5 U.S.C. 552, the EPA legal office shall issue a final determination denying that request.

(f) *Determination that information is not entitled to confidential treatment; notice; waiting period; release of information.*

(1) Notice of denial (or partial denial) of a business confidentiality claim, in the form prescribed by paragraph (f)(2) of this section, shall be furnished—

(i) By the EPA office taking action under § 2.204, to each business on behalf of which a claim has been made, whenever § 2.204(d)(2) requires such notice; and

(ii) By the EPA legal office taking action under this section, to each business which has asserted a claim applicable to the information and which has furnished timely comments under paragraph (b) of this section, whenever the EPA legal office determines that the information is not entitled to confidential treatment under this subpart for the benefit of the business, or determines that the period of any entitlement to confidential treatment is shorter than that requested by the business.

(2) The notice prescribed by paragraph (f)(1) of this section shall be written, and shall be furnished by certified mail (return receipt requested), by personal delivery, or by other means which allows verification of the fact of receipt and the date of receipt. The notice shall state the basis for the determination, that it constitutes final agency action concerning the business confidentiality claim, and that such final agency action may be subject to judicial review under chapter 7 of title 5, United States Code. With respect to EPA's implementation of the determination, the notice shall state that (subject to § 2.210) EPA will make the information available to the public on the tenth working day after the date of the business's receipt of the written notice (or on such later date as is established in lieu thereof by the EPA legal office under paragraph (f)(3) of this section), unless the EPA legal office has first been notified of the business's commencement of an action in a Federal court to obtain judicial review of the determination, and to obtain preliminary injunctive relief against disclosure. The notice shall further state that if such an action is timely commenced, EPA may nonetheless make the information available to the public (in the absence of an order by the court to the contrary), once the court has denied a motion for a preliminary injunction in the action or has otherwise up-

held the EPA determination, or whenever it appears to the EPA legal office, after reasonable notice to the business, that the business is not taking appropriate measures to obtain a speedy resolution of the action. If the information has been found to be temporarily entitled to confidential treatment, the notice shall further state that the information will not be disclosed prior to the end of the period of such temporary entitlement to confidential treatment.

(3) The period established in a notice under paragraph (f)(2) of this section for commencement of an action to obtain judicial review may be extended if, before the expiration of such period, a request for an extension is made by the business and approved by the EPA legal office. Except in extraordinary circumstances, the EPA legal office will not approve such an extension without the consent of any person whose request for release of the information under 5 U.S.C. 552 is pending.

(4) After the expiration of any period of temporary entitlement to confidential treatment, a determination under this paragraph (f) shall be implemented by the EPA legal office by making the information available to the public (in the absence of a court order prohibiting disclosure) whenever—

(i) The period provided for commencement by a business of an action to obtain judicial review of the determination has expired without notice to the EPA legal office of commencement of such an action;

(ii) The court, in a timely-commenced action, has denied the business's motion for a preliminary injunction, or has otherwise upheld the EPA determination; or

(iii) The EPA legal office, after reasonable notice has been provided to the business, finds that the business is not taking appropriate measures to obtain a speedy resolution of the timely-commenced action.

(5) Any person whose request for release of the information under 5 U.S.C. 552 is pending at the time notice is given under paragraph (f)(2) of this section shall be furnished a determination under 5 U.S.C. 552 stating the circumstances under which the information will be released.

(g) *Emergency situations.* If the General Counsel finds that disclosure of information covered by a claim would be helpful in alleviating a situation posing an imminent and substantial danger to public health or safety, he may prescribe and make known to interested persons such shorter comment period (paragraph (b) of this section), post-determination waiting period (paragraph (f) of this section), or both, as he finds necessary under the circumstances.

(h) *Modification of prior determinations.* A determination that information is entitled to confidential treatment for the benefit of a business, made under this subpart by an EPA legal office, shall continue in effect in accordance with its terms until an EPA legal office taking action under this section, or under § 2.206 or § 2.207, issues a final determination

stating that the earlier determination no longer describes correctly the information's entitlement to confidential treatment because of change in the applicable law, newly-discovered or changed facts, or because the earlier determination was clearly erroneous. If an EPA legal office tentatively concludes that such an earlier determination is of questionable validity, it shall so inform the business, and shall afford the business an opportunity to furnish comments on pertinent issues in the manner described by § 2.204(e) and paragraph (b) of this section. If, after consideration of any timely comments submitted by the business, the EPA legal office makes a revised final determination that the information is not entitled to confidential treatment, or that the period of entitlement to such treatment will end sooner than it would have ended under the earlier determination, the office will follow the procedure described in paragraph (f) of this section. Determinations under this section may be made only by, or with the concurrence of, the General Counsel.

(i) *Delegation and redelegation of authority.* Unless the General Counsel otherwise directs, or this subpart otherwise specifically provides, determinations and actions required by this subpart to be made or taken by an EPA legal office shall be made or taken by the appropriate Regional Counsel whenever the EPA office taking action under § 2.204 or § 2.206(b) is under the supervision of a Regional Administrator, and by the General Counsel in all other cases. The General Counsel may redelegate any or all of his authority under this subpart to any attorney employed by EPA on a full-time basis under the General Counsel's supervision. A Regional Counsel may redelegate any or all of his authority under this subpart to any attorney employed by EPA on a full-time basis under the Regional Counsel's supervision.

§ 2.206 Advance confidentiality determinations.

(a) An advance determination under this section may be issued by an EPA legal office if—

(1) EPA has requested or demanded that a business furnish business information to EPA;

(2) The business asserts that the information, if submitted, would constitute voluntarily submitted information under § 2.201(i);

(3) The business will voluntarily submit the information for use by EPA only if EPA first determines that the information is entitled to confidential treatment under this subpart, and

(4) The EPA office which desires submission of the information has requested that the EPA legal office issue a determination under this section.

(b) The EPA office requesting an advance determination under this section shall—

(1) Arrange to have the business furnish directly to the EPA legal office a copy of the information (or, where feasible, a description of the nature of

the information sufficient to allow a determination to be made), as well as the business's comments concerning the matters addressed in § 2.204(e)(4), excluding, however, matters addressed in § 2.204(e)(4)(iii) and (e)(4)(iv); and

(2) Furnish to the EPA legal office the materials referred to in § 2.204(f)(3), (f)(7), (f)(8), and (f)(9).

(c) In making a determination under this section, the EPA legal office shall first determine whether or not the information would constitute voluntarily submitted information under § 2.201(i). If the information would constitute voluntarily submitted information, the legal office shall further determine whether the information is entitled to confidential treatment.

(d) If the EPA legal office determines that the information would not constitute voluntarily submitted information, or determines that it would constitute voluntarily submitted information but would not be entitled to confidential treatment, it shall so inform the business and the EPA office which requested the determination, stating the basis of the determination, and shall return to the business all copies of the information which it may have received from the business (except that if a request under 5 U.S.C. 552 for release of the information is received while the EPA legal office is in possession of the information, the legal office shall retain a copy of the information, but shall not disclose it unless ordered by a Federal court to do so). The legal office shall not disclose the information to any other EPA office or employee and shall not use the information for any purpose except the determination under this section, unless otherwise directed by a Federal court.

(e) If the EPA legal office determines that the information would constitute voluntarily submitted information and that it is entitled to confidential treatment, it shall so inform the EPA office which requested the determination and the business which submitted it, and shall forward the information to the EPA office which requested the determination.

§ 2.207 Class determinations.

(a) The General Counsel may make and issue a class determination under this section if he finds that—

(1) EPA possesses, or is obtaining, related items of business information;

(2) One or more characteristics common to all such items of information will necessarily result in identical treatment for each such item under one or more of the provisions in this subpart, and that it is therefore proper to treat all such items as a class for one or more purposes under this subpart; and

(3) A class determination would serve a useful purpose.

(b) A class determination shall clearly identify the class of information to which it pertains.

(c) A class determination may state that all of the information in the class—

(1) Is, or is not, voluntarily submitted information under § 2.201(i);

(2) Is, or is not, governed by a particular section of this subpart, or by a particular set of substantive criteria under this subpart;

(3) Fails to satisfy one or more of the applicable substantive criteria, and is therefore ineligible for confidential treatment;

(4) Satisfies one or more of the applicable substantive criteria; or

(5) Satisfies one or more of the applicable substantive criteria during a certain period, but will be ineligible for confidential treatment thereafter.

(d) The purpose of a class determination is simply to make known the Agency's position regarding the manner in which information within the class will be treated under one or more of the provisions of this subpart. Accordingly, the notice of opportunity to submit comments referred to in § 2.204(d)(1)(ii) and § 2.205(b), and the list of materials required to be furnished to the EPA legal office under § 2.204(d)(1)(iii), may be modified to reflect the fact that the class determination has made unnecessary the submission of materials pertinent to one or more issues. Moreover, in appropriate cases, action based on the class determination may be taken under § 2.204(b)(1), § 2.204(d), § 2.205(d), or § 2.206. However, the existence of a class determination shall not, of itself, affect any right a business may have to receive any notice under § 2.204(d)(2) or § 2.205(f).

§ 2.208 Substantive criteria for use in confidentiality determinations.

Determinations issued under §§ 2.204 through 2.207 shall hold that business information is entitled to confidential treatment for the benefit of a particular business if—

(a) The business has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn;

(b) The business has satisfactorily shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;

(c) The information is not, and has not been, reasonably obtainable without the business's consent by other persons (other than governmental bodies) by use of legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding);

(d) No statute specifically requires disclosure of the information; and

(e) Either—

(1) The business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business's competitive position; or

(2) The information is voluntarily submitted information (see § 2.201(i)), and its disclosure would be likely to impair the Government's ability to obtain necessary information in the future.

§ 2.209 Disclosure in special circumstances.

(a) General. Information which, under this subpart, is not available to the public may nonetheless be disclosed to the per-

sons, and in the circumstances, described by paragraphs (b) through (f) of this section. (This section shall not be construed to restrict the disclosure of information which has been determined to be available to the public.)

(b) *Disclosure to Congress or the Comptroller General.* Upon receipt of a written request in appropriate form, EPA will disclose business information to either House of Congress, to a committee or subcommittee of Congress, or to the Comptroller General, unless a statute forbids such disclosure. In making such a disclosure, EPA will inform the requesting body of any unresolved business confidentiality claim known to cover the information, and of any determination by EPA under this subpart holding that the information is entitled to confidential treatment.

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

(1) EPA receives a written request for disclosure of the information from a duly authorized officer or employee of the other agency;

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

(3) EPA notifies the other agency of any unresolved business confidentiality claim covering the information, and of any determination under this subpart holding that the information is entitled to confidential treatment; and

(4) The other agency agrees not to disclose the information further unless—

(i) The other agency has statutory authority both to compel production of the information and to make the proposed disclosure;

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

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

(d) *Court-ordered disclosure.* EPA may disclose any business information in the manner and to the extent ordered by a Federal court.

(e) *Disclosure within EPA.* An EPA office, officer, or employee may disclose any business information to another EPA office, officer, or employee with an official need for the information.

(f) *Disclosure with consent of business.* EPA may disclose any business information to any person if EPA has obtained the prior consent of each affected business to such disclosure.

(g) *Record of disclosures to be maintained.* Each EPA office which discloses information to Congress, a committee or subcommittee of Congress, the Comptroller General, or another Federal agency under the authority of paragraph (b) or (c) of this section, shall maintain a record of the fact of such disclosure for a period of not less than 36 months after such disclosure. Such a record, which may be in the form of a log, shall show the name of the affected businesses, the date of disclosure, the person or body to whom disclosure was made,

and a description of the information disclosed.

§ 2.210 Nondisclosure for reasons other than business confidentiality or where disclosure is prohibited by other statute.

(a) Information which is not entitled to confidential treatment under this subpart shall be made available to the public (using the procedures set forth in §§ 2.204 and 2.205) if its release is requested under 5 U.S.C. 552, unless EPA determines (under subpart A of this part) that, for reasons other than reasons of business confidentiality, the information is exempt from mandatory disclosure and cannot or should not be made available to the public. Any such determination under subpart A shall be coordinated with actions taken under this subpart for the purpose of avoiding delay in responding to requests under 5 U.S.C. 552.

(b) Notwithstanding any other provision of this subpart, if any statute not cited in this subpart appears to require EPA to give confidential treatment to any business information for reasons of business confidentiality, the matter shall be referred promptly to an EPA legal office for resolution. Pending resolution, such information shall be treated as if it were entitled to confidential treatment.

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

(a) No EPA officer or employee may disclose, or use for his or her private gain or advantage, any business information which came into his or her possession, or to which he or she gained access, by virtue of his or her official position or employment, except as authorized by this subpart.

(b) Each EPA officer or employee who has custody or possession of business information shall take appropriate measures to properly safeguard such information and to protect against its improper disclosure.

(c) Violation of paragraphs (a) or (b) of this section shall constitute grounds for dismissal, suspension, fine, or other adverse personnel action. Willful violation of paragraph (a) of this section may result in criminal prosecution under 18 U.S.C. 1905 or other applicable statute.

(d) Each contractor with EPA, and each employee of such contractor, who is furnished business information, by EPA under § 2.301(h), § 2.302(h), § 2.304(h), § 2.307(h), or § 2.308(i), shall use or disclose that information only as permitted by the contract under which the information was furnished. Any violation of this paragraph shall constitute grounds for debarment or suspension of the contractor or contractor's employee in question. Willful violation of this paragraph may result in criminal prosecution.

§ 2.212 Establishment of control offices for categories of business information.

(a) The Administrator, by order, may establish one or more mutually exclusive categories of business information, and may designate for each such category an EPA office (hereinafter referred to as a "control office") which shall have responsibility for taking actions (other than actions required to be taken by an EPA legal office) with respect to all information within such category.

(b) If a control office has been assigned responsibility for a category of business information, no other EPA office, officer, or employee may make available to the public (or otherwise disclose to persons other than EPA officers and employees) any information in that category without first obtaining the concurrence of the control office. Requests under 5 U.S.C. 552 for release of such information shall be referred to the control office.

(c) A control office shall take the actions and make the determinations required by § 2.204 with respect to all information in any category for which the control office has been assigned responsibility.

(d) A control office shall maintain a record of the following, with respect to items of business information in categories for which it has been assigned responsibility:

- (1) Business confidentiality claims;
- (2) Comments submitted in support of claims;
- (3) Waivers and withdrawals of claims;
- (4) Actions and determinations by EPA under this subpart;
- (5) Actions by Federal courts; and
- (6) Related information concerning business confidentiality.

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

(a) A business which wishes to designate a person or office as the proper addressee of communications from EPA to the business under this subpart may do so by furnishing in writing to the Freedom of Information Officer (A-101), Environmental Protection Agency, 401 M St. SW., Washington, D.C. 20460, the following information: the name and address of the business making the designation; the name, address, and telephone number of the designated person or office; and a request that EPA inquiries and communications (oral and written) under this subpart, including inquiries and notices which require reply within deadlines if the business is to avoid waiver of its rights under this subpart, be furnished to the designee pursuant to this section. Only one person or office may serve at any one time as a business's designee under this subpart.

(b) If a business has named a designee under this section, the following EPA inquiries and notices to the business shall be addressed to the designee:

(1) Inquiries concerning a business's desire to assert a business confidentiality claim, under § 2.204(c) (2) (i) (A);

(2) Notices affording opportunity to substantiate confidentiality claims, under § 2.204(d) (1) and § 2.204(e);

(3) Inquiries concerning comments, under § 2.205(b) (4);

(4) Notices of denial of confidential treatment and proposed disclosure of information, under § 2.205(f);

(5) Notices concerning shortened comment and/or waiting periods under § 2.205(g);

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

(7) Notices to affected businesses under § 2.301(g) and § 2.301(h), and analogous provisions in § 2.302, § 2.303, and § 2.304.

(c) Businesses making designations under this section should bear in mind that several working days may be required for the dissemination within EPA of information concerning such designations.

§§ 2.214-2.300 [Reserved]

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

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

(1) "Act" means the Clean Air Act, as amended, 42 U.S.C. 1857 et seq.

(2) (i) "Emission data" means, with reference to any source of emission of any substance into the air—

(A) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

(B) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and

(C) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

(ii) Notwithstanding paragraph (a) (2) (i) of this section, the following information shall be considered to be "emission data" only to the extent necessary to allow EPA to disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation, or to allow EPA to demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation:

(A) Information concerning research, or the results of research, on any project, method, device or installation (or any component thereof) which was produced, developed, installed, and used only for research purposes; and

(B) Information concerning any product, method, device, or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.

(3) "Standard or limitation" means any emission standard or limitation established or publicly proposed pursuant to the Act or pursuant to any regulation under the Act.

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

(5) "Manufacturer" has the meaning given it in section 214(1) of the Act, 42 U.S.C. 1857f-7(1).

(b) *Applicability.* (1) This section applies to business information which was—

(i) Provided or obtained under section 114 of the Act, 42 U.S.C. 1857c-9, by the owner or operator of any stationary source, for the purpose (A) of developing or assisting in the development of any implementation plan under section 110 or 111(d) of the Act, 42 U.S.C. 1857c-5, 1857c-6(d), any standard of performance under section 111 of the Act, 42 U.S.C. 1857c-6, or any emission standard under section 112 of the Act, 42 U.S.C. 1856c-7, (B) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (C) of carrying out section 119 or 303 of the Act, 42 U.S.C. 1857c-10, 1857h-1;

(ii) Provided or obtained under section 208 of the Act, 42 U.S.C. 1857f-6, by any manufacturer, for the purpose of enabling the Administrator to determine whether such manufacturer has acted or is acting in compliance with the Act and regulations under the Act; or

(iii) Provided in response to a subpoena for the production of papers, books, or documents issued under the authority of section 307(a) of the Act, 42 U.S.C. 1857h-5(a).

(2) Information will be considered to have been provided or obtained under section 114 of the Act if it was provided in response to a request by EPA made for any of the purposes stated in section 114, or if its submission could have been required under section 114, regardless of whether section 114 was cited as the authority for any request for the information, whether an order to provide the information was issued under section 113(a) of the Act, 42 U.S.C. 1857c-8(a), whether an action was brought under section 113(b) of the Act, 42 U.S.C. 1857c-8(b), or whether the information was provided directly to EPA or through some third person.

(3) Information will be considered to have been provided or obtained under section 208 of the Act if it was provided in response to a request by EPA made for any of the purposes stated in section 208,

or if its submission could have been required under section 208, regardless of whether section 208 was cited as the authority for any request for the information, whether an action was brought under section 204 of the Act, 42 U.S.C. 1857f-3, or whether the information was provided directly to EPA or through some third person.

(4) Information will be considered to have been provided or obtained under section 307(a) of the Act if it was provided in response to a subpoena issued under section 307(a), or if its production could have been required by subpoena under section 307(a), regardless of whether section 307(a) was cited as the authority for any request for the information, whether a subpoena was issued by EPA, whether a court issued an order under section 307(a), or whether the information was provided directly to EPA or through some third person.

(5) This section specifically does not apply to information obtained under section 115(j) or 211(b) of the Act, 42 U.S.C. 1857d(j), 1857f-6c(b).

(c) *Basic rules which apply without change.* Section 2.201 through § 2.205, § 2.207, § 2.209, and § 2.211 through § 2.213 apply without change to information to which this section applies.

(d) *Special procedure for advance confidentiality determinations.* Section 2.206 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies to information to which this section applies, except that information which is emission data or a standard or limitation is not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(f) *Availability of information not entitled to confidential treatment.* Section 2.210 does not apply to information to which this section applies. Emission data, standards or limitations, and any other information provided under section 114 or 208 of the Act which is determined under this subpart not to be entitled to confidential treatment, shall be available to the public notwithstanding any other provision of this part. Emission data and standards or limitations provided in response to a subpoena issued under section 307(a) of the Act shall be available to the public notwithstanding any other provision of this part. Information (other than emission data and standards or limitations) provided in response to a subpoena issued under section 307(a) of the Act, which is determined under this subpart not to be entitled to confidential treatment, shall be available to the public, unless EPA determines that the information is exempt from mandatory disclosure under 5 U.S.C. 552(b) for reasons other than reasons of business confidentiality and cannot or should not be made available to the public.

(g) *Disclosure of information relevant to a proceeding.*

(1) Under sections 114, 208 and 307 of the Act, any information to which this section applies may be released by EPA because of the relevance of the information to a proceeding, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

(2) In connection with any proceeding in which EPA contemplates taking action by means other than a decision made on the record after an opportunity for a hearing, information to which this section applies may be made available to the public under this paragraph (g).

(2). No information may be disclosed under this paragraph (g) (2) unless it has first been determined to be eligible for confidential treatment under § 2.204 and § 2.205. No information shall be made available to the public under this paragraph (g) (2) until any affected business has been informed that EPA is considering making the information available to the public under this paragraph (g) (2) in connection with an identified rulemaking proceeding, and has afforded the business a reasonable period for comment (such notice and opportunity to comment may be afforded in connection with the notice prescribed by § 2.204 (d) (1) and § 2.204(e)). Information may be made available to the public under this paragraph (g) (2) only if, after consideration of any timely comments submitted by the business, the General Counsel determines that the information is relevant to the subject of the proceeding and the EPA office conducting the proceeding determines that the public interest would be served by making the information available to the public.

(3) In connection with any proceeding in which it appears that a decision will be made on the record after an opportunity for a hearing, information to which this section applies may be made available to the public, or to one or more parties of record to the proceeding, under this paragraph (g) (3). An EPA office proposing disclosure of information under this paragraph (g) (3), shall so notify the presiding officer in writing. Upon receipt of such a notification, the presiding officer shall notify each affected business that disclosure under this paragraph (g) (3) has been proposed, and shall afford each such business a period for comment found by the presiding officer to be reasonable under the circumstances. Information may be disclosed under this paragraph (g) (3) only if, after consideration of any timely comments submitted by the business, the EPA office determines in writing that, for reasons directly associated with the conduct of the proceeding, the contemplated disclosure would serve the public interest, and the presiding officer determines in writing that the information is relevant to a matter in controversy in the proceeding. The presiding officer may condition disclosure of the information

to a party of record on the making of such protective arrangements and commitments as he finds to be warranted. Disclosure to one or more parties of record, under protective arrangements or commitments, shall not, of itself, affect the eligibility of information for confidential treatment under the other provisions of this subpart.

(4) In connection with any proceeding in which it appears that a decision will be made on the record after an opportunity for a hearing, information to which this section applies may be made available to one or more parties of record to the proceeding, under this paragraph (g) (4). A party of record seeking disclosure of information shall direct his request to the presiding officer. Upon receipt of such a request, the presiding officer shall notify each affected business that disclosure under this paragraph (g) (4) has been requested, and shall afford each such business a period for comment found by the presiding officer to be reasonable under the circumstances. Information may be disclosed to a party of record under this paragraph (g) (4) only if, after consideration of any timely comments submitted by the business, the presiding officer determines in writing that (i) the party of record has satisfactorily shown that with respect to a significant matter which is in controversy in the proceeding, the party's ability to participate effectively in the proceeding will be significantly impaired unless the information is disclosed to him, and (ii) any harm to an affected business that would result from the disclosure is likely to be outweighed by the benefit to the proceeding and to the public interest that would result from the disclosure. The presiding officer may condition disclosure of the information to a party of record on the making of such protective arrangements and commitments as he finds to be warranted. Disclosure to one or more parties of record, under protective arrangements or commitments, shall not, of itself, affect the eligibility of information to confidential treatment under the other provisions of this subpart.

(h) *Disclosure to authorized representatives.* (1) Under sections 114, 208 and 307(a) of the Act, EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h) (2) or (h) (3) of this section.

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

carry out the work required by the contract.

(ii) No information shall be disclosed under this paragraph (h) (2) unless the contract in question provides that the contractor and the contractor's employees shall use the information only for the purpose of carrying out the work required by the contract, shall refrain from disclosing the information to anyone other than EPA without the prior written approval of each affected business or of an EPA legal office, and shall return to EPA all copies of the information (and any abstracts or extracts therefrom) upon request by the EPA program office or whenever the information is no longer required by the contractor for the performance of the work required by the contract, nor unless the contract further provides that the contractor shall obtain a written agreement to honor such terms of the contract from each of the contractor's employees who will have access to the information, before such employee is allowed such access, nor unless the contract further provides that the contractor acknowledges and agrees that the contract provisions concerning the use and disclosure of business information are included for the benefit of, and shall be enforceable by, both EPA and any affected business having an interest in information concerning it supplied to the business by EPA under the contract.

(iii) Except to the extent that the EPA program office determines in writing that conduct of EPA activities would be seriously hampered by notifying affected businesses of disclosures proposed to be made under this paragraph (h) (2), no information shall be disclosed under this paragraph (h) (2) until each affected business has been furnished notice of the contemplated disclosure by the EPA program office, and has been afforded a period found reasonable by that office (not less than 5 working days) to submit its comments. Such notice shall include a description of the information to be disclosed, the identity of the contractor, the contract number, and the purposes to be served by the disclosure.

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

(3) A state or local governmental agency which has duties or responsibilities under the Act, or under regulations which implement the Act, may be considered an authorized representative of the United States for purposes of this paragraph (h). Information to which this section applies may be furnished to such an agency at the agency's written request, but only if—

(i) The agency has first furnished to the EPA office having custody of the in-

formation a written opinion from the agency's chief legal officer or counsel stating that under applicable state or local law the agency has the authority to compel a business which possesses such information to disclose it to the agency, or

(ii) Each affected business is informed of those disclosures under this paragraph (h) (3) which pertain to it, and the agency has shown to the satisfaction of an EPA legal office that the agency's use and disclosure of such information will be governed by state or local law and procedures which will provide adequate protection to the interests of affected businesses.

§ 2.302 Special rules governing certain information obtained under the Federal Water Pollution Control Act.

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

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

(2) (i) "Effluent data" means, with reference to any source of discharge of any pollutant (as that term is defined in section 502(6) of the Act, 33 U.S.C. 1362 (6))—

(A) Information necessary to determine the identity, amount, frequency, concentration, temperature, or other characteristics (to the extent related to water quality) of any pollutant which has been discharged by the source (or of any pollutant resulting from any discharge from the source), or any combination of the foregoing;

(B) Information necessary to determine the identity, amount, frequency, concentration, temperature, or other characteristics (to the extent related to water quality) of the pollutants which, under an applicable standard or limitation, the source was authorized to discharge (including, to the extent necessary for such purpose, a description of the manner or rate of operation of the source); and

(C) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

(ii) Notwithstanding paragraph (a) (2) (i) of this section, the following information shall be considered to be "effluent data" only to the extent necessary to allow EPA to disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation, or to allow EPA to demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation:

(A) Information concerning research, or the results of research, on any product, method, device, or installation (or any component thereof) which was produced, developed, installed, and used only for research purposes; and

(B) Information concerning any product, method, device, or installation (or any component thereof) designed and in-

tended to be marketed or used commercially but not yet so marketed or used.

(3) "Standard or limitation" means any prohibition, any effluent limitation, or any toxic, pre-treatment or new source performance standard established or publicly proposed pursuant to the Act or pursuant to regulations under the Act, including limitations or prohibitions in a permit issued or proposed by EPA or by a State under section 402 of the Act, 33 U.S.C. 1342.

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

(b) *Applicability.* (1) This section applies only to business information—

(i) Provided to or obtained by EPA under section 308 of the Act, 33 U.S.C. 1318, by or from the owner or operator of any point source, for the purpose of carrying out the objective of the Act (including but not limited to developing or assisting in the development of any standard or limitation under the Act, or determining whether any person is in violation of any such standard or limitation); or

(ii) Provided to or obtained by EPA under section 509(a) of the Act, 33 U.S.C. 1369(a).

(2) Information will be considered to have been provided or obtained under section 308 of the Act if it was provided in response to a request by EPA made for any of the purposes stated in section 308, or if its submission could have been required under section 308, regardless of whether section 308 was cited as the authority for any request for the information, whether an order to provide the information was issued under section 309(a)(3) of the Act, 33 U.S.C. 1319(a)(3), whether a civil action was brought under section 309(b) of the Act, 33 U.S.C. 1319(b), and whether the information was provided directly to EPA or through some third person.

(3) Information will be considered to have been provided or obtained under section 509(a) of the Act if it was provided in response to a subpoena issued under section 509(a), or if its production could have been required by subpoena under section 509(a), regardless of whether section 509(a) was cited as the authority for any request for the information, whether a subpoena was issued by EPA, whether a court issued an order under section 307(a), or whether the information was provided directly to EPA or through some third person.

(4) This section specifically does not apply to information obtained under section 310(d) or 312(g)(3) of the Act, 33 U.S.C. 1320(d), 1322(g)(3).

(c) *Basic rules which apply without change.* Section 2.201 through §§ 2.203, 2.207, 2.209 and 2.211 through 2.213 apply without change to information to which this section applies.

(d) *Special procedure for advance confidentiality determinations.* Section 2.206 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies to information to which this section applies, except that information which is effluent data or a standard or limitation is not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(f) *Availability of information not entitled to confidential treatment.* Section 2.210 does not apply to information to which this section applies. Effluent data, standards or limitations, and any other information provided or obtained under section 308 of the Act which is determined under this subpart not to be entitled to confidential treatment, shall be available to the public notwithstanding any other provision of this part. Effluent data and standards or limitations provided in response to a subpoena issued under section 509(a) of the Act shall be available to the public notwithstanding any other provision of this part. Information (other than effluent data and standards or limitations) provided in response to a subpoena issued under section 509(a) of the Act, which is determined under this subpart not to be entitled to confidential treatment, shall be available to the public, unless EPA determines that the information is exempt from mandatory disclosure under 5 U.S.C. 552(b) for reasons other than reasons of business confidentiality and cannot or should not be made available to the public.

(g) *Disclosure of information relevant to a proceeding.*

(1) Under sections 308 and 509(a) of the Act, any information to which this section applies may be released by EPA because of the relevance of the information to a proceeding, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information to which this section applies because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

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

(h) *Disclosure to authorized representatives.* (1) Under sections 308 and 509(a) of the Act, EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

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

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

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

(1) "Act" means the Noise Control Act of 1972, 42 U.S.C. 4901 et seq.

(2) "Manufacturer" has the meaning given it in 42 U.S.C. 4902(6).

(3) "Product" has the meaning given it in 42 U.S.C. 4902(3).

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

(b) *Applicability.* This section applies only to information provided to or obtained by EPA under section 13 of the Act, 42 U.S.C. 4912, by or from any manufacturer of any product to which regulations under section 6 or 8 of the Act (42 U.S.C. 4905, 4907) apply. Information will be deemed to have been provided or obtained under section 13 of the Act if it was provided in response to a request by EPA made for the purpose of enabling EPA to determine whether the manufacturer has acted or is acting in compliance with the Act, or if its submission could have been required under section 13 of the Act, regardless of whether section 13 was cited as authority for the request, whether an order to provide such information was issued under section 11(d) of the Act, 42 U.S.C. 4910(d), and whether the information was provided directly to EPA by the manufacturer or through some third person.

(c) *Basic rules which apply without change.* Section 2.201 through § 2.203, § 2.207, and § 2.209 through § 2.213 apply without change to information to which this section applies.

(d) *Special procedure for advance confidentiality determinations.* Section 2.206 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

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

(f) *Reserved.*

(g) *Disclosure of information relevant to a proceeding.* (1) Under section 13 of the Act, any information to which this section applies may be released by EPA because of its relevance to a matter in controversy in a proceeding, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

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

(h) *Reserved.*

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

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

(1) "Act" means the Safe Drinking Water Act, 42 U.S.C. 300f et seq.

(2) "Contaminant" means any physical, chemical, biological, or radiological substance or matter in water.

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

(b) *Applicability.* (1) This section applies only to information—

(i) Which was provided to or obtained by EPA pursuant to a requirement of a regulation which was issued by EPA under the Act for the purpose of—

(A) Assisting the Administrator in establishing regulations under the Act;

(B) Determining whether the person providing the information has acted or is acting in compliance with the Act; or

(C) Administering any program of financial assistance under the Act; and

(ii) Which was provided by a person—

(A) Who is a supplier of water, as defined in section 1401(5) of the Act, 42 U.S.C. 300f(5);

(B) Who is or may be subject to a primary drinking water regulation under section 1412 of the Act, 42 U.S.C. 300g-1;

(C) Who is or may be subject to an applicable underground injection control program, as defined in section 1422 (d) of the Act, 42 U.S.C. 300h-1(d);

(D) Who is or may be subject to the permit requirements of section 1424(b) of the Act, 42 U.S.C. 300h-3(b);

(E) Who is or may be subject to an order issued under section 1441(c) of the Act, 42 U.S.C. 300j(c); or

(F) Who is a grantee, as defined in section 1445(e) of the Act, 42 U.S.C. 300 j-4(e).

(2) This section applies to any information which is described by paragraph (b)(1) of this section if it was provided in response to a request by EPA or its authorized representative (or by a State agency administering any program under the Act) made for any purpose stated in paragraph (b)(1) of this section, or if its submission could have been required under section 1445 of the Act, 42 U.S.C. 300j-4, regardless of whether such section was cited in any request for the information, or whether the information was provided directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Section 2201 through § 2205, § 2207, § 2209, and § 2211 through § 2213 apply without change to information to which this section applies.

(d) *Special procedure for advance confidentiality determinations.* Section 2206 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(e) *Substantive criteria for use in confidentiality determinations.* Section 2208 applies to information to which this section applies, except that information which deals with the existence, absence, or level of contaminants in drinking water is not eligible for confidential treatment. No information to which this

section applies is voluntarily submitted information.

(f) *Nondisclosure for reasons other than business confidentiality or where disclosure is prohibited by other statute.* Section 2210 applies to information to which this section applies, except that information which deals with the existence, absence, or level of contaminants in drinking water shall be available to the public notwithstanding any other provision of this part.

(g) *Disclosure of information relevant to a proceeding.* (1) Under section 1445 (d) of the Act, any information to which this section applies may be released by EPA because of the relevance of the information to a proceeding, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information to which this section applies because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

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

(h) *Disclosure to authorized representatives.* (1) Under section 1445(d) of the Act, EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

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

§ 2.305 [Reserved]

§ 2.306 [Reserved]

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

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

(1) "Act" means the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. 136 et seq., and its predecessor, 7 U.S.C. 135 et seq.

(2) "Applicant" means any person who has submitted to EPA (or to a predecessor agency with responsibility for administering the Act) a registration statement or application for registration under the Act of a pesticide or of an establishment.

(3) "Registrant" means any person who has obtained registration under the Act of a pesticide or of an establishment.

(b) *Applicability.* This section applies to all information submitted to EPA by an applicant or registrant for the purpose of satisfying some requirement or condition of the Act or of regulations which implement the Act, including information originally submitted to EPA for some other purpose but incorporated by the applicant or registrant into a sub-

mission in order to satisfy some requirement or condition of the Act or of regulations which implement the Act. This section does not apply to information supplied to EPA by a petitioner in support of a petition for a tolerance under 21 U.S.C. 346a(d), unless the information is also described by the first sentence of this paragraph.

(c) *Basic rules which apply without change.* Section 2201 through § 2203, § 2207, and § 2210 through § 2213 apply without change to information to which this section applies.

(d) *Initial action by EPA office.* Section 2204 applies to information to which this section applies, except that the provisions of paragraph (e) of this section regarding the time allowed for seeking judicial review shall be reflected in any notice furnished to a business under § 2.204(d)(2).

(e) *Final confidentiality determination by EPA legal office.* Section 2205 applies to information to which this section applies, except that—

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

(2) In addition to the statement prescribed by the second sentence of § 2.205 (f)(2), the notice of denial of a business confidentiality claim shall state that under section 10(c) of the Act, 7 U.S.C. 136h(c), the business may commence an action in an appropriate Federal district court for a declaratory judgment;

(3) The following sentence is substituted for the third sentence of § 2.205(f)(2): "With respect to EPA's implementation of the determination, the notice shall state that (subject to § 2.210) EPA will make the information available to the public on the thirty-first (31st) calendar day after the date of the business's receipt of the written notice (or on such later date as is established in lieu thereof under paragraph (f)(3) of this section), unless the EPA legal office has first been notified of the business's commencement of an action in a Federal court to obtain judicial review of the determination or to obtain a declaratory judgment under section 10(c) of the Act and to obtain preliminary injunctive relief against disclosure;" and

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

(f) *Special procedure for advance confidentiality determinations.* Section 2206 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(g) *Substantive criteria for use in confidentiality determinations.* Section 2208 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(d) *Disclosure by person or institution.* (1) Section 2207 applies without change to information to which this section applies. In addition, under section 12(a)(2)(D) of the Act, 7 U.S.C. 136(a)(2)(D), EPA possesses authority to disclose any information to which this section applies to physicians, pharmacists, and other qualified persons needing such information for the performance of their duties. Notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart, such authority under section 12(a)(2)(D) of the Act may be exercised only in accordance with paragraph (a)(2) or (a)(3) of this section.

(2) Information to which this section applies may be disclosed (notwithstanding the fact that it might otherwise be entitled to confidential treatment under this subpart) to physicians, pharmacists, hospitals, veterinarians, law enforcement personnel, or governmental agencies with responsibilities for protection of public health, and to employees of any such persons or agencies, or to other qualified persons, when and to the extent that disclosure is necessary in order to treat illness or injury or to prevent imminent harm to persons, property, or the environment, in the opinion of the Administrator or his designee.

(3) Information to which this section applies may be disclosed (notwithstanding the fact that it otherwise might be entitled to confidential treatment under this subpart) to a person under contract to EPA to perform work for EPA in connection with the Act or regulations which implement the Act, if the EPA program office managing the contract first determines in writing that such disclosure is necessary in order that the contractor may carry out the work required by the contract. Any such disclosure to a contractor shall be made only in accordance with the procedure and requirements of § 2.301(h) (2) (ii) through (iv).

(4) Information to which this section applies, and which relates to formulas of products, may be disclosed at any public hearing or in findings of fact issued by the Administrator, to the extent and in the manner authorized by the Administrator or his designee.

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

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

(1) "Act" means the Federal Food, Drug and Cosmetic Act, as amended, 21 U.S.C. 301 et seq.

(2) "Petition" means a petition for the issuance of a regulation establishing a tolerance for a pesticide chemical or exempting the pesticide chemical from the necessity of a tolerance, pursuant to section 408(d) of the Act, 21 U.S.C. 346a(d).

(3) "Petitioner" means a person who has submitted a petition to EPA (or to a predecessor agency).

(b) *Applicability.* (1) This section applies only to business information submitted to EPA (or to an advisory com-

mittee established under the Act) by a petitioner solely in support of a petition which has not been acted on by the publication by EPA of a regulation establishing a tolerance for a pesticide chemical or exempting the pesticide chemical from the necessity of a tolerance as provided in section 408(d) (2) or (3) of the Act, 21 U.S.C. 346a(d) (2) or (3).

(2) Section 2307 rather than this section applies to information described by the first sentence of § 2.307(b) (material incorporated into submissions in order to satisfy the requirements of the Federal Insecticide, Fungicide and Rodenticide Act, as amended), even though such information was originally submitted by a petitioner in support of a petition.

(3) This section does not apply to information gathered by EPA under a proceeding initiated by EPA to establish a tolerance under section 408(e) of the Act, 21 U.S.C. 346a(e).

(c) *Basic rules which apply without change.* Section 2.201, § 2.202, § 2.207, and § 2.210-2.213 apply without change to information to which this section applies.

(d) *Effect of submission of information without claim.* Sections 2.203 (a) and (b) apply without change to information to which this section applies. Section 2.203(c), however, does not apply to information to which this section applies. A petitioner's failure to assert a claim when initially submitting a petition shall not constitute a waiver of any claim the petitioner may have.

(e) *Initial action by EPA office.* Section 2.204 applies to information to which this section applies, except that—

(1) Unless the EPA office has on file a written waiver of a petitioner's claim, a petitioner shall be regarded as an affected business, a petition shall be treated as if it were covered by a business confidentiality claim, and an EPA office acting under § 2.204(d) shall determine that the information in the petition is or may be entitled to confidential treatment and shall take action in accordance with § 2.204(d) (1);

(2) In addition to other required provisions of any notice furnished to a petitioner under § 2.204(e), such notice shall state that—

(i) Section 408(f) of the Act, 21 U.S.C. 346a(f), affords absolute confidentiality to information to which this section applies, but after publication by EPA of a regulation establishing a tolerance (or exempting the pesticide chemical from the necessity of a tolerance) neither the Act nor this section affords any protection to the information;

(ii) Information submitted in support of a petition which is also incorporated into a submission in order to satisfy a requirement or condition of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. 136 et seq., is regulated by EPA as being governed, with respect to business confidentiality, by § 2.307 rather than by this section;

(iii) Although it appears that this section may apply to the information at this time, EPA is presently engaged in

determining whether for any reason the information is entitled to confidential treatment or will be entitled to such treatment if and when this section no longer applies to the information, and

(iv) Information determined by EPA to be covered by this section will not be disclosed for as long as this section continues to apply, but will be made available to the public thereafter (subject to § 2.210) unless the business furnishes timely comments in response to the notice.

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

(1) Notwithstanding § 2.205(a), the General Counsel or his designee, rather than the Regional Counsel, shall in all cases make the determinations and take the actions required by § 2.205.

(2) In addition to the circumstances mentioned in § 2.205(f) (1), notice in the form prescribed by § 2.205(f) (2) shall be furnished to each affected business whenever information is found to be entitled to confidential treatment under section 408(f) of the Act but not otherwise entitled to confidential treatment. With respect to such cases, the following sentences shall be substituted for the third sentence of § 2.205(f) (2): "With respect to EPA's implementation of the determination, the notice shall state that (subject to § 2.210) EPA will make the information available to the public on the thirty-first (31st) calendar day after the business's receipt of the written notice (or on such later date as is established in lieu thereof under paragraph (1) (3) of this section), unless the EPA local office has first been notified of the business's commencement of an action in a Federal court to obtain judicial review of the determination and to obtain preliminary injunctive relief against disclosure; provided, that the information will not be made available to the public for so long as it is entitled to confidential treatment under section 408(f) of the Federal Food Drug and Cosmetic Act, 21 U.S.C. 346a(f)."; and

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

(g) *Special procedure for advance confidentiality determinations.* Section 2.206 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(h) *Substantive criteria for use in confidentiality determinations.* Section 2.203 does not apply to information to which this section applies. Such information shall be determined to be entitled to confidential treatment for so long as this section continues to apply to it.

(i) *Disclosure in special circumstances.*

(1) Section 2.209 applies to information to which this section applies. In addition, under Section 408(f) of the Act, 21 U.S.C. 346a(f), EPA is authorized to disclose the information to other persons. Such authority under section 408(f) of the Act may be exercised only in accordance

with paragraph (b)(2) or (b)(3) of this section.

(2) Information to which this section applies may be disclosed (notwithstanding the fact that it otherwise might be entitled to confidential treatment under this subpart) to a person under contract to EPA to perform work for EPA in connection with the Act, with the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, or regulations which implement either such Act, if the EPA program office managing the contract first determines in writing that such disclosure is necessary in order that the contractor may carry out the work required by the contract. Any such disclosure to a contractor shall be made only in accordance with the procedures and requirements of § 2.301(h)(2) (h) through (iv).

(3) Information to which this section applies may be disclosed by EPA to an advisory committee in accordance with section 408(d) of the Act, 21 U.S.C. 346a(d).

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

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

(1) "Act" means the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. 1401 et seq.

(2) "Permit" means any permit applied for or granted under the Act.

(3) "Application" means an application for a permit.

(b) *Applicability.* This section applies to all information provided to or obtained by EPA as a part of any application or in connection with any permit.

(c) *Basic rules which apply without change.* Section 2.201 through § 2.207 and § 2.209 through § 2.213 apply without change to information to which this section applies.

(d) *Substantive criteria for use in confidentiality determinations.* Section 2.208 does not apply to information to which this section applies. Pursuant to section 104(f) of the Act, 33 U.S.C. 1414(f), no information to which this section applies is eligible for confidential treatment.

PART 30—GENERAL GRANT REGULATIONS AND PROCEDURES

2. By revising § 30.235(b) to read as follows:

§ 30.235 Disclosure of information.

(b) Any person who submits to EPA any information under this Part, and who desires that EPA not disclose any or all of the information, may place on (or attach to) the information, at the time it is submitted to EPA, a cover sheet, stamped or typed legend, or other suitable form of notice employing language such as "trade secret," "proprietary," or "business confidential." Allegedly confidential portions of otherwise non-confidential documents should be clearly identified by the business, and may be submitted separately to facilitate identification and handling by EPA. Ap-

plicants should also comply with further instructions in application forms concerning the assertion of confidentiality claims. See §§ 2.203 and 2.204 of this chapter.

3. By revising § 30.320(b) to read as follows:

§ 30.320 Use and disclosure of information.

(b) An assertion of entitlement to confidential treatment of part or all of the information in an application may be made using the procedure described in § 30.235(b). See also §§ 2.203 and 2.204 of this chapter.

PART 40—RESEARCH AND DEMONSTRATION GRANTS

4. By revising § 40.155 (a) and (b) to read as follows:

§ 40.155 Availability of information.

(a) The availability to the public of information provided to, or otherwise obtained by, the Administrator under this Part shall be governed by Part 2 of this chapter.

(b) An assertion of entitlement to confidential treatment of part or all of the information in an application may be made using the procedure described in § 30.235(b). See also §§ 2.203 and 2.204 of this chapter.

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

5. By revising § 60.9 to read as follows:

§ 60.9 Availability of information.

The availability to the public of information provided to, or otherwise obtained by, the Administrator under this Part shall be governed by Part 2 of this chapter. (Information submitted voluntarily to the Administrator for the purposes of §§ 60.5 and 60.6 is governed by § 2.201 through § 2.213 of this chapter and not by § 2.301 of this chapter.)

PART 61—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS

6. By revising § 61.15 to read as follows:

§ 61.15 Availability of information.

The availability to the public of information provided to, or otherwise obtained by, the Administrator under this part shall be governed by Part 2 of this chapter.

PART 79—REGISTRATION OF FUEL ADDITIVES

7. By revising § 79.3 to read as follows:

§ 79.3 Availability of information.

The availability to the public of information provided to, or otherwise obtained by, the Administrator under this part shall be governed by Part 2 of this chapter.

PART 125—NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

8. By revising § 125.37 to read as follows:

§ 125.37 Public access to information.

Certifications issued pursuant to section 401 of the Act, the comments of all governmental agencies on a permit application, and draft permits prepared pursuant to § 125.37 shall be available to the public without restriction. The availability to the public of other information submitted by an applicant to the Administrator in connection with a permit application or which may be furnished by a permittee in connection with required periodic reports shall be governed by Part 2 of this chapter.

PART 167—REGISTRATION OF PESTICIDE-PRODUCING ESTABLISHMENTS, SUBMISSION OF PESTICIDES REPORTS, AND LABELING

9. By revising § 167.5(d) to read as follows:

§ 167.5 Pesticides reports.

(d) The availability to the public of information provided to, or otherwise obtained by, the Administrator under this Part shall be governed by Part 2 of this chapter.

PART 169—BOOKS AND RECORDS OF PESTICIDE PRODUCTION AND DISTRIBUTION

10. By revising § 169.3(c) to read as follows:

§ 169.3 Inspection.

(c) *Availability of information.* The availability to the public of information provided to, or otherwise obtained by, the Administrator under this Part shall be governed by Part 2 of this chapter.

PART 180—TOLERANCES AND EXEMPTIONS FROM TOLERANCES FOR PESTICIDES CHEMICALS IN OR ON RAW AGRICULTURAL COMMODITIES

11. By revising paragraph (c) of § 180.7 to read as follows:

§ 180.7 Petitions proposing tolerances or exemptions for pesticide residues in or on raw agricultural commodities.

(c) Except as noted in paragraph (d) of this section, a petition shall not be accepted for filing if any of the data prescribed by section 408(d) are lacking or are not set forth so as to be readily understood. The availability to the public of information provided to, or otherwise obtained by, the Agency under this Part shall be governed by Part 2 of this chapter.

APPENDIX A—SIGNIFICANT COMMENTS, RESPONSES, AND OTHER NOTEWORTHY ITEM

The significant comments (in summarized form) received in connection with the notices of proposed rule making dated May 20

and July 9, 1975, 40 FR 21987 and 23814 on the subject of confidential business information, and the responses of the Administrator to those comments, are as follows:

1. **Comment**—The proposed rule does not adequately encourage EPA offices to use techniques that would allow some parts of allegedly confidential information to be made public (e.g., masking the business's identity or disclosing the data in aggregated form).

Response—Section 2.202(b) has been modified to emphasize the possibility of use of such techniques.

2. **Comment**—The proposed rule would preclude EPA from discretionary disclosures of information EPA has found to be entitled to confidential treatment. This is contrary to the public interest and will decrease EPA's flexibility.

Response—The Administrator disagrees with this comment. A provision that EPA could disclose information by exercise of discretion, even if the information had been found to be entitled to confidential treatment, would conflict with the basic approach of the regulation, which is that businesses are entitled to know the extent of the protection EPA will afford the information submitted by them.

3. **Comment**—The definition of "voluntarily submitted information" in § 2.201(i) of the proposed rule is unclear with respect to information submitted in connection with contracts and grants.

Response—The Administrator agrees with this comment. Section 2.201(i) of the rule as promulgated below now points out that information which an EPA contractor or grantee has contractually agreed to furnish is not voluntarily submitted information. Section 2.201(i) also now states that other information which EPA may require as a condition of considering contract bids, contract or grant proposals, or the like, as well as information furnished to EPA in connection with the administration of a contract or grant, may qualify as voluntarily submitted information.

4. **Comment**—Section 2.202(d) of the proposed rule would require disclosure of an item of information, if one statute required disclosure but another statute required confidential treatment of the same information. The regulation should require confidential treatment of an item of information whenever that result is required by any statutory provision.

Response—The Administrator disagrees with this comment. The first inquiry, in a situation where two statutes appear to require different results concerning the treatment of the same information, should be an examination to determine whether in fact there is a conflict. If there is a true conflict, however, the Administrator believes that the public policy in favor of disclosure of information should prevail.

5. **Comment**—The regulation should require that requests or demands by EPA for information should specifically alert a business to the possibility of asserting a business confidentiality claim and should warn the business that the failure to assert a claim may result in the information being made available to the public.

Response—The Administrator agrees with this comment. Section 2.203 of the rule as promulgated below now requires such a warning whenever EPA requests or demands information which is likely to be regarded as confidential.

6. **Comment**—There should be no requirement that a business assert its business confidentiality claim at the time of initial submission of the information. This will tend to increase administrative difficulties and will lead businesses either to submit less information or to submit it less willingly by

focusing attention on the subject of confidentiality.

Response—The Administrator disagrees with this comment. EPA experience has shown that when a business submits information which the business regards as confidential but fails to place an appropriate marking on the information, administrative difficulties in dealing with the information are likely to result. Although the business may assume that EPA employees may afford the information confidential treatment, the EPA office which receives the information may not appreciate the need for confidentiality and may allow it to be publicly disclosed. Even if the EPA office which originally obtains the information is aware of the business's tacit confidentiality claim, other EPA offices which obtain access to the information may be unaware of the claim. A requirement that businesses assert their confidentiality claims at the time of submission of the information will greatly lessen the risk of inadvertent disclosure of information entitled to confidential treatment.

7. **Comment**—A business which fails to mark as confidential an item of information which it submits to EPA in the future should not be penalized by such failure. It should be able to assert its claim without penalty at any time unless the information has already been disclosed.

Response—Section 2.203 has been revised to provide that a business's failure to assert a claim when submitting information to EPA will not prejudice the business unless the EPA request or demand for the information notified the business of the consequences of failure to assert a claim. See also the Response to Comment 8.

8. **Comment**—A business may inadvertently or negligently fail to assert a claim at the time it submits information to EPA, even though it knew of the requirement and meant to assert a claim. Corrections of such errors should be allowed.

Response—Section 2.203 has been modified to provide that a business's failure to assert a claim when submitting information is not necessarily a waiver of the claim. The revised § 2.203 provides, however, that if, when soliciting the information, EPA afforded the business a fair opportunity to assert a claim, and if the information submitted in response was not accompanied by a claim, EPA will not make further inquiries to the business under § 2.204(c)(1). EPA will make administratively practicable efforts to associate later claims with the information in question, but cannot assure the success of such efforts. See also the Response to Comment 6.

9. **Comment**—The regulation should require a business to submit its justification for its claim of confidential treatment, not just the claim, when submitting information. This would permit speedier decisions if and when a request for release of the information is received by EPA.

Response—The Administrator disagrees with this comment. A provision has been added to § 2.204(a) which would encourage EPA offices to initiate the determination process as soon as it appears likely that requests for the information eventually will be received by EPA, even though they have not yet been received. This should produce speedier decisions. But to require detailed substantiation of a claim in every case at the time of submission of the information itself would inevitably slow the responses of businesses to requests for information, would in many cases cause businesses to expend needless effort, and would complicate EPA record-keeping unjustifiably.

10. **Comment**—Different formats for business confidentiality claims, each fairly elaborate, should be prescribed for information which is: (A) voluntarily submitted, (B) re-

quired to be submitted, or (C) submitted in connection with grants or contracts.

Response—The Administrator disagrees with this comment. This would be an unnecessary elaboration that would not effectively assist a business but would cause administrative difficulties for EPA.

11. **Comment**—In contrast to what is contemplated by § 2.204(a) of the proposed rule, EPA should never initiate the confidentiality determination with respect to an item of business information until and unless that item of information is the subject of a request for release under 5 U.S.C. 552.

Response—This comment raises the possibility that EPA may have reason to doubt to disclose business information in connection with standard-setting or other EPA activities. A procedure is needed to allow EPA, on its own initiative, to determine whether or not it may disclose business information. Moreover, the comment's advice, if followed, would not allow EPA to initiate the confidentiality determination process with regard to information which is certain or likely to be the subject of later requests under 5 U.S.C. 552, thus forcing businesses to submit comments under rigid deadlines when a request is actually received and slowing the handling of responses to requests under 5 U.S.C. 552.

12. **Comment**—Once EPA has determined that information is entitled to confidential treatment for reasons of business confidentiality, there should be no automatic re-examination of that determination merely because of the passage of time. Such a re-examination, with its attendant burden of justification of the claim by the business, should be commenced only when there is good reason to believe that the claim is no longer valid.

Response—The Administrator agrees with this comment and the criticized language in § 2.204(b) of the proposed rule has been deleted. As modified, the regulation provides that if an EPA office has reason to doubt the continuing validity of such a determination it will refer the matter to the EPA legal office for possible action under § 2.205(h).

13. **Comment**—Even if a prior determination states that information of a certain type is not entitled to confidential treatment, a business should be afforded the opportunity to seek judicial review of the validity and applicability of that determination.

Response—The Administrator agrees with this comment. Section 2.204 has been modified in various respects to provide that notice under § 2.205(f) will be given in every case where EPA proposes to disclose information which is known to be covered by a business confidentiality claim, unless such a notice has previously been given to the business with regard to the same information.

14. **Comment**—Businesses sometimes compile or obtain information at the request of one Federal agency, only to have it requested later by another agency. If the agency at whose request the information was first compiled or obtained has determined that the information is entitled to confidential treatment, EPA should automatically honor such a determination.

Response—The Administrator believes that although other agencies' determinations are proper for consideration by EPA, EPA cannot commit itself to honor such determinations in every case. Differences in statutory provisions or disagreement concerning application of the law may require different conclusions on EPA's part.

15. **Comment**—Information should not be determined to be available to the public without consultation with a business merely because at some time in the past the information has been located in EPA files which

were not available to the public. The placement of such information in each file may have been improper. Moreover, the information may not actually have been disseminated.

Response—The Administrator agrees with this comment. Section 2204(c) has been appropriately modified. Evidence of public dissemination of such information may bear on the question of whether the information is to be confidential.

16. Comment—Initial determinations by an EPA office that an item of business information is not entitled to confidential treatment should be referred to the EPA legal office, just as are determinations that an item of information is or may be entitled to confidential treatment.

Response—The Administrator disagrees with this comment. EPA's existing under § 2204(d) is to make one of two determinations: either that the information clearly is not entitled to confidential treatment, in which case the business receives a notice under § 2205(f), or that the information may be entitled to confidential treatment, in which case further inquiry is made and the matter is referred to an EPA legal office for a final determination. The final kind of determination will be made only where the EPA office can ascertain that EPA's position on the matter is already clear and that there is nothing further to consider.

17. Comment—The "procedural" denial contemplated by § 2204(d)(1) is a "sham" that conflicts with the mandate of the Freedom of Information Act, 5 U.S.C. 552(a)(6), because it is not a good-faith decision on the merits. EPA offices should be required to make a substantive, yes-or-no decision on the merits within the 10-working-day period following receipt of a request under 5 U.S.C. 552. All information necessary for such a determination, including any comments an affected business might be allowed to make, should be considered at that stage.

Response—The Administrator disagrees with this comment. It is recognized that every effort should be made to provide decisions on the merits as expeditiously as possible. However, EPA now has on hand a great deal of business information, most of which has never been the subject of a business confidentiality determination, with regard to most of this information, the submitter businesses have never presented to EPA any justification for confidential treatment nor have they been given specific notice of the need to do so. Moreover, EPA does not expect to receive requests for release of much of the business information EPA possesses and will continue to acquire. The Administrator does not believe it will be possible in most cases to issue decisions on the merits before seeing the business's comments. Attempts to issue initial determinations on the merits without knowing the business's views would produce uninformed initial determinations and complicate the handling of appeals. As stated in the Response to Comment 9 the Administrator does not believe it is appropriate to require new submissions to be accompanied by a business's justification for its confidential treatment request. The Administrator finds that in most cases it will not be possible to locate the requested information, invite a business's comments, allow a reasonable time for preparation by a business of such comments, receive the comments, and issue a determination on the merits within the ten-working-day period after receipt of a request allowed by 5 U.S.C. 552(a)(6) for the issuance of initial determinations. Accordingly, in many cases it will be necessary to issue a "procedural" initial denial. As noted elsewhere, the regulation has been modified in various ways to make it more likely either that all information needed for a determination will be on hand when a request is re-

ceived or that the determination will already have been made. Moreover, as EPA offices make more confidentiality determinations (especially class determinations under § 2207), the EPA position on entitlement to confidential treatment of various categories of information will become better defined, with consequent narrowing of the issues remaining to be decided. This will tend to increase the proportion of initial determinations on the merits issued under either § 2204(b)(1) or § 2204(d)(2) and decrease the proportion which must be "procedural" denials under § 2204(d)(1).

18. Comment—EPA should not require a business to carry the burden of substantiating its assertion that an item of information is entitled to confidential treatment. An assertion of entitlement should be regarded as conclusive or at least as prima facie proof of entitlement.

Response—The Administrator does not believe that such an approach is justifiable under the judicial interpretations of 5 U.S.C. 552. An objective analysis of entitlement of the item of information to confidential treatment is required.

19. Comment—The period proposed for a business to prepare and submit its comments—15 calendar days from the date of a notice, under proposed § 2204(e)—is too short, if meaningful comments by the business are desired. Problems with directing the notice to the proper corporate officials and the occasional absence on leave or travel of key officials, will cause great difficulty.

Response—The Administrator is conscious of the problems that may be posed in some cases by the deadline. On the other hand, the deadlines for this Agency's issuance of determinations prescribed by 5 U.S.C. 552 make impossible the allowance of a period such as 60 days (suggested by one comment) for a business to furnish its comments. The Administrator has determined that a period of 15 working days (Government business days) should be allowed. See also the Response to Comments 9 and 17.

20. Comment—There appears to be no logical reason why businesses should be required to submit substantiating comments within a period of limited length, at some inconvenience to them, if no request for the information is pending under 5 U.S.C. 552.

Response—The Administrator agrees with this comment. Section 2204(e) has been accordingly modified. Additionally, § 2204(e) and § 2205(f) have been modified to indicate that if a request under 5 U.S.C. 552 is pending, neither the comment period nor the post-determination waiting period will normally be extended without the consent of the requestor.

21. Comment—In order to allow a business as much time as possible for preparation of comments, telephone notice should be given the business at the time EPA decides to issue the notice contemplated by § 2204(d) to the business.

Response—The Administrator agrees with this comment, and § 2204(e) has been modified appropriately.

22. Comment—Comments submitted by businesses in substantiation of their business confidentiality claims may include other business information which itself may be entitled to confidential treatment. The regulation should provide automatic entitlement to confidential treatment for comment information. If requested by the business.

Response—The Administrator agrees with this comment, and a new provision, § 2205(c), has been added which incorporates the substance of the comment. This automatic entitlement to confidentiality will apply only if EPA possesses the information only because of its inclusion in substantiating comments and is grounded on the continuing need to obtain frank and full comments from busi-

nesses in order to promote sound decision-making under this subpart.

23. Comment—The views of an EPA office concerning entitlement of an item of business information to confidential treatment, which under proposed § 2204(f) are to be furnished to the EPA legal office for consideration in issuing final determinations, should also be furnished to the affected business for comment.

Response—The Administrator disagrees with this comment. Requiring such disclosures would tend to reduce the number of EPA office's comments in many cases. There also would exist a substantial risk of leaks involving more than one affected business of inadvertent disclosure to one business of possibly confidential information obtained by the other. Moreover, in cases where prompt action is required (e.g., where a business under 5 U.S.C. 552 is pending), it is unlikely that an EPA office's comments could be received by the affected business in time to be used in the preparation of the business's comments. The Administrator notes, however, that § 2204(c)(5) of the rule promulgated below requires an EPA office to seek confirmation of its understanding of the pertinent facts.

24. Comment—The 10-calendar-day waiting period prescribed by proposed § 2205(f) after a determination adverse to a business during which the business may commence an action for judicial review, is too short a period for the obtaining of suitable counsel and the preparation and filing of suitable pleadings.

Response—The Administrator agrees with this comment and has modified § 2205(f) to provide a period of ten working days, rather than ten calendar days, for initiation of judicial review action.

25. Comment—The proposed waiting period mentioned in Comment 24 above is too long. Five calendar days would be sufficient.

Response—The Administrator disagrees with this comment. EPA records contain business information concerning businesses ranging in size from very large corporations to sole proprietorships. Moreover, because of the number and scope of the various statutes EPA administers, the businesses whose information EPA holds are not concentrated in a few fields but come from many different industrial and commercial fields. The Administrator finds that businesses may in many cases require up to ten working days for purposes of retaining legal counsel, familiarizing counsel with the facts, determining whether to seek judicial review of EPA's determination, and preparing and filing necessary pleadings. 5 U.S.C. 552 requires that once EPA has determined that information is not exempt from disclosure and is to be disclosed, it shall make the information available to the requestor with reasonable promptness. The Administrator believes that a waiting period of ten working days is inconsistent with that requirement.

26. Comment—Proposed § 2205(f) is improper to the extent that under it EPA proposes to disclose information when a business is in the process of obtaining judicial review of the adverse EPA determination. The 30-day period established by the proposed rule, at the end of which EPA would disclose information unless a court had ordered its continued withholding, would interfere with the role of the judicial system.

Response—The Administrator partially agrees with the comment. The purpose of the proposed provision was to ensure that a business would expeditiously pursue its request for judicial review. A business could merely file a complaint and take no further action to obtain a speedy hearing on a motion for injunctive relief, were there not some spur to expeditious action. However,

26. Comment—The Administrator has concluded that a fixed period of time during which the contractor must obtain a judicial order in order to prevent disclosure is not the best way to solve the problem. Accordingly, the 30-day period has been eliminated from the regulation as promulgated below, but in its place has been substituted language which would result in disclosure of the information in the absence of a court order prohibiting disclosure, after a business has failed to convince a court of the propriety of a temporary injunction against disclosure, or in cases where, after reasonable notice to the business, EPA determines that the business is not taking appropriate measures to obtain a speedy resolution of the matter. The substituted provisions should adequately protect the interests of those who have requested the information under 5 U.S.C. 552, while eliminating the objectionable features of the proposed rule.

27. Comment—Proposed § 2.205(g) should be modified to provide that the comment period and post-determination waiting period should be allowed to be shortened only in cases where disclosure of allegedly confidential business information would alleviate or assist in alleviating an imminent hazard.

Response—The Administrator agrees with this comment and has caused § 2.205(g) to be appropriately modified.

28. Comment—The authority of the various EPA legal offices to issue determinations, as set forth in § 2.205(i) of the proposed rule, is too broad. Regional Counsel should not be authorized to issue such determinations for similar situations are apt to lead to differing determinations.

Response—The Regional Counsel should be authorized to issue determinations in those cases where they are most familiar with the records and where action by them would eliminate organizational delays. Dissemination of decisions and consultation with the General Counsel will tend to minimize divergent results.

29. Comment—The Administrator or some member of his immediate staff, rather than the various EPA legal offices, should issue the determinations contemplated by § 2.205, § 2.206, and § 2.207 since 5 U.S.C. 552 speaks of an appeal to the head of the Agency.

Response—The comment acknowledges that the Administrator himself cannot be expected to personally rule on each confidentiality claim and foresees delegation to a staff member. Which staff member performs this function under a delegation is a matter for determination by the Agency.

30. Comment—The regulation should provide that the appeal determination must be issued by a person other than the person who issued the initial determination, at least where requests under 5 U.S.C. 552 are concerned.

Response—The Administrator agrees that the same person should not issue both determinations but believes that this separation of functions should be provided for by the General Counsel, acting under § 2.205(i) of the regulation.

31. Comment—Section 2.206 of the proposed rule should be extended to allow advance confidentiality determinations even where the information concededly would not, if submitted for general use by EPA, constitute voluntarily submitted information.

Response—The Administrator disagrees with this comment. The purpose of an advance confidentiality determination is to allow EPA to obtain for its use information it could not otherwise obtain. Advance confidentiality determinations present problems for EPA (See Comments 33 and 34 below.) and thus should be employed when other procedures for determining confidentiality are inadequate.

32. Comment—A mechanism should exist for determining whether or not information would be voluntarily submitted information if submitted for general use by EPA.

Response—The Administrator agrees with this comment. Section 2.206 has been modified to allow such determinations.

33. Comment—Business information submitted to an EPA legal office for the sole purpose of obtaining an advance confidentiality determination should not be regarded as an "agency record" and, if the determination holds that the information is not entitled to confidential treatment, all copies should be returned to the submitter, even if a request for release of that information is pending under 5 U.S.C. 552.

Response—The Administrator disagrees with this comment. Although definitive judicial pronouncements on the subject are lacking, the Administrator believes that there is a substantial possibility that information held by an EPA legal office for purposes of examination in the course of issuance of an advance confidentiality determination under § 2.206 would be held by a court to constitute agency records under 5 U.S.C. 552. The Administrator believes that the issue of whether such documents would constitute agency records should be determined by a court (EPA would disclose such information only pursuant to a court order.)

34. Comment—The regulation should provide that EPA should treat as confidential the fact that a business has submitted an item of information to EPA under § 2.206.

Response—The Administrator agrees with this comment insofar as it asserts that an EPA legal office (or other office) should not voluntarily disclose such a fact. However, the Administrator is of the opinion that in some cases where a request for disclosure of records concerning such submissions has been made under 5 U.S.C. 552, it might be legally improper to refuse to disclose such a fact. No change to the regulation is deemed necessary with respect to this comment.

35. Comment—Class determinations, as contemplated by proposed § 2.207, should allow prior comment by all businesses which might be affected by such a determination.

Response—The Administrator believes that in many cases such a requirement would preclude issuance of a class determination, since the identities of potentially affected businesses might be unascertainable. Section 2.207 has been modified to clarify the purpose and effect of class determinations. (See Response to Comment 37 below.)

36. Comment—An EPA office should not be allowed to make assertedly confidential business information available to the public in reliance on a class determination without prior notice to the business.

Response—The Administrator agrees with this comment. See the Response to Comment 13 above and the clarifying modifications which appear as § 2.207(d) of the rule as promulgated below.

37. Comment—Various terms in § 2.207 as proposed require clarification so that businesses will know what constitutes a "common fact situation," a "class," etc.

Response—The Administrator agrees that the proposed § 2.207 could have been stated more definitively, and the section has been rewritten to make more certain its purpose, applicability, and effect.

38. Comment—Certain of the substantive criteria proposed by § 2.208 are either irrelevant or else impossible to satisfy. Specifically, the provision in § 2.208(c) of the proposal concerning the "reasonableness" of a business claim is unduly vague, and the reference to the "practices of other businesses" is irrelevant.

Response—The Administrator agrees with this comment. Section 2.208 has been re-

written to reflect this and several other changes suggested by comments, as well as to conform the section to other sections in which procedural changes have been made.

39. Comment—Proposed § 2.208(e)(1) improperly interprets judicial opinions concerning the proper criterion of competitive harm. Specifically, a business should not have to demonstrate either that the likelihood of harm is "substantial" or that the harm which would result from disclosure is "substantial."

Response—The Administrator agrees in part. The decision in "National Parks & Conservation Ass'n v. Morton," 498 F.2d 773 (D.C. Cir. 1974), requires only a likelihood, not a substantial likelihood, that a business's competitive position will be substantially harmed by Government disclosure of an item of information. The section has been modified accordingly.

40. Comment—Section 2.208 is wrong in concerning itself with harm to a business's competitive position; the test should be whether the business discloses the information, not whether the Government's disclosure would harm the business's competitive posture.

Response—The Administrator believes that the "National Parks" case cited above precludes EPA from taking such an approach and that the test as now stated in § 2.208 is the proper one.

41. Comment—The regulation should list specific categories of information which are, and which are not, entitled to confidential treatment.

Response—The Administrator does not believe that it is now possible to issue comprehensive listings of the type urged by the comment. While it is desirable for businesses and the public to become aware of the types of information which EPA believes to be entitled or unentitled to confidential treatment, this can best be accomplished by issuance of determinations under § 2.205, § 2.206, and § 2.207.

42. Comment—Section 2.208 should not require a business to "prove a negative," i.e., it should not have the burden of showing that information is not readily obtainable by others.

Response—The Administrator agrees that businesses might find it extremely difficult to show that another person could not obtain information. However, it is clear that the availability to others of information is relevant to the determination. The section has been modified to eliminate the burden on the business of making an affirmative showing in this regard, but continues to require EPA consideration of the issue.

43. Comment—Some information a business guards zealously may nonetheless be available via court-ordered discovery in a legal proceeding. Availability via discovery should not negate a business's confidentiality entitlement.

Response—The Administrator agrees in part with this comment. Section 2.208, as promulgated below, explicitly treats this subject, and differentiates between information which would be routinely discoverable and that which would be discoverable only upon a showing of special need.

44. Comment—There may be situations in which although a business has taken no steps to preserve the confidentiality of an item of information, the information has not been disclosed outside the business. In such situations, the information should not be ineligible for confidential treatment.

Response—The Administrator disagrees with this comment. If no steps have been taken to safeguard the information, the importance to the business of confidentiality is at best questionable and the likelihood of prior unregulated disclosure is great.

45. Comment—In many cases, disclosure of one item of information by itself might not cause substantial competitive harm to a business. But the cumulative effect of disclosures of several related, seemingly unimportant items of information could result in great competitive harm.

Response—The Administrator is conscious of this possibility and advises that an item of business information will not be determined to be ineligible for confidential treatment merely because its disclosure alone would not directly cause substantial competitive harm. The test is whether disclosure of the item of information would make substantial harm to the business's competitive position likely.

46. Comment—Disclosures under proposed § 2209 to Congress, the Comptroller General, or other Federal agency, should be subject to the attention of the affected business.

Response—Except where legitimate reasons exist for withholding from businesses the fact of such disclosure (e.g., where law enforcement would be hampered), the Administrator advises that there is no objection to informing a business that information has been disclosed to other branches or agencies of the Federal Government. However, automatic notification to a business each time such a disclosure occurred would create administrative burdens for EPA offices which the Administrator does not to be warranted. Section 2209 of the regulation has been modified to provide that EPA offices shall maintain a record of disclosures of business information made to Congress, the Comptroller General, or other Federal agencies. Such information, insofar as it pertains to an affected business, will be disclosed on receipt of written request of that business, except where legitimate reasons exist for withholding it.

47. Comment—Disclosure of business information should not be made to Congress, its committees, or subcommittees, unless a Congressional subpoena covering such information has been issued.

Response—The Administrator disagrees with this comment. Fully authorized requests from Congress, its committees, its subcommittees will be honored, and the requesting body will be informed of unresolved confidentiality claims and of determinations of entitlement to confidential treatment.

48. Comment—Section 2210 of the proposed rule appears to allow EPA to first decide whether a request for business information would be denied under subpart B, and thereafter decide whether the information would be withheld for other reasons. The regulation should provide for parallel consideration of all possible bases for withholding information to avoid delays in response to requests under 5 U.S.C. 552.

Response—The Administrator agrees with this comment. Section 2210, as promulgated below, has been revised accordingly.

49. Comment—The regulation should state penalties for improper disclosure of business information by EPA employees.

Response—The Administrator agrees with the general tenor of this comment. Section 2211 of the regulation as promulgated below has been revised to remind employees of the criminal penalties for willful violation of applicable laws and to inform employees that improper disclosure of business information may be grounds for adverse personnel action.

50. Comment—The regulation should provide detailed rules for the handling within EPA of confidential information.

Response—The Administrator does not believe that a regulation is the most effective way in which to handle guidance concerning the details of handling the various kinds of business information possessed by various EPA offices. However, a new § 2212 has been

added to the regulation as promulgated below, which will allow the designation of "control offices" which have exclusive responsibility and authority to disclose certain categories of business information outside the Agency. Such control offices, if and when designated, shall also maintain information concerning confidentiality claims, determinations, and other pertinent materials under this subpart with respect to the items of information for which they are responsible.

51. Comment—The regulation should provide a mechanism by which a business may designate an agent for purposes of receipt of inquiries and notices under the subpart in order to lessen the likelihood of delay in responding to inquiries and notices (especially those coming from large, decentralized businesses).

Response—The Administrator agrees with this comment. A new § 2213 has been added to the regulation as promulgated below, describing how a business may designate one person as its sole representative for such purposes.

52. Comment—The basic definition of "emission data" as proposed in § 2301(a)(2) is too broad. It should not include descriptions of "hardware" nor the "details of a confidential process as it is being practiced."

Response—It is impossible to make intelligent reference to data concerning an emission of a substance into the air without referring also to the nature and location of the source of the emission. Section 2301(a)(2) has been modified slightly to emphasize that information concerning the nature of the source is emission data only "to the extent necessary" to identify the source and to distinguish it from other sources.

53. Comment—By including in the definition of emission data "information necessary to determine the emissions which a standard or limitation permits a source to emit," the proposed regulation would in some cases require the disclosure of various information pertaining to stationary sources which a business may wish to maintain in confidence, such as raw material feed rates, production rates, or byproducts generated. This is improper and goes beyond the Congressional intent.

Response—This comment is based on the fact that in some cases, individual emission sources are subject to emission limitations expressed in terms of units of pollutant that may be emitted per unit of raw material processed or per unit of production. In order that the actual emissions during a period may be compared with the allowable emissions, it is necessary to know how many input or output units were processed by the facility during the period in question. Otherwise, a person would not know whether or not a source had complied with the emission limitation. In Section 110(a)(2)(F) of the Clean Air Act, as amended, 42 U.S.C. 1857c-5(a)(2)(F), Congress required that emission data concerning stationary sources be correlated with applicable emission standards or limitations and be made available for publication. A similar provision requiring that effluent data be related to applicable standards or limitations is found in Section 303 of the Federal Water Pollution Control Act, 33 U.S.C. 1318(b). The Administrator believes that Congress, by employing such language, desired that members of the public be able to know not only the actual emission figures, but also the emissions allowable under applicable standards and limitations. Accordingly, the Administrator disagrees with the comment.

54. Comment—The definition of emission data should include data concerning pollutants which result from emissions but which are not released directly from the

source, i.e., data concerning substances which exist in the air as the direct result of the emission from a source of one or more other substances.

Response—The Administrator agrees with this comment. The regulation has been modified to incorporate the substance of this comment.

55. Comment—Emission data should not be defined to include data concerning "contaminated" emission sources.

Response—The meaning of "emission data" is significant because the Clean Air Act requires that emission data must be made available to the public notwithstanding any allegation that it is entitled to confidential treatment. The Administrator believes that the purpose of the disclosure requirement is to enable members of the public to inform themselves in order that they may initiate, or participate in, an informed basis in proceeding with standards and limitations under the Act are enforced. The definition of emission data should further this purpose. Section 2301(a)(2) has been rewritten to state more clearly the relationship between the purpose to be served by disclosure of data and the coverage of the term "emission data." The reference to "contaminated" sources has been eliminated as unnecessary. As pointed out below, the definition of emission data includes data concerning actual (expected) emissions, data needed to calculate emissions that were allowable under standards or limitations (to determine compliance), and information necessary to specify the identity and location of the source.

56. Comment—There should be no exclusion from the definition of emission data of information concerning products, methods, devices, or installations merely because they are developed and used solely for research purposes.

Response—The Administrator disagrees with this statement in large part. Certainly the exclusion appears to be necessary in order to encourage research. However, the Administrator is of the opinion that information should be disclosed to the extent necessary to show that a source is (or is not) complying with applicable standards or limitations, or to substantiate the validity of an existing or proposed standard or limitation. The definition of emission data has been modified appropriately.

57. Comment—The "research" exclusion should cover even full-scale installations, not just laboratory- or pilot-scale installations, if in fact it is used only for research purposes.

Response—The Administrator agrees with this comment, and the rule as promulgated below has been appropriately modified. It should be noted, however, that it is not anticipated that many full-scale installations will be found to be used solely for research purposes. For example, a full-scale industrial installation which is intended to contribute productively to the output of a business would not be regarded as being only for research purposes, even if the installation is shown to function and in fact contributing to the business as a whole.

58. Comment—Information relating to products being readied for introduction into a market (but not yet introduced) and information pertaining to on-line research aimed at improving existing products on the market should not be automatically eligible for confidential treatment. It should be excluded from the definition of emission data.

Response—The Administrator agrees in part with this comment. However, the information must be available to the public to the extent necessary to indicate the source's compliance or non-compliance with

applicable standards or limitations, or to permit EPA to demonstrate the validity of an existing or proposed standard or limitation. The definition of emission data has been modified accordingly.

59. Under proposed § 2.301(e) (substantive criteria for confidential treatment), emission data should not be excluded automatically from eligibility for such treatment.

Response—The exclusion in question is specifically required by the Clean Air Act, sections 114, 208, and 307(a).

60. Comment—Emission data should be disclosed on request, without any consultation of the business which submitted it, to avoid delay.

Response—While the Clean Air Act clearly states that emission data must be made publicly available, it does not define the boundaries of the term. The Administrator finds that it is not unlikely that one or more businesses may disagree with the definition of emission data established in § 2.301(a)(2) and further finds that the business's procedural rights (submission of comments and opportunity to seek judicial review) should not be denied merely because EPA may characterize information as emission data.

61. Comment—Of the information to which § 2.301 applies, only those "trade secrets" which are "methods of processes" are entitled to confidential treatment, under the Clean Air Act and its legislative history, and the regulation should not allow confidential treatment for other information.

Response—The Administrator does not agree with this comment. The Congress supplied no definition of the terms it employed, and (as noted in the May 20, 1975, explanation of the proposed approach) the Administrator has been unable to conclude that the Congress intended to require public disclosure of the information which EPA must obtain from businesses in order to develop standards and perform its other emissions. Routine disclosure to the public of all that information would profoundly affect the business structure of the Nation in ways that have nothing to do with the purposes of the Clean Air Act.

62. Comment—Proposed § 2.301(g), pertaining to disclosure of information otherwise entitled to confidential treatment when the information is relevant to a matter in controversy in a proceeding, should allow such disclosure only in those proceedings which involve a public hearing, not in informal rulemaking proceedings.

Response—The Administrator disagrees with this comment but recognizes that the proposed rule failed to properly acknowledge the differences that exist between proceedings which are conducted on the record and with parties of record, on the one hand, and proceedings of an informal nature, on the other. There can be no limited disclosure under protective arrangements in an informal rulemaking proceeding; if information is to be disclosed at all, it must be publicly disclosed. This and other differences between the two classes of proceedings have led the Administrator to conclude that there should be separate procedures to be used in informal proceedings, and the regulation has been modified accordingly. Separate procedures have also been established in the regulation as promulgated below for disclosure in on-the-record proceedings when disclosure is proposed by EPA, on the one hand and by a party to the proceeding other than EPA, on the other.

63. Comment—There should be no disclosure of the type contemplated by § 2.301(g) unless the business has the right, as part of the proceeding, to argue against disclosure.

Response—The regulation has been modified

to make clear that a business has this right.

64. Comment—Information should be disclosable under proposed § 2.301(g) only if it is actually found to be relevant to a matter in controversy in the proceeding.

Response—The Administrator agrees with this comment, and the regulation has been modified appropriately.

65. Comment—Information should be disclosed under proposed § 2.301(g) only to those parties who have a "business or financial interest in the proceeding" or those who show that "the public interest would not be adequately served by EPA's representation."

Response—The Administrator disagrees with this comment. The Administrator does not believe that the proceedings will produce the most broadly based and useful results if relevant information is routinely withheld from parties who lack a business interest and who may have a different perception than that of the Administrator of where the public interest lies. The criteria for disclosure to parties adequately protect against frivolous requests.

66. Comment—Proposed § 2.301(g) should prescribe the protective measures that should be required as a condition of disclosure to parties.

Response—The Administrator believes that, given the variety of circumstances that arise in different proceedings, it is impossible to anticipate all problems. Details in this regard are, it is felt, best left to the sound discretion of the administrative law judge or other presiding officer.

67. Comment—The proposed rule's 10-day waiting period for the comments of a business on the proposed disclosure of information it submitted will unduly delay many proceedings. Moreover, where a delay in releasing information does ensue, in appropriate cases a corresponding delay in the proceedings should be granted for the benefit of the party which requested disclosure of the information. Finally, the existence of a court order requiring a proceeding to be completed by a certain date should be listed as another basis for shortening the normal 10-day comment period.

Response—The regulation, as promulgated below, now eliminates any reference to a fixed period for a business's comments and instead relies on the discretion of the administrative law judge or other presiding officer to set a comment period reasonable in the circumstances. With respect to suspending the proceedings pending decision on a request for information, this is also a matter that should be left to the presiding officer's sound discretion.

68. Comment—A business's comments on a proposed rule should not be disclosable under proposed § 2.301(g), because if a business believes its comments might be made public over its objections, it may refrain from submitting the comments.

Response—This comment may be based on a misunderstanding of proposed § 2.301(g), which is concerned with certain circumstances under which any information to which § 2.301 applies may be disclosed (Proposed § 2.301 would apply only to information the production of which EPA may legally compel). The Administrator does not believe that there is a basis for discrimination in treatment of information based on whether or not EPA obtained it in comments in a rulemaking proceeding.

69. Comment—Contractors should not be considered "authorized representatives" under § 2.301(h), the legislative history of the Clean Air Act and Federal Water Pollution Control Act (FWPCA) indicate that only EPA officers or employees may be regarded as authorized representatives.

Response—The Administrator disagrees with this comment. There is no legislative history pertaining to the FWPCA which indicates, with reference to FWPCA section 308(a) (in which the term "authorized representative" is used in a different context and in a semantically different manner) that only EPA officers or employees may act as "authorized representatives" for the purpose of exercising a right of entry onto certain private premises. But in section 114(a), 208(b) and 307(a) of the Clean Air Act, and section 308(b) of the FWPCA, it appears clear that by authorizing disclosure to EPA's employees, or authorized representatives of the United States (emphasis added), Congress meant something more than disclosure only to officers and employees. It also appears that the language in the legislative history of the FWPCA concerning rights of entry was based on a reference to section 215(a) of the Clean Air Act, where the right of entry is explicitly given only to officers or employees.

70. Comment—Information should be disclosed to an EPA contractor under proposed § 2.301(h) only if the affected business gives its prior consent.

Response—The Administrator disagrees with this comment, which would have the effect of nullifying disclosure to contractors (the rule elsewhere states that information may be disclosed if the business consents). Much of EPA's mission must be performed by use of the resources which contractors offer. If the comment was adopted, businesses could seriously hinder EPA efforts simply by refusing to consent to disclosure.

71. Comment—Information should be disclosed to a contractor under proposed § 2.301(h) only if the affected business has been given prior notice of the contemplated disclosure.

Response—The Administrator agrees that prior notice should be given except when to do so would impair the working of an EPA program. The rule as promulgated below has been modified accordingly.

72. Comment—Information should be disclosed to a contractor under proposed § 2.301(h) only if affected businesses are reasonably protected by the arrangements between EPA and the contractor.

Response—The Administrator agrees with this comment, and the rule as promulgated below has been modified to make more specific the contractor's undertakings, to require recordkeeping by EPA concerning disclosures, to require that the contract recognize explicitly the third-party beneficiary status of the affected businesses, to require EPA to determine that the disclosure is necessary for the contract work, and to require EPA to give affected businesses prior notice in most cases of disclosure of information in which they have an interest.

73. Comment—Before EPA discloses information to contractors under proposed § 2.301(h), an investigation should be made into any possible competitive conflicts of interest the contractor may have.

Response—The Administrator agrees with the protective measures outlined in the response to Comment 72 should adequately protect affected businesses in most cases, and notes that more stringent protective measures may be taken in connection with individual contracts.

74. Comment—Information should be disclosed to state or local power plant facilities under proposed § 2.301(h) only if the affected business consents or if the state or local agency agrees that the information shall not be further disclosed and that state or local public information acts shall not apply to the information.

Response—The Administrator disagrees with the comment. Many of the statutes or

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which EPA has the primary Federal responsibility in enforcing the Clean Air Act, coordination of releasing relationships between EPA and state and local pollution control agencies, and such statutes often assign significant responsibilities to state and local agencies. EPA desires to be able to provide such agencies with information it has which would be useful to them. However, the Administrator recognizes the fact that the other provisions of this subpart would afford protection to businesses if disclosure of information to state and local agencies were made without attention to the treatment that would be afforded to such information by them. Accordingly, the rule as promulgated below has been amended to provide that information may be disclosed to state or local agencies under § 2301(h) only if the state or locality itself could have required the business to disclose the information, or if the state or locality has shown to EPA's satisfaction that the information will be adequately protected.

75. Comment—Various commenters raised the same points with respect to the definition of "effluent data" in proposed § 2302(a)(2) as they raised with respect to the definition of "emission data."

Response—See Responses 52 through 61.

76. Comment—Various commenters raised the same points with respect to release of information relevant to a matter in controversy in a proceeding under proposed §§ 2302(g), 2303(g), and 2304(g) as they raised with respect to proposed § 2301(g).

Response—See Responses to Comments 62 through 63.

77. Comment—Various commenters raised the same points with respect to release of information to authorized representatives under proposed §§ 2302(h) and 2304(h) as they raised with respect to proposed § 2301(h).

Response—See Responses to Comments 63 through 74.

78. Comment—Proposed § 2307(b), which would have established special substantive criteria for use in connection with information obtained in applications for registration of pesticides under the Federal Insecticide, Fungicide and Rodenticide Act, as amended (FIFRA), 7 U.S.C. 136 et seq., would exceed the Administrator's authority and violate 7 U.S.C. 136h. Proposed § 2307(g) would deny confidential treatment to certain categories of research data and related information, but 7 U.S.C. 136h, it is asserted, requires confidential treatment for some of that data.

Confidentiality determinations should be made only on a case-by-case basis.

Response—The Administrator disagrees with this comment. However, for reasons unrelated to the comment, the special substantive criteria have been deleted from § 2307. This action has been taken because, under P.L. 94-140, (November 28, 1975), 89 Stat. 751, the Administrator may not promulgate regulations which implement FIFRA without first submitting the regulations to an external review process. In view of the delay that would be involved in obtaining such review, the provisions concerning substantive criteria have been deleted. (On March 5, 1976, the General Counsel issued an interim determination concerning the confidentiality of such information to confidential treatment.)

In addition to the changes to the proposed rule which are discussed in the Comments and Responses above, other noteworthy changes are:

(1) The definition of "entitled to confidential treatment" in proposed § 2201(f) has been deleted as unnecessary.

(2) Definitions of "EPA office," "EPA legal office," and "working day" have been added to § 2201.

(3) Section 2202 has been modified to emphasize the need for alertness to the possibility that different types of information within a single document may require different treatment.

(4) Section 2204(b) has been simplified by deletion of language which concerned the effect of a prior determination holding that an item of information is not entitled to confidential treatment. The treatment of such information is covered by § 2204(d)(2).

(5) The rule has been modified in several places to emphasize the fact that two or more businesses may have an interest in preserving the confidentiality of the same item of information, and that it may be necessary to resolve separately the confidentiality claims of each business. See §§ 2204(c)(1), 2204(d), and 2205(d)(3).

(6) The rule has been modified to acknowledge that a business may desire confidential treatment of an item of information only for a stated period, after which it would not object to public disclosure of the information. See §§ 2203(b), 2204(e)(4)(ii), 2205(d)(2), 2205(e), and 2205(f)(1)(ii).

(7) The requirement that information must bear a confidentiality claim when submitted if waiver of the claim is to be avoided will apply to information received on or after

the effective date of the rule, rather than only to information received on or after the 180-day after the rule's effective date. This change is justified by the fact that a claim will be determined to have been waived only if the business first had been warned specifically that it must assert its claim at the time of submission of the information.

(8) Section 2204(e) has been modified to indicate that when a request under 5 U.S.C. 552 is pending and EPA must inquire whether a business desires to assert a confidentiality claim, any claim in response to that inquiry must be made not later than one working day after the inquiry is made. The Administrator has determined that this change will not impose undue burdens on businesses because of the ease with which a claim may be asserted and the business's opportunity to designate a representative for the purpose of making such inquiries (see § 2203).

(9) Changes have been made in several places in the rule to indicate that various deadlines must be met when there is pending a request for information under 5 U.S.C. 552, a less rigid timetable must be applied when no such request is pending.

(10) Section 2204(e) of the rule has been modified to conform the list of topics to be addressed by a business in its comments more closely to the substantive criteria under § 2208.

(11) Section 2205(f) has been modified to confine to essentials the information which an EPA office must forward to the EPA legal office.

(12) Section 2205(a) has been modified to provide a timetable for issuance of a final determination by an EPA legal office after a "procedural" denial of a request under 5 U.S.C. 552.

(13) Section 2205(h) has been modified to more clearly set forth the procedure by which an EPA legal office may overrule or modify an earlier determination holding that an item of information is entitled to confidential treatment.

(14) A number of changes have been made to § 2307 and § 2308, designed to simplify their application and increase the extent to which they parallel language in other sections of the subpart.

(15) Section 2309 has been rewritten to eliminate unneeded elaborateness and increase the extent to which the section parallels other provisions of the subpart.

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