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the common rule, Government-wide Debarment and Suspension (Non-procurement), that implements Executive Order 12549 and Executive Order 12689.

§ 1008.635 Drug-free workplace.

Drug-free workplace means a site for the performance of work done in connection with a specific award at which employees of the recipient are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

§ 1008.640 Employee.

(a) *Employee* means the employee of a recipient directly engaged in the performance of work under the award, including—

- (1) All direct charge employees;
- (2) All indirect charge employees, unless their impact or involvement in the performance of work under the award is insignificant to the performance of the award; and
- (3) Temporary personnel and consultants who are directly engaged in the performance of work under the award and who are on the recipient's payroll.

(b) This definition does not include workers not on the payroll of the recipient (*e.g.*, volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces).

(c) This definition does not include workers not on the payroll of the recipient (*e.g.*, volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces).

§ 1008.645 Federal agency or agency.

Federal agency or agency means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency.

§ 1008.650 Grant.

Grant means an award of financial assistance that, consistent with 31 U.S.C. 6304, is used to enter into a relationship—

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(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and

(b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

§ 1008.655 Individual.

Individual means a natural person.

§ 1008.660 Recipient.

Recipient means any individual, corporation, partnership, association, unit of government (except a Federal agency) or legal entity, however organized, that receives an award directly from a Federal agency.

§ 1008.665 State.

State means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

§ 1008.670 Suspension.

Suspension means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered non-procurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Non-procurement), that implements Executive Order 12549 and Executive Order 12689. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

CHAPTER XI—INTERNATIONAL BOUNDARY
AND WATER COMMISSION, UNITED STATES
AND MEXICO, UNITED STATES SECTION

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PART 1100—EMPLOYEE RESPONSIBILITIES AND CONDUCT

AUTHORITY: 5 U.S.C. 7301.

SOURCE: 71 FR 25934, May 3, 2006, unless otherwise noted.

§ 1100.1 Cross-references to employee ethical conduct standards, financial disclosure and financial interests regulations and other conduct rules.

Employees of the United States Section of the International Boundary and Water Commission are subject to the executive branch standards of ethical conduct contained in 5 CFR part 2635, the executive branch financial disclosure regulations contained in 5 CFR part 2634, and the executive branch financial interests regulations contained in 5 CFR part 2640, as well as the executive branch employee responsibilities and conduct regulations contained in 5 CFR part 735.

PART 1101—PRIVACY ACT OF 1974

Sec.

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AUTHORITY: Privacy Act of 1974 (Pub. L. 93-579, as amended, 5 U.S.C. 552a).

SOURCE: 57 FR 24945, June 12, 1992, unless otherwise noted.

§ 1101.1 Purpose and scope.

The purpose of these regulations is to prescribe responsibilities, rules, guide-

lines, and policies and procedures to implement the Privacy Act of 1974 (Pub. L. 93-579, as amended; 5 U.S.C. 552a) to assure that personal information about individuals collected by the United States Section is limited to that which is legally authorized and necessary and is maintained in a manner which precludes unwarranted intrusions upon individual privacy. Further, these regulations establish procedures by which an individual can: (a) Determine if the United States Section maintains records or a system of records which includes a record pertaining to the individual and (b) gain access to a record pertaining to him or her for the purpose of review, amendment or correction.

§ 1101.2 Definitions.

For the purpose of these regulations:

- (a) *Act* means the Privacy Act of 1974.
- (b) *Agency* is defined to include any executive department, military department, Government corporation, Government controlled corporation or other establishment in the executive branch of the Government (including the Executive Office of the President, or any independent regulatory agency) (5 U.S.C. 552)).
- (c) *Commission* means the International Boundary and Water Commission, United States and Mexico.
- (d) *Commissioner* means head of the United States Section, International Boundary and Water Commission, United States and Mexico.
- (e) *Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence.
- (f) *Maintain* includes maintain, collect, use, or disseminate.
- (g) *Record* means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.
- (h) *Routine use* means, with respect to the disclosure of a record, the use of

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such record for a purpose which is compatible with the purpose for which it is collected.

(i) *Section* means the United States Section, International Boundary and Water Commission, United States and Mexico.

(j) *Statistical record* means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by 13 U.S.C. 8 (Census data).

(k) *System of records* means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

§ 1101.3 General policy: Collection and use of personal information.

(a) Heads of Divisions, Branches, and the projects shall ensure that all Section personnel subject to their supervision are advised of the provisions of the Act, including the criminal penalties and civil liabilities provided therein, and that Section personnel are made aware of their responsibilities to protect the security of personal information, to assure its accuracy, relevance, timeliness and completeness, to avoid unauthorized disclosure either orally or in writing, and to ensure that no system of records concerning individuals, no matter how small or specialized, is maintained without public notice.

(b) Section personnel shall:

(1) Collect no information of a personal nature from individuals unless authorized to collect it to achieve a function or carry out a responsibility or function of the Section.

(2) Collect from individuals only that information which is necessary to Section responsibilities or functions;

(3) Collect information, wherever possible, directly from the individual to whom it relates;

(4) Inform individuals from whom information is collected of the authority for collection, the purpose thereof, the uses that will be made of the information, and the effects, both legal and

practical, of not furnishing the information;

(5) Neither collect, maintain, use nor disseminate information concerning an individual's religious or political beliefs or activities or his membership in associations or organizations, unless (i) the individual has volunteered such information for his own benefit; (ii) the information is expressly authorized by statute to be collected, maintained, used or disseminated; or (iii) the activities involved are pertinent to and within the scope of an authorized investigation or adjudication activity;

(6) Advise an individual's supervisors of the existence or contemplated development of any system of records which retrieves information about individuals by individual identified;

(7) Maintain an accounting of all disclosures of information to other than Section personnel;

(8) Disclose no information concerning individuals to other than Section personnel except when authorized by the Act or pursuant to a routine use published in the FEDERAL REGISTER;

(9) Maintain and process information concerning individuals with care in order to ensure that no inadvertent disclosure of the information is made to other than Section personnel; and

(10) Call to the attention of the PA Officer any information in a system maintained by the Section which is not authorized to be maintained under the provisions of the Act, including information on First Amendment activities, information that is inaccurate, irrelevant or so incomplete as to risk unfairness to the individual concerned.

(c) The system of records maintained by the Section shall be reviewed annually by the PA Officer to ensure compliance with the provisions of the Act.

(d) Information which may be used in making determinations about an individual's rights, benefits, and privileges shall, to the greatest extent practicable, be collected directly from that individual. In deciding whether collection of information from an individual, as opposed to a third party source, is practicable, the following criteria, among others, may be considered:

(1) Whether the nature of the information sought is such that it can only be obtained from a third party;

(2) Whether the cost of collecting the information from the individual is unreasonable when compared with the cost of collecting it from a third party;

(3) Whether there is a risk that information requested from the third parties, if inaccurate, could result in an adverse determination to the individual concerned;

(4) Whether the information, if supplied by the individual, would have to be verified by a third party; or

(5) Whether provisions can be made for verification by the individual of information collected from third parties.

(e) Employees whose duties require handling of records subject to the Act shall, at all times, take care to protect the integrity, security and confidentiality of these records.

(f) No employee of the section may alter or destroy a record subject to the Act unless (1) such alteration or destruction is properly undertaken in the course of the employee's regular duties or (2) such alteration or destruction is required by a decision of the Commissioner or the decision of a court of competent jurisdiction.

§ 1101.4 Reports on new systems of records; computer matching programs.

(a) Before establishing any new systems of records, or making any significant change in a system of records, the Section shall provide adequate advance notice to:

(1) The Committee on Government Operations of the House of Representatives;

(2) The Committee on Governmental Affairs of the Senate; and

(3) The Office of Management and Budget.

(b) Before participating in any computerized information "matching program," as that term is defined by 5 U.S.C. 552a(a)(8) the Section will comply with the provisions of 5 U.S.C. 552a(o), and will provide adequate advance notice as described in § 1101.4(a) above.

§ 1101.5 Security, confidentiality and protection of records.

(a) The Act requires that records subject to the Act be maintained with appropriate administrative, technical and

physical safeguards to ensure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience or unfairness to any individual on whom information is maintained.

(b) When maintained in manual form (typed, printed, handwritten, etc.) records shall be maintained, at a minimum, subject to the following safeguards, or safeguards affording comparable protection:

(1) Areas in which the records are maintained or regularly used shall be posted with an appropriate warning stating that access to the records is limited to authorized persons. The warning shall also summarize the requirements of § 1101.3 and state that the Act contains a criminal penalty for the unauthorized disclosure of records to which it applies.

(2) During working hours: (i) The area in which the records are maintained or regularly used shall be occupied by authorized personnel or (ii) access to the records shall be restricted by their storage in locked metal file cabinets or a locked room.

(3) During non-working hours, access to the records shall be restricted by their storage in locked metal file cabinets or a locked room.

(4) Where a locked room is the method of security provided for a system, that security shall be supplemented by: (i) Providing lockable file cabinets or containers for the records or (ii) changing the lock or locks for the room so that they may not be opened with a master key. For purposes of this paragraph, a master key is a key which may be used to open rooms other than the room containing records subject to the Act, unless those rooms are utilized by officials or employees authorized to have access to the records subject to the Act.

(5) Personnel handling personal information during routine use will ensure that the information is properly controlled to prevent unintentional or unauthorized disclosure. Such information will be used, held, or stored only

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where facilities or conditions are adequate to prevent unauthorized or unintentional disclosure.

(c) When the records subject to the Act are maintained in computerized form, safeguards shall be utilized based on those recommended in the National Bureau of Standard's booklet "Computer Security Guidelines for Implementing the Privacy Act of 1974" (May 30, 1975), and any supplements thereto, which are adequate and appropriate to assuring the integrity of the records.

§ 1101.6 Requests for access to records.

(a) Any individual may submit an inquiry to the Section to ascertain whether a system of records contains a record pertaining to him or her.

(b) The inquiry should be made either in person or by mail addressed to the PA Officer, United States Section, International Boundary and Water Commission, 4171 North Mesa, Suite C-310, El Paso, TX 79902-1422. The PA Officer shall provide assistance to the individual making the inquiry to assure the timely identification of the appropriate systems of records. The office of the PA Officer is located in Suite C-316 and is open to an individual between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (excluding holidays).

(c) Inquiries submitted by mail should be marked "PRIVACY ACT REQUEST" on the bottom left-hand corner of the envelope.

(d) The letter should state that the request is being made under the Privacy Act.

(e) Inquiries concerning whether a system of records contains a record pertaining to an individual should contain the following:

(1) Name, address and telephone number (optional) of the individual making the inquiry;

(2) Name, address and telephone number (optional) of the individual to whom the record pertains, if the inquiring individual is either the parent of a minor or the legal guardian of the individual to whom a record pertains;

(3) A certified or authenticated copy of documents establishing parentage or guardianship;

(4) Whether the individual to whom the record pertains is a citizen of the

United States or an alien lawfully admitted for permanent residence into the United States;

(5) Name of the system of records, as published in the FEDERAL REGISTER;

(6) Location of the system of records, as published in the FEDERAL REGISTER;

(7) Such additional information as the individual believes will or might assist the Section in responding to the inquiry and in verifying the individual's identity (for example: date of birth, place of birth, names of parents, place of work, dates of employment, position title, etc.);

(8) Date of inquiry; and

(9) Signature of the requester.

The Section reserves the right to require compliance with the identification procedures appearing at paragraph (f) of this section where conditions warrant.

(f) The requirement for identification of individuals seeking access to records are as follows:

(1) In person: Each individual making a request in person shall be required to present satisfactory proof of identity. The means of proof, in the order of preference and priority, are:

(i) A document bearing the individual's photograph (for example, driver's license, passport or military or civilian identification card);

(ii) A document bearing the individual's signature, preferably issued for participation in a federally sponsored program (for example, Social Security card, unemployment insurance book, employer's identification card, national credit card and professional, craft or union membership card); and

(iii) A document bearing either the photograph or the signature of the individual, preferably issued for participation in a federally sponsored program (for example, Medicaid card). In the event the individual can provide no suitable documentation of identity, the Section will require a signed statement asserting the individual's identity and stipulating that the individual understands the penalty provision of 5 U.S.C. 552a(i)(3).

(2) Not in person: If the individual making a request does not appear in person before the PA Officer, a certificate of a notary public or equivalent

officer empowered to administer oaths must accompany the request.

(3) Parents of minors and legal guardians: An individual acting as the parent of a minor or the legal guardian of the individual or an heir or legal representative of a deceased person to whom a record pertains shall establish his or her personal identity in the manner prescribed in either paragraph (f)(1) or (2) of this section. In addition, such individual shall establish his or her identity in the representative capacity of parent or legal guardian. In the case of the parent of a minor, the proof of identity shall be a certified or authenticated copy of the minor's birth certificate. In the case of a legal guardian of an individual who has been declared incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, the proof of identity shall be a certified or authenticated copy of the court's order. A parent or legal guardian may act only for a living individual, not for a decedent. A parent or legal guardian may be accompanied during personal access to a record by another individual, provided the requirements of paragraph (f) of § 1101.7 are satisfied. In the case of an heir or legal representative of a deceased person the proof of identity shall be a certified copy of the Will, if any; the order of a court of competent jurisdiction admitting the Will to probate; the order of a court of competent jurisdiction appointing an executor, executrix, or administrator; a letter of administration; or any other documentary evidence which establishes the identity of the individual as an heir or legal representative of a deceased person.

(g) When the provisions of this part are alleged to have the effect of impeding an individual in exercising his or her right to access, the Section will consider, from an individual making a request, alternative suggestions regarding proof of identity and access to records.

(h) An inquiry which is not addressed as specified in paragraph (b) of this section or which is not marked as specified in paragraph (c) of this section will be so addressed and marked by the Section's personnel and forwarded immediately to the PA Officer. An inquiry

which is not properly addressed by the individual will not be deemed to have been "received" for purposes of measuring time periods for response until forwarding of the inquiry to the PA Officer has been effected. In each instance when an inquiry so forwarded is received, the PA Officer shall notify the individual that his or her inquiry was improperly addressed and the date when the inquiry was received at the proper address.

(i) Each inquiry received shall be acted upon promptly by the PA Officer. Although there is no fixed time when an agency must respond to a request for access to records under the Act, every effort will be made to respond within ten (10) days (excluding Saturdays, Sundays and holidays) of the date of receipt. If a response cannot be made within ten (10) days, the PA Officer shall send an acknowledgment during that period providing information on the status of the inquiry and asking for such further information as may be necessary to process the inquiry. Every effort will be made to provide the requested records within thirty (30) days.

(j) An individual shall not be required to state a reason or otherwise justify his or her inquiry.

§ 1101.7 Disclosure of records to individuals who are subjects of those records.

(a) Each request received shall be acted upon promptly by the PA Officer. Every effort will be made to respond within ten (10) days (excluding Saturdays, Sundays, and holidays) of the date of receipt. If a response cannot be made within ten (10) days due to unusual circumstances, the PA Officer shall send an acknowledgment during that period providing information on the status of the request and asking for such further information as may be necessary to process the request. Every effort will be made to provide the requested records within thirty (30) days. "Unusual circumstances" shall include circumstances where a search for and collection of requested records from inactive storage, field facilities or other establishments are required, cases where a voluminous amount of data is involved, instances where information on other individuals must be separated

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or expunged from the particular record, and cases where consultations with other agencies having a substantial interest in the determination of the request are necessary.

(b) Grant of access:

(1) Notification.

(i) An individual shall be granted access to a record pertaining to him or her except where the record is subject to an exemption under the Act and these rules.

(ii) The PA Officer shall notify the individual of such determination and provide the following information:

(A) The methods of access, as set forth in paragraph (b)(2) of this section;

(B) The place at which the records may be inspected;

(C) The earliest date on which the record may be inspected and the period of time that the records will remain available for inspection. In no event shall the earliest date be later than thirty (30) days from the date of notification;

(D) The estimated date by which a copy of the record could be mailed and the estimate of fees pursuant to §1101.11. In no event shall be estimated date be later than thirty (30) days from the date of notification;

(E) The fact that the individual, if he or she wishes, may be accompanied by another individual during the personal access, subject to the procedures set forth in paragraph (f) of this section; and

(F) Any additional requirements needed to grant access to a specific record.

(2) Method of access: The following methods of access to records by an individual may be available depending on the circumstances of a given situation:

(i) Inspection in person may be made in the office specified by the PA Officer, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (excluding holidays);

(ii) Transfer of records to a Federal facility more convenient to the individual may be arranged, but only if the PA Officer determines that a suitable facility is available, that the individual's access can be properly supervised at that facility, and that transmittal of the records to that facility will not unduly interfere with operations of the

section or involve unreasonable costs, in terms of both money and manpower; and

(iii) Copies may be mailed at the request of the individual, subject to payment of the fees prescribed in §1101.11. The Section, at its own initiative, may elect to provide a copy by mail, in which case no fee will be charged to the individual.

(c) Access to medical records: Upon advice by a physician that release of medical information directly to the requester could have an adverse effect on the requester, the Section may attempt to arrange an acceptable alternative. This will normally involve release of such information to a physician named by the requester, with the requester's written consent. (Note that release to any third party, including a physician or family member, must comply with the provisions of §1101.8 of this part.)

(d) The Section shall supply such other information and assistance at the time of access to make the record intelligible to the individual.

(e) The Section reserves the right to limit access to copies and abstracts of original records, rather than the original records. This election would be appropriate, for example, when the record is in an automated data media such as tape or disc, when the record contains information on other individuals, and when deletion of information is permissible under exemptions (for example 5, U.S.C. 552(k)(1)). In no event shall original records of the Section be made available to the individual except under the immediate supervision of the PA Officer or his designee. Title 18 U.S.C. 2701(a) makes it a crime to conceal, mutilate, obliterate, or destroy a record filed in a public office, or to attempt to do any of the foregoing.

(f) Any individual who requests access to a record pertaining to that individual may be accompanied by another individual of his or her choice. "Accompanied" includes discussion of the record in the presence of the other individual. The individual to whom the record pertains shall authorize the presence of the other individual in writing and shall include the name of the other individual, a specific description of the record to which access is

sought, and the date and the signature of the individual to whom the record pertains. The other individual shall sign the authorization in the presence of the PA Officer or his designee. An individual shall not be required to state a reason or otherwise justify his or her decision to be accompanied by another individual during the personal access to a record.

(g) Initial denial of access:

(1) Grounds. Access by an individual to a record which pertains to that individual will be denied only upon a determination by the PA Officer that:

(i) The record is subject to an exemption under the Act and these rules;

(ii) The record is information compiled in reasonable anticipation of a civil action or proceeding;

(iii) The provisions of §1101.7(c) pertaining to medical records have been temporarily invoked; or

(iv) The individual unreasonably has failed to comply with the procedural requirements of these rules.

(2) Notification. The PA Officer shall give notice of denial of access of records to the individual in writing and shall include the following information:

(i) The PA Officer's name and title or position;

(ii) The date of denial;

(iii) The reasons for the denial, including citation to the appropriate section of the Act and these rules;

(iv) The individual's opportunities for further administrative consideration, including the identity and address of the responsible official;

(v) If stated to be administratively final within the Section, the individual's right to judicial review under 5 U.S.C. 552a(g) (1) and (5).

(3) Administrative review: When an initial denial of a request is issued by the PA Officer, the individual's opportunities for further consideration shall be as follows:

(i) As to denial under paragraph (g)(1)(i) of this section, the sole procedure is a petition for the issuance, amendment, or repeal of a rule under 5 U.S.C. 553(e). Such petition shall be filed with the Commissioner, United States Section, International Boundary and Water Commission, 4171 North Mesa, Suite C-310, El Paso, TX 79902-

1422. If the exception was determined by another agency, the PA Officer will provide the individual with the name and address of the other agency and any relief sought by the individual shall be that provided by the regulations of the other agency. Within the Section, no such denial is administratively final until such a petition has been filed by the individual and disposed of on the merits by the Commissioner.

(ii) As to denial under paragraphs (g)(1), (ii), (iii) or (iv) of this section, the individual may file for review with the Commissioner, as indicated in the PA Officer's initial denial notification.

(h) If a request is partially granted and partially denied, the PA Officer shall follow the appropriate procedures of this section as to the records within the grant and the records within the denial.

§ 1101.8 Disclosure of records to third-parties.

(a) The Section will not disclose any information about an individual to any person other than the individual except in the following instances:

(1) Upon written request by the individual about whom the information is maintained;

(2) With prior written consent of the individual about whom the information is maintained;

(3) To the parent(s) of a minor child, or the legal guardian of an incompetent person, when said parent(s) or legal guardian act(s) on behalf of said minor or incompetent person.

(4) When permitted under 5 U.S.C. 552a(b) (1) through (11) which provides as follows:

(i) To those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(ii) Required under 5 U.S.C. 552 of the U.S. Code;

(iii) For a routine use as defined in the Act at 5 U.S.C. 552a(a)(7);

(iv) To the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13 of the U.S. Code;

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(v) To a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(vi) To the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(vii) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(viii) To a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(ix) To either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee, and to a Congressman who is acting on behalf of his constituent;

(x) To the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(xi) Pursuant to the order of a court of competent jurisdiction;

(5) When required by the Act and not covered explicitly by the provisions of 5 U.S.C. 552a(b). These situations include the following:

(i) Dissemination of a corrected or amended record or notation of a disagreement statement (5 U.S.C. 552a(c)(4));

(ii) Disclosure of records to an individual to whom they pertain (5 U.S.C. 552a(d));

(iii) Civil actions by an individual (5 U.S.C. 552a(g));

(iv) Release of records or information to the Privacy Protection Study Commission (Section 5 of Pub. L. 93-579);

(v) Fulfill the needs of Office of Management and Budget to provide continuing oversight and assistance to the section in implementation of the Act (Section 6 of Pub. L. 93-579).

§ 1101.9 Exemptions.

The following are exempt from disclosure under 5 U.S.C. 552a (j) and (k):

(a) Any record originated by another agency which has determined that the record is exempt. If a request encompasses such a record, the Section will advise the requester of its existence, and of the name and address of the source agency.

(b) Records specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy, and which are, in fact, properly classified pursuant to such executive order.

(c) Those systems of records listed as exempt in the Notice of Records of the FEDERAL REGISTER, including: Certificates of Medical Examination; Occupational Health and Injury Files; and Investigative Records.

§ 1101.10 Accounting for disclosures.

(a) Each system manager shall establish a system of accounting for all disclosures of records, either orally or in writing made outside the Section, unless otherwise exempted under this section. Accounting procedures may be established in the least expensive and most convenient form that will permit the PA Officer to advise individuals promptly upon request of the persons or agencies to which records concerning them have been disclosed. Accounting of disclosures made under 5 U.S.C. 552a(b)(7) relating to civil or criminal law enforcement activities shall not be made available to the individual named in the record.

(b) Accounting records, at a minimum, shall include the date, nature, and purpose of each disclosure of a

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record and the name and address of the person or agency to whom the disclosure was made. Accounting records shall be maintained for at least five years or the life of the record, whichever is longer.

(c) Accounting is not required to be kept for disclosure made within the Section or disclosures made pursuant to the Freedom of Information Act.

(d) If an accounting of the disclosure was made, the PA Officer shall inform any person or other agency about any correction or notation of dispute made by the Section in accordance with 5 U.S.C. 552a(d) of any record that has been disclosed to the person or agency.

§ 1101.11 Fees.

(a) Under the Act, fees can only be charged for the cost of copying records. No fees may be charged for the time it takes to search for the records or for the time it takes to determine if any exemptions apply. The Section will not charge a fee for the first copy of an individual's personnel record.

(b) The Section will charge a fee of \$0.10 per page for copies of documents which are identified by an individual and reproduced at the individual's request for retention, except that there will be no charge for requests involving costs of \$1.00 or less, but the copying fees for contemporaneous request by the same individual shall be aggregated to determine the total fee.

(c) Special and additional services provided at the request of the individual, such as certification or authentication, will be charged to the individual in accordance with other published regulations of the Section pursuant to statute (for example, 22 CFR part 1102—Freedom of Information Act.)

(d) Remittances shall be in the form of either a personal check or bank draft drawn on a bank in the United States, a postal money order, or cash. Remittance shall be made payable to the order of the U.S. Section, International Boundary and Water Commission, and delivered to or mailed to the PA Officer, United States Section, International Boundary and Water Commission, 4171 North Mesa, Suite C-310, El Paso, TX 79902-1422. The Section

will assume no responsibility for cash sent by mail.

(e) A receipt for fees paid will be given only upon request.

§ 1101.12 Request to correct or amend a record.

(a) Any individual may submit a request for correction of or amendment to a record to the Section. The request should be made either in person or by mail addressed to the PA Officer who processed the individual's request for access to the record, and to whom is delegated authority to make initial determinations on requests for correction or amendment.

(b) Since the request, in all cases, will follow a request for access under § 1101.6, the individual's identity will be established by his or her signature on the request.

(c) A request for correction or amendment should be in writing. The envelope containing the request should be marked "Privacy Act Amendment Request" on the lower left hand corner. The request should include the following:

(1) First, the letter should state that it is a request to amend a record under the Privacy Act of 1974.

(2) Second, the request should identify the specific record and the specific information in the record for which an amendment is being sought.

(3) Third, the request should state why the information is not accurate, relevant, timely, or complete. Supporting evidence may be included with the request.

(4) Fourth, the request should state what new or additional information, if any, should be included in place of the erroneous information. Evidence of the validity of new or additional information should be included. If the information in the file is wrong and needs to be removed rather than supplemented or corrected, the request should make this clear.

(5) Fifth, the request should include the name, address, and telephone number (optional) of the requester.

§ 1101.13 Agency review of request to correct or amend a record.

(a) (1) Not later than ten (10) days (excluding Saturdays, Sundays and

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holidays) after receipt of a request to correct or amend a record, the PA Officer shall send an acknowledgment providing an estimate of time within which action will be taken on the request and asking for such further information as may be necessary to process the request. The estimate of time may take into account unusual circumstances as described in §1101.7(a). No acknowledgment will be sent if the request can be reviewed, processed and the individual notified of the results of review (either compliance or denial) within ten (10) days (excluding Saturdays, Sundays and holidays). Requests filed in person will be acknowledged in writing at the time submitted.

(2) Promptly after acknowledging receipt of a request, or after receiving such further information as might have been requested, or after arriving at a decision within ten (10) days, the PA Officer shall either:

(i) Make the requested correction or amendment and advise the individual in writing of such action, providing either a copy of the corrected or amended record or a statement as to the means whereby the correction or amendment was effected in cases where a copy cannot be provided (for example, erasure of information from a record maintained only in an electronic data bank); or

(ii) Inform the individual in writing that his or her request is denied and provide the following information:

(A) The PA Officer's name, title and position;

(B) The date of denial;

(C) The reasons for the denial, including citation to the appropriate sections of the Act and these rules;

(D) The procedures for appeal of the denial as set forth in §1101.14.

The term promptly in this paragraph means within thirty (30) days (excluding Saturdays, Sundays and holidays). If the PA Officer cannot make the determination within thirty (30) days, the individual will be advised in writing of the reason therefor and of the estimated date by which the determination will be made.

(b) Whenever an individual's record is corrected or amended pursuant to a request by that individual, the PA Officer shall notify all persons and agen-

cies to which copies of the record had been disclosed prior to its correction or amendment, if an accounting of such disclosure required by the Act was made. The notification shall require a receipt agency maintaining the record to acknowledge receipt of the notification, to correct or amend the record, and to apprise any agency or person to which it has disclosed the record of the substance of the correction or amendment.

(c) The following criteria will be considered by the PA Officer in reviewing a request for correction or amendment.

(1) The sufficiency of the evidence submitted by the individual;

(2) The factual accuracy of the information;

(3) The relevance and necessity of the information in terms of purpose for which it was collected.

(4) The timeliness and currency of the information in light of the purpose for which it was collected;

(5) The completeness of the information in terms of the purpose for which it was collected;

(6) The degree of possibility that denial of the request could unfairly result in determinations adverse to the individual;

(7) The character of the record sought to be corrected or amended; and

(8) The propriety and feasibility of complying with the specific means of correction or amendment requested by the individual.

(d) The Section will not undertake to gather evidence for the individual, but does reserve the right to verify the evidence which the individual submits.

(e) Correction or amendment of a record requested by an individual will be denied only upon a determination by the PA Officer that:

(1) The individual has failed to establish, by a preponderance of the evidence, the propriety of the correction or amendment in light of the criteria set forth in paragraph (c) of this section;

(2) The record sought to be corrected or amended was compiled in a terminated judicial, quasi-judicial or quasi-legislative proceeding to which the individual was a party or participant;

(3) The record sought to be corrected or amended is the subject of a pending

judicial, quasi-judicial or quasi-legislative proceeding to which the individual is a party or participant;

(4) The correction or amendment would violate a duly enacted statute or promulgated regulation; or

(5) The individual unreasonably has failed to comply with the procedural requirements of these rules.

(f) If a request is partially granted and partially denied, the PA Officer shall follow the appropriate procedures of this section as to the records within the grant and the records within the denial.

§ 1101.14 Appeal of agency decision not to correct or amend a record.

(a) An appeal of the initial refusal to amend a record under § 1101.13 may be requested by the individual who submitted the request. The appeal must be requested in writing, and state that the appeal is being made under the Privacy Act of 1974, it should identify the denial that is being appealed and the records that were withheld, it should include the requester's name and address and telephone number (optional), and it should be signed by the individual making the request. It should be received by the Section within sixty (60) calendar days of the date the individual is informed of the PA Officer's refusal to amend a record in whole or in part. The request should be addressed and sent via certified mail to the Commissioner, United States Section, International Boundary and Water Commission, 4171 North Mesa, suite C-310, El Paso, TX 79902-1422. The processing of appeals will be facilitated if the words "PRIVACY APPEAL" appear in capital letters on both the envelope and the top of the appeal papers. An appeal not addressed and marked as provided herein will be marked by Section personnel when it is so identified and will be forwarded immediately to the Commissioner.

(b) The time for decision on the appeal begins on the date the appeal is received by the Commissioner. The appeal should include any documentation, information or statements advanced for the amendment of the record.

(c) There shall be a written record of the reason for the final determination.

The final determination will be made not later than thirty (30) days (excluding Saturdays, Sundays and holidays) from the date the Commissioner receives the appeal; unless, for good cause shown, the Commissioner extends such determination beyond the thirty (30) day period.

(d) When the final determination is that the record should be amended in accordance with the individual's request, the Commissioner shall direct the office responsible for the record to comply. The office responsible for the record shall:

(1) Amend the record as directed;

(2) If a distribution of the record has been made, advise all previous recipients of the record of the amendment and its substance;

(3) So advise the individual in writing.

(e) When the final decision is that the request of the individual to amend the record is refused, the Commissioner shall advise the individual:

(1) Of the refusal and the reasons for it;

(2) Of his or her right to file a concise statement of the reasons for disagreeing with the decision of the Section;

(3) Of the procedures for filing the statement of disagreement;

(4) That the statement which is filed will be made available to anyone to whom the record is subsequently disclosed together with, at the discretion of the Section, a brief statement by the Section summarizing its reasons for refusing to amend the record;

(5) That prior recipients of the disputed record will be provided a copy of any statement of dispute to the extent that an accounting of disclosures was maintained; and

(6) Of his or her right to seek judicial review of the Section's refusal to amend the record.

(f) When the final determination is to refuse to amend a record and the individual has filed a statement under paragraph (e)(2) of this section, the Section will clearly annotate the record so that the fact that the record is disputed is apparent to anyone who may subsequently have access to use or disclose it. When information that is the subject of a statement of dispute

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filed by an individual is subsequently disclosed, the Section will note that the information is disputed and provide a copy of the individual's statement. The Section may also include a brief summary of the reasons for not making a correction when disclosing disputed information. Such statements will normally be limited to the reasons given to the individual for not amending the record. Copies of the Section's statement shall be treated as part of the individual's record for granting access; however, it will not be subject to amendment by the individual under these rules.

(g) An appeal will be decided on the basis of the individual's appeal papers and the record submitted by the PA officer. No personal appearance or hearings on appeals will be allowed.

§ 1101.15 Judicial review.

After having exhausted all administrative remedies set forth in § 1101.7(g)(3) or § 1101.14, a requester may bring a civil action against the Section, in a United States District Court of proper venue, within two years of the final administrative decision which the requester seeks to challenge.

§ 1101.16 Criminal penalties.

(a) Under the provisions of the Act, it is a Federal crime for any person to knowingly and willfully request or obtain information from a Federal agency, including this Section, by false pretenses.

(b) It is also a crime for any officer or employee of the Section to knowingly and willfully:

(1) Make an unauthorized disclosure; or

(2) Fail to publish public notice of a system of records as required by 5 U.S.C. 552a(e)(4).

§ 1101.17 Annual report to Congress.

(a) On or before August 1 of each calendar year the Commissioner shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and the President of the Senate for referral to the appropriate committees of the Congress. The report shall include:

(1) The U.S. Section's point of contact responsible for implementing the Privacy Act of 1974;

(2) The number of active systems, new systems published, systems deleted, systems automated, either in whole or part, number of existing systems for which new routine uses were established, number of existing systems for which new exemptions were claimed, number of existing systems from which exemptions were deleted, and number of public comments received by the agency of publication of rules or notices;

(3) Total number of requests for access, number of requests wholly or partially granted, number of requests totally denied, number of requests for which no record was found, number of appeals of denials of access, number of appeals in which denial was upheld, number of appeals in which denial was overturned either in whole or part, number of requests to amend records in system, number of amendment requests wholly or partially granted, number of amendment requests totally denied, number of appeals of denials of amendment requests, number of appeals in which denial was upheld, number in which denial was overturned either in whole or in part, whether the U.S. Section denied an individual access to his or her records in a system of record on any basis other than a Privacy Act exemption under 5 U.S.C. 552(j) or (k), and the legal justification for the denial, number of instances in which individuals litigated the results of appeals of access or amendment, and the results of such litigation, and a statement of our involvement in matching programs;

(4) Any other information which will indicate the U.S. Section's effort to comply with the objectives of the Act, to include any problems encountered, with recommendations for solving thereof;

(5) And, a copy of these regulations.

PART 1102—FREEDOM OF INFORMATION ACT

Sec.

1102.1 Purpose.

1102.2 Definitions.

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- 1102.3 Procedures for requesting access to records or information.
- 1102.4 Fees.
- 1102.5 Categories of requesters for fee purposes.
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- 1102.7 The Section's determination and appeal procedures.
- 1102.8 Exemptions.
- 1102.9 Annual report to Congress.
- 1102.10 Examination of records.

AUTHORITY: 5 U.S.C. 552 (Pub. L. 90-23, as amended by Pub. L. 93-502 and 99-570).

SOURCE: 55 FR 35898, Sept. 4, 1990, unless otherwise noted.

§ 1102.1 Purpose.

The purpose of this part is to prescribe rules, guidelines and procedures to implement the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended on November 21, 1974, by Public Law 93-502, and on October 27, 1986, by Public Law 99-570.

§ 1102.2 Definitions.

Act means the Freedom of Information Act, 5 U.S.C. 552, as amended.

Commercial-use request refers to a request from or on behalf of one who seeks information for a cause or purpose that furthers the commercial, trade, or profit interests of the requester or person on whose behalf the request is made. In determining whether a requester properly belongs in this category, the Section will consider how the requester will use the documents.

Commissioner means head of the United States Section, International Boundary and Water Commission, United States and Mexico.

Direct costs means those expenditures which the Section actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility where the records are stored.

Disclose or disclosure means making records available, on request for exam-

ination and copying, or furnishing a copy of records.

Duplication refers to the process of making a copy of a document in response to a FOIA request. Such copies can take the form of paper, microform, audiovisual materials, or machine-readable documentation. The Section will provide a copy of the material in a form that is usable by the requester unless it is administratively burdensome to do so.

Educational institution refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

Noncommercial scientific institution refers to an institution that is not operated on a "commercial" basis as that term is referenced above, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

Person or *Requester* includes any individual, firm, corporation, organization or other entity.

Records and/or *information* are defined as all books, papers, manuals, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by the Section under Federal law or in connection with the transaction of public business or in carrying out its treaty responsibilities and obligations, and preserved or appropriate for preservation by the Section as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the information value of the data in them, but does not include books, magazines or other material acquired solely for library purposes and through other sources, and does not include analyses, computations, or compilations of information not extant at the time of the request. The term "records" does not include objects or articles such as structures, furniture, paintings, sculptures, three-dimensional models, vehicles, and equipment.

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Representative of the news media refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only those instances when they can qualify as disseminators of “news”) who make their products available for purchase or subscription by the general public. In the case of “freelance” journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization even though not actually employed by it.

Request means a letter or other written communication seeking records or information under the Freedom of Information Act.

Review refers to the process of examining documents located in response to a request that is for commercial use to determine if any portion of that document is permitted to be withheld, and processing any document for disclosure (i.e., doing all that is necessary to excise them and otherwise prepare them for release). It does not include time spent resolving general legal or policy issues regarding the application of exemptions.

Search includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Searches should be performed in the most efficient and least expensive manner so as to minimize costs for both the Section and the requester; for example, line-by-line searches should not be undertaken when it would be more efficient to duplicate the entire document. Note that such activity should be distinguished from “review” of material in determining whether the material is exempt from disclosure. Searches may be done manually or by computer using existing programming.

The *Section* means United States Section, International Boundary and

Water Commission, United States and Mexico.

All terms used in this part which are defined in 5 U.S.C. 552 shall have the same meaning herein.

§ 1102.3 Procedures for requesting access to records or information.

(a) A request for any information or records shall be addressed to the FOIA Officer, United States Section, International Boundary and Water Commission, 4171 North Mesa, suite C-310, El Paso, TX 79902-1422. The envelope and the letter shall be clearly marked “Freedom of Information Request” or “Request for Records,” or the equivalent, to distinguish it from other mail to the Section. If the request is not so marked and addressed, the 10-day time limit described in the Act will not begin to run until the request has been received by the FOIA Officer in the normal course of business. In each instance where a request is received in the normal course of business, the FOIA Officer shall notify the requester that its request was improperly addressed and the date the request was received.

(b) In order for the Section to locate records or information and make them available, it is necessary that it be able to identify the specific record or information sought. Persons wishing to inspect or obtain copies of records or information should, therefore, seek to identify them as fully and accurately as possible. In cases where requests are submitted which are not sufficient to permit identification, the FOIA Officer will endeavor to assist the persons seeking the records or information in filling in necessary details. In most cases, however, persons seeking records or information will find that time taken in trying to identify materials in the beginning is well worth their while in enabling the Section to respond promptly to their request.

(c) A person submitting a request should—

(1) Indicate the specific event or action, if any or if known, to which the request has reference.

(2) Designate the Division, Branch, or Project Office of the Section which may be responsible for or may have

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produced the record or information requested.

(3) Furnish the date of the record or information or the date or period to which it refers or relates, if known.

(4) Name the character of record or information, such as a contract, an application, or a report.

(5) List the Section's personnel who may have prepared or have knowledge of the record or information.

(6) Furnish the reference material such as newspapers or publications which are known to have made a reference to the record or information desired.

(7) If the request relates to a matter in pending litigation or one which has been litigated, supply the Court location and case style and number.

(8) Describe, when the request includes more than one record or source of information, specifically each record or information so that availability may be separately determined.

(9) Clearly indicate whether the request is an initial request or an appeal from a denial of a record or information previously requested.

(10) Identify, when the request concerns a matter about the Section's personnel, the person as follows: First name, middle name or initial, and surname; date and place of birth; and social security account number, if known.

(d) No particular format is needed for the request, except that it:

(1) Must be in writing;

(2) Must describe the records or information sought with sufficient detail to permit identification;

(3) Should state a limitation of the fees the requester is willing to pay, if any; and

(4) Must include the name, address, and telephone number (optional) of the person submitting the request.

§ 1102.4 Fees.

(a) The following shall be applicable with respect to services rendered to members of the public under this subpart:

(1) Fee schedule.

(i) Searching for records, per hour or fraction thereof per individual:

Professional	\$18.00
Clerical	\$9.00

Includes the salary of the category of employee who actually performs the search, plus an additional 16% of that rate to cover benefits.

(ii) The cost for computer searches will be calculated based on the salary of the category of employee who actually performs the computer search, plus 16% of that rate to cover benefits, plus the direct costs of the central processing unit, input-output devices, and memory capacity of the actual computer configuration.

(iii) Reproduction fees:

Pages no larger than 8½ by 14 inches when reproduced by routine electrostatic copying: \$0.10 per page.

Pages requiring reduction, enlargement, or other special services will be billed at direct cost to the Section.

Reproduction by other than routine electrostatic copying will be billed at direct cost to the Section.

(iv) Certification of each record as a true copy—\$1.00

(v) Certification of each record as a true copy under official seal—\$1.50

(vi) For each signed statement of negative result of search for record—\$1.00

(vii) For each signed statement of nonavailability of record—\$1.00

(viii) Duplication of architectural photographs and drawings:

Available tracing or reproducible, per square foot	\$0.10
If intermediate negative and reproducible required	\$2.00;
Plus tracing per square foot	\$1.00

(ix) *Postage and handling.* It will be up to the person requesting the records or information to designate how the material will be mailed or shipped. In the absence of such instructions no records or information will be sent to a foreign address, and records and information will be sent to domestic addresses utilizing first class certified mail, return receipt requested and will be billed at direct cost to the Section.

(2) Only requesters who are seeking documents for commercial use will be charged for time spent reviewing records to determine whether they are exempt from mandatory disclosure. The cost for review will be calculated based on the salary of the category of the employee who actually performed the review plus 16% of the rate to cover

benefits. Charges will be assessed only for the initial review (i.e., review undertaken the first time in order to analyze the applicability of specific exemption(s) to a particular record or portion of record) and not review at the administrative appeal level of the exemption(s) already applied.

(3) If records requested under this part are stored elsewhere than the headquarters of the U.S. Section, IBWC, 4171 North Mesa, EL Paso, TX, the special cost of returning such records to the headquarters shall be included in the search costs. These costs will be computed at the actual costs of transportation of either a person or the requested record between the place where the record is stored and the Section headquarters when, for time or other reasons, it is not feasible to rely on Government mail service.

(4) When no specific fee has been established for a service, or the request for a service does not fall under one of the above categories due to the amount or size or type thereof, the FOIA Officer is authorized to establish an appropriate fee, pursuant to the criteria established in Office of Management and Budget Circular No. A-25, entitled "User Charges."

(b) Where it is anticipated that the fees chargeable under this part will amount to more than \$25 and the requester has not indicated in advance her/his willingness to pay fees as high as anticipated, the requester shall be promptly notified of the amount of the anticipated fees or such portion thereof as can readily be estimated. The notice or request for an advance deposit shall extend an offer to the requester to confer with knowledgeable Section personnel in an attempt to reformulate the request in a manner which will reduce the fees and meet the needs of the requester. Dispatch of such notice or request shall suspend the running of the period for response by the Section until a reply is received from the requester.

(c) Search costs are due and payable even if the record which was requested cannot be located after all reasonable efforts have been made, or if the Section determines that a record which has been requested, but which is ex-

empt from disclosure under this part, is to be withheld.

(d) The Section will begin assessing interest charges on an unpaid bill starting the 31st day following the day on which the billing was sent. The accrual of interest will be stayed upon receipt of the fee, rather than upon its processing by the Section. Interest will at the rate prescribed in section 3717 of title 31 U.S.C.

(e) A requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When the Section reasonably believes that a requester or a group of requesters acting in concert is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the Section will aggregate any such requests and charge accordingly.

(f) The Section will not require a requester to make an advance payment, i.e., payment before work is commenced or continued on a request, unless:

(1) The Section estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250. Then the Section will notify the requester of the likely costs and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment; or

(2) Requesters who have previously failed to pay fees charged in a timely fashion (i.e., within 30 days of the date of the billing), the Section will require such requesters to pay the full amount owed plus any applicable interest as provided above or demonstrate that they have, in fact, paid the fee, and to make an advance payment of the full amount of the estimated fee before the agency begins to process new requests or pending requests from such requesters.

When the Section acts under paragraph (f) (1) or (2) of this section, the administrative time limit prescribed in subsection (a)(6) of the FOIA (i.e., 10 working days from receipt of initial requests plus permissible extensions of

that time limit) will begin only after the Section has received payments described above.

(g) In accordance with the provisions and authorities of the Debt Collection Act of 1982 (Pub. L. 97-365), the Section reserves the right to disclose information to consumer reporting agencies and to use collection agencies, where appropriate, to encourage repayment.

(h) No fees under \$10 will be billed by the Section because the cost of collection would be greater than the fee.

(i) Requester should pay fees by check or money order made out to the U.S. Section, International Boundary and Water Commission, and mailed to the Finance and Accounting Office, United States Section, International Boundary and Water Commission, 4171 North Mesa, suite C-310, El Paso, TX 79902-1422.

§ 1102.5 Categories of requesters for fee purposes.

There are four categories of requesters: Commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The Act prescribes specific levels of fees for each of these categories. The Section will take into account information provided by requesters in determining their eligibility for inclusion in one of these categories as defined in § 1102.2. It is in the requester's best interest to provide as much information as possible to demonstrate inclusion within a non-commercial category of fee treatment.

(a) The Section will assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought for commercial use. Commercial use requesters are entitled to neither two hours of free search time nor 100 free pages of reproduction of documents.

(b) The Section will provide documents to educational and non-commercial scientific institutions for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request being made is authorized by, and under the auspices of, a qualifying institution and that the records are not sought for

a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research.

(c) The Section will provide documents to representatives of the news media for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category; a requester must meet the criteria in § 1102.2(m), and the request must not be made for a commercial use. In reference to this class of requesters, a request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use.

(d) The Section will charge requesters who do not fit into any of the categories above fees which recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge. Moreover, requests from record subjects for records about themselves will continue to be treated under the fee provisions of the Privacy Act of 1974 which permit fees only for reproduction.

(e) In making determinations under this section, the Section may take into account whether requesters who previously were granted (b), (c), or (d) status under the Act did in fact use the requested records for purposes compatible with the status accorded them.

§ 1102.6 Fee waivers and appeals.

(a) Waiver or reduction of any fee provided for in § 1102.4 may be made upon a determination by the FOIA Officer, United States Section, International Boundary and Water Commission, 4171 North Mesa, suite C-310, El Paso, TX 79902-1422. The Section shall furnish documents without charge or at a reduced charge provided that: Disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government, and is not primarily in the commercial interest of the requester. Requests for a waiver or

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reduction of fees shall be considered on a case-by-case basis.

(1) In order to determine whether disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government, the Section will consider the following four factors:

(i) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the Government;

(ii) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of Government operations or activities;

(iii) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to public understanding; and

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute significantly to public understanding of Government operations or activities.

(2) In order to determine whether disclosure of the information is not primarily in the commercial interest of the requester, the Section will consider the following two factors:

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(ii) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(b) The Section will not consider waiver or reduction of fees for requesters (persons or organizations) from whom unpaid fees remain due to the Section for another information access request.

(c)(1) The Section's decision to refuse to waive or reduce fees as requested under paragraph (a) of this section may be appealed to the Commissioner, United States Section, International Boundary and Water Commission, 4171

North Mesa, Suite C-310, El Paso, TX 79902-1422. Appeals should contain as much information and documentation as possible to support the request for a waiver or reduction of fees.

(2) Appeals will be reviewed by the Commissioner, who may consult with other officials of the Section as appropriate. The requester will be notified within thirty working days from the date on which the Section received the appeal.

§ 1102.7 The Section's determination and appeal procedures.

Upon receipt of any request for records of information under the Act the following guidelines shall be followed:

(a) The FOIA Officer will determine within 10 days (excepting Saturdays, Sundays, and legal holidays) after receipt of any such request whether to comply with such request and will immediately notify the person making such request of such determination, the reasons therefore, and of the right to such person to appeal to the Commissioner any adverse determination.

(b) All appeals should be addressed to the Commissioner, United States Section, International Boundary and Water Commission, 4171 North Mesa, Suite, C-310, El Paso, TX 79902-1422, and should be clearly identified as such on the envelope and in the letter of appeal by using the marking "Freedom of Information Appeal" or "Appeal for Records" or the equivalent. Failure to properly address an appeal may defer the date of receipt by the Section to take into account the time reasonably required to forward the appeal to the Commissioner. In each instance when an appeal is incorrectly addressed to the Commissioner, he shall notify the person making the appeal that his appeal was improperly addressed and of the date the appeal was received by the Commissioner. The Commissioner will make a determination with respect to any appeal within 20 days (excepting Saturdays, Sundays, and legal holidays) after the receipt of an appeal. If on appeal the denial or the request is in whole or in part upheld, the Commissioner will notify the person making such request of the provisions for

judicial review under the Act. An appeal must be in writing and filed within 30 days from receipt of the initial determination (in cases of denials of an entire request), or from receipt of any records being made available pursuant to the initial determination (in case of partial denials). In those cases where a request or appeal is not addressed to the proper official, the time limitations stated above will be computed from the receipt of the request or appeal by the proper official.

(c) In unusual circumstances, as set forth in paragraph (d) of this section, the time limits for responding to the original request or the appeal may be extended by not more than an additional 10 working days by written notice to the person making a request. This notice must be sent within either 10- or 20-day time limit and will specify the reason for the extension and the date on which determination is expected to be dispatched. The extension may be invoked only once during the consideration of a request either during the initial consideration period or during the consideration of an appeal, but not both.

(d) The unusual circumstances are:

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

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

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

(e) If the FOIA Officer receives a request which is of proper concern to an agency or entity outside the Section, it will be returned to the person making the request, advising the requester to refer it to the appropriate agency or entity if requester desires, and providing the requester with the name or title, address and other appropriate information. An information copy of the

request and the letter of referral will be forwarded promptly to the agency or entity outside the Section that may expect the request. In the event the FOIA Officer receives a request to make available a record or provide information which is of interest to more than one agency (Federal, State, municipal, or legal entity created thereby), the FOIA Officer will retain and act upon the request if the Section is one of the interest agencies and if its interest in the record is paramount.

(f) The Commissioner's determination on an appeal shall be in writing and when it denies records in whole or in part, the letter to the person making a request shall include:

(1) Notation of the specific exemption or exemptions of the Act authorizing the withholding.

(2) A statement that the decision is final for the Section.

(3) Advice that judicial review of the denial is available in the district in which the person making the request resides or has his principal place of business, the district in which the Section's records are situated, or the District of Columbia.

(4) The names and titles or positions of each official responsible for the denial of a request.

When appropriate, the written determination may also state how an exemption applied in that particular case, and, when relevant, why a discretionary rebase is not appropriate.

(g) In those cases where it is necessary to find and examine records before the legality or appropriateness of their disclosure can be determined, and where after diligent effort this has not been achieved within the required period, the FOIA Officer may advise the person making the request that a determination to presently deny the request has been made because the records or information have not been found or examined, that the determination will be considered when the search or examination is completed and the time within which completion is expected, but that the person making the request may immediately file an administrative appeal to the Commissioner.

§ 1102.8

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§ 1102.8 Exemptions.

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

(1) *Classified documents.* Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and that are, in fact, properly classified under the Executive order.

(2) *Internal personnel rules and practices.* Related solely to the internal personnel rules and practices of an agency.

(3) *Information exempt under other laws.* Specifically exempted from disclosure by statute, provided that the statute—

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

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

(4) *Confidential business information.* Trade secrets and commercial or financial information obtained from a person and privileged or confidential.

(5) *Internal government communications.* 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) *Personal privacy.* Personnel, medical, and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

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

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

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

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

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in

the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation information furnished by a confidential source;

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

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

(8) *Financial institutions.* 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.

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

(b) The Section will provide any reasonably segregable portion of a record to a requester after deletion of the portions that are exempt under this section.

(c) The section will invoke no exemption under this section if the requested records are available to the requester under the Privacy Act of 1974 and its implementing regulations.

(d) Whenever a request is made which involves access to records described in paragraph (a)(7)(i) of this section and

(1) The investigation or proceeding involves a possible violation of criminal law, and

(2) There is reason to believe that the subject of the investigation or proceeding is not aware of its pendency, and disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

§ 1102.9 Annual report to Congress.

(a) On or before March 1 of each calendar year the Commissioner shall submit a report covering the preceding calendar year to the Speaker of the

House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include:

(1) The number of determinations made by the section not to comply with request for records made to the section under the Act and this part and the reasons for each such determination.

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

(3) The names and titles or positions of each person responsible for the denial of records requested under the Act, and the number of instances of participation for each.

(4) The results of each proceeding conducted pursuant to 552(1)(4)(F) of the Act, including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken.

(5) A copy of this part.

(6) A copy of the fee schedule and the total amount of fees collected by the section for making records available under the Act.

(7) Such other information as indicates efforts to administer fully the Act.

(b) A copy of each such report to the Congress made pursuant to paragraph (a) of this section will be made available for public inspection and copying in the office of the FOIA Officer, United States Section, International Boundary and Water Commission, 4171 North Mesa, Suite C-310, El Paso, TX 79902-1422.

§ 1102.10 Examination of records.

When a request to examine records is approved by the FOIA Officer, every reasonable effort will be made to provide facilities for the purpose of such examination. "On the spot" copying will be available if the FOIA Officer decides there will be no interference with ordinary activities or routine business of the section.

PART 1103—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY INTERNATIONAL BOUNDARY AND WATER COMMISSION, UNITED STATES AND MEXICO, UNITED STATES SECTION

Sec.

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AUTHORITY: 29 U.S.C. 794.

SOURCE: 51 FR 4577, Feb. 5, 1986, unless otherwise noted.

§ 1103.101 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 1103.102 Application.

This part applies to all programs or activities conducted by the agency.

§ 1103.103 Definitions.

For purposes of this part, the term—*Assistant Attorney General* means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Handicapped person means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning

disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addition and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

Qualified handicapped person means—

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; or

(2) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(3) *Qualified handicapped person* is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by §1103.140.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

[51 FR 4577, Feb. 5, 1986; 51 FR 7543, Mar. 5, 1986]

§§ 1103.104–1103.109 [Reserved]

§ 1103.110 Self-evaluation.

(a) The agency shall, by April 9, 1987, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, until three years following the completion of the self-evaluation, maintain on file and make available for public inspections:

(1) A description of areas examined and any problems identified, and

(2) A description of any modifications made.

§ 1103.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 1103.112–1103.129 [Reserved]

§ 1103.130 General prohibitions against discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permiscibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of

administration the purpose or effect of which would—

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

§§ 1103.131–1103.139 [Reserved]

§ 1103.140 **Employment.**

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 1103.141–1103.148 [Reserved]

§ 1103.149 **Program accessibility: Discrimination prohibited.**

Except as otherwise provided in § 1103.150, no qualified handicapped person shall, because the agency's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 1103.150 **Program accessibility: Existing facilities.**

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 1103.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section

through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by June 6, 1986, except that where structural changes in facilities are undertaken, such changes shall be made by April 7, 1989, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by October 7, 1986, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

[51 FR 4577, Feb. 5, 1986; 51 FR 7543, Mar. 5, 1986]

§ 1103.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

§§ 1103.152-1103.159 [Reserved]

§ 1103.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons

with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with §1103.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§ 1103.161–1103.169 [Reserved]

§ 1103.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity

Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Director, Equal Employment Opportunity shall be responsible for coordinating implementation of this section. Complaints may be sent to Director, Equal Employment Opportunity, International Boundary and Water Commission, United States and Mexico, United States Section, The Commons, Building C, Suite 310, 4171 North Mesa, El Paso, Texas 79902.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

- (1) Findings of fact and conclusions of law;
- (2) A description of a remedy for each violation found;
- (3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by §1103.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt

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of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[51 FR 4577, Feb. 5, 1986, as amended at 51 FR 4577, Feb. 5, 1986]

§§ 1103.171-1103.999 [Reserved]

PART 1104—PROTECTION OF ARCHAEOLOGICAL RESOURCES

Sec.

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- 1104.2 Definitions.
- 1104.3 Prohibited acts.
- 1104.4 Permit requirements and exceptions.
- 1104.5 Application for permits and information collection.
- 1104.6 Notification to Indian tribes of possible harm to, or destruction of, sites on public lands having religious or cultural importance.
- 1104.7 Issuance of permits.
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- 1104.10 Appeals relating to permits.
- 1104.11 Relationship to section 106 of the National Historic Preservation Act.
- 1104.12 Custody of archaeological resources.
- 1104.13 Determination of archaeological or commercial value and cost of restoration and repair.
- 1104.14 Assessment of civil penalties.
- 1104.15 Civil penalty amounts.
- 1104.16 Other penalties and rewards.
- 1104.17 Confidentiality of archaeological resource information.
- 1104.18 Report to the Secretary of the Interior.

AUTHORITY: Pub. L. 96-95, 93 Stat. 721 (16 U.S.C. 470aa-11) (Sec. 10(a).) Related Authority: Pub. L. 59-209, 34 Stat. 225 (16 U.S.C. 432, 433); Pub. L. 86-523, 74 Stat. 220, 221 (16 U.S.C. 469), as amended, 88 Stat. 174 (1974); Pub. L. 89-665, 80 Stat. 915 (16 U.S.C. 470a-t), as amended, 84 Stat. 204 (1970), 87 Stat. 139 (1973), 90 Stat. 1320 (1976), 92 Stat. 3467 (1978),

94 Stat. 2987 (1980); Pub. L. 95-341, 92 Stat. 469 (42 U.S.C. 1996).

SOURCE: 56 FR 21590, May 10, 1991, unless otherwise noted.

§ 1104.1 Purpose.

(a) The regulations in this part implement provisions of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa-11) by establishing the definitions, standards, and procedures to be followed by the Commissioner in providing protection for archaeological resources, located on public lands through permits authorizing excavation and/or removal of archaeological resources, through civil penalties for unauthorized excavation and/or removal, through provisions for the preservation of archaeological resource collections and data, and through provisions for ensuring confidentiality of information about archaeological resources when disclosure would threaten the archaeological resources.

(b) The regulations in this part do not impose any new restrictions on activities permitted under other laws, authorities, and regulations relating to mining, mineral leasing, reclamation, and other multiple uses of the public lands.

§ 1104.2 Definitions.

As used for purposes of this part:

(a) *Archaeological resource* means any material remains of human life or activities which are at least 100 years of age, and which are of archaeological interest.

(1) *Of archaeological interest* means capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques such as controlled observation, contextual measurement, controlled collection, analysis, interpretation and explanation.

(2) *Material remains* means physical evidence of human habitation, occupation, use, or activity, including the site, location, or context in which such evidence is situated.

(3) The following classes of material remains (and illustrative examples), if they are at least 100 years of age, are of archaeological interest and shall be

considered archaeological resources unless determined otherwise pursuant to paragraph (a)(4) or (a)(5) of this section:

(i) Surface or subsurface structures, shelters, facilities, or features (including, but not limited to, domestic structures, storage structures, cooking structures, ceremonial structures, artificial mounds, earthworks, fortifications, canals, reservoirs, horticultural/agricultural gardens or fields, bedrock mortars or grinding surfaces, rock alignments, cairns, trails, borrow pits, cooking pits, refuse pits, burial pits or graves, hearths, kilns, post molds, wall trenches, middens);

(ii) Surface or subsurface artifact concentrations or scatters;

(iii) Whole or fragmentary tools, implements, containers, weapons and weapon projectiles, clothing, and ornaments (including, but not limited to, pottery and other ceramics, cordage, basketry and other weaving, bottles and other glassware, bone, ivory, shell, metal, wood, hide, feathers, pigments, and flaked, ground, or pecked stone);

(iv) By-products, waste products, or debris resulting from manufacture or use of human-made or natural materials;

(v) Organic waste (including but not limited to, vegetable and animal remains, coprolites);

(vi) Human remains (including, but not limited to, bone, teeth, mummified flesh, burials, cremations);

(vii) Rock carvings, rock paintings, intaglios and other works of artistic or symbolic representation;

(viii) Rockshelters and caves or portions thereof containing any of the above material remains;

(ix) All portions of shipwrecks (including but not limited to, armaments, apparel, tackle, cargo);

(x) Any portion or piece of any of the foregoing.

(4) The following material remains shall not be considered of archaeological interest, and shall not be considered to be archaeological resources for purposes of the Act and this part, unless found in a direct physical relationship with archaeological resources as defined in this section:

(i) Paleontological remains;

(ii) Coins, bullets, and unworked minerals and rocks.

(5) The Commissioner may determine that certain material remains, in specified areas under the Commissioner's jurisdiction, and under specified circumstances, are not or are no longer of archaeological interest and are not to be considered archaeological resources under this part. Any determination made pursuant to this subparagraph shall be documented. Such Determination shall in no way affect the Commissioner's obligations under other applicable laws or regulations.

(b) *Arrowhead* means any projectile point which appears to have been designed for use with an arrow.

(c) *Commissioner* means the head of the United States Section, International Boundary and Water Commission, United States and Mexico, and his delegate.

(d) *Public lands* means lands to which the United States of America holds fee title, and which are under the control of the U.S. Section, International Boundary and Water Commission, United States and Mexico.

(e) *Indian tribe* as defined in the Act means any Indian tribe, band, nation, or other organized group or community. In order to clarify this statutory definition for purposes of this part, *Indian tribe* means:

(1) Any tribal entity which is included in the annual list of recognized tribes published in the FEDERAL REGISTER by the Secretary of the Interior pursuant to 25 CFR part 54;

(2) Any other tribal entity acknowledged by the Secretary of the Interior pursuant to 25 CFR part 54 since the most recent publication of the annual list;

(f) *Person* means an individual, corporation, partnership, trust, institution, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the United States, or of any Indian tribe, or of any State or political subdivision thereof.

(g) *State* means any of the fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

(h) *Act* means the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa-11.), as amended.

§ 1104.3 Prohibited acts.

(a) No person may excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands unless such activity is pursuant to a permit issued under § 1104.7 or exempted by § 1104.4(b) of this part.

(b) No person may sell, purchase, exchange, transport, or receive any archaeological resource, if such resource was excavated or removed in violation of:

- (1) The prohibitions contained in paragraph (a) of this section; or
- (2) Any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law.

§ 1104.4 Permit requirements and exceptions.

(a) Any person proposing to excavate and/or remove archaeological resources from public lands, and to carry out activities associated with such excavation and/or removal, shall apply to the Commissioner for a permit for the proposed work, and shall not begin the proposed work until a permit has been issued. The Commissioner may issue a permit to any qualified person, subject to appropriate terms and conditions, provided that the person applying for a permit meets conditions in § 1104.7(a) of this part.

(b) Exceptions:

(1) No permit shall be required under this part for any person conducting activities on the public lands under other permits, leases, licenses, or entitlements for use, when those activities are exclusively for purposes other than the excavation and/or removal of archaeological resources, even though those activities might incidentally result in the disturbance of archaeological resources. General earth-moving excavation conducted under a permit or other authorization shall not be construed to mean excavation and/or removal as used in this part. This exception does not, however, affect the Commissioner's responsibility to comply with other authorities which protect archaeological resources prior to approving permits, leases, licenses, or entitlements for use; any excavation and/or removal of archaeological resources required for compliance with

those authorities shall be conducted in accordance with the permit requirements of this part.

(2) No permit shall be required under this part for any person collecting for private purposes any rock, coin, bullet, or mineral which is not an archaeological resource as defined in this part, provided that such collecting does not result in disturbance of any archaeological resource.

(3) No permit shall be required under section 3 of the Act of June 8, 1906 (16 U.S.C. 432) for any archaeological work for which a permit is issued under this part.

(c) Persons carrying out official agency duties under the Commissioner's direction, associated with the management of archaeological resources, need not follow the permit application procedures of § 1104.5. However, the Commissioner shall insure that provisions of §§ 1104.7 and 1104.8 have been met by other documented means, and that any official duties which might result in harm to or destruction of any Indian tribal religious or cultural site, as determined by the Commissioner, have been the subject of consideration under § 1104.6.

(d) Upon the written request of the Governor of any State, on behalf of the State or its educational institutions, the Commissioner shall issue a permit, subject to the provisions of §§ 1104.4(b)(5), 1104.6, 1104.7(a) (3), (4), (5), (6), and (7), 1104.8, 1104.9, 1104.11, and 1104.12(a) to such Governor or to such designee as the Governor deems qualified to carry out the intent of the Act, for purposes of conducting archaeological research, excavating and/or removing archaeological resources, and safeguarding and preserving any materials and data collected in a university, museum, or other scientific or educational institution approved by the Commissioner.

(e) Under other statutory, regulatory, or administrative authorities governing the use of public lands, authorizations may be required for activities which do not require a permit under this part. Any person wishing to conduct on public lands any activities related to but believed to fall outside the scope of this part should consult with the Commissioner, for the purpose

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of determining whether any authorization is required, prior to beginning such activities.

§ 1104.5 Application for permits and information collection.

(a) Any person may apply to the Commissioner for a permit to excavate and/or remove archaeological resources from public lands and to carry out activities associated with such excavation and/or removal.

(b) Each application for a permit shall include:

(1) The nature and extent of the work proposed, including how and why it is proposed to be conducted, proposed time of performance, locational maps, and proposed outlet for public written dissemination of the results.

(2) The name and address of the individual(s) proposed to be responsible for conducting the work, institutional affiliation, if any, and evidence of education, training, and experience in accord with the minimal qualifications listed in § 1104.7(a).

(3) The name and address of the individual(s), if different from the individual(s) named in paragraph (b)(2) of this section, proposed to be responsible for carrying out the terms and conditions of the permit.

(4) Evidence of the applicant's ability to initiate, conduct, and complete the proposed work, including evidence of logistical support and laboratory facilities.

(5) Where the application is for the excavation and/or removal of archaeological resources on public lands, the names of the university, museum, or other scientific or educational institution in which the applicant proposes to store all collections, and copies of records, data, photographs, and other documents derived from the proposed work. Applicants shall submit written certification, signed by an authorized official of the institution, of willingness to assume curatorial responsibility for the collections, records, data, photographs and other documents and to safeguard and preserve these materials as property of the United States.

(c) The Commissioner may require additional information, pertinent to land management responsibilities, to

be included in the application for permit and shall so inform the applicant.

(d) Paperwork Reduction Act. The information collection requirement contained in § 1104.5 of these regulations has been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1024-0037. The purpose of the information collection is to meet statutory and administrative requirements in the public interest. The information will be used to assist the Commissioner in determining that applicants for permits are qualified, that the work proposed would further archaeological knowledge, that archaeological resources and associated records and data will be properly preserved, and that the permitted activity would not conflict with the management of the public lands involved. Response to the information requirement is necessary in order for an applicant to obtain a benefit.

§ 1104.6 Notification to Indian tribes of possible harm to, or destruction of, sites on public lands having religious or cultural importance.

(a) If the issuance of a permit under this part may result in harm to, or destruction of, any Indian tribal religious or cultural site on public lands, as determined by the Commissioner, at least 30 days before issuing such a permit the Commissioner shall notify any Indian tribe which may consider the site as having religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of section 9 of the Act.

(1) Notice by the Commissioner to any Indian tribe shall be sent to the chief executive officer or other designated official of the tribe. Indian tribes are encouraged to designate a tribal official to be the focal point for any notification and discussion between the tribe and the Commissioner.

(2) The Commissioner may provide notice to any other Native American group that is known by the Commissioner to consider sites potentially affected as being of religious or cultural importance.

(3) Upon request during the 30-day period, the Commissioner may meet with official representatives of any Indian

tribe or group to discuss their interests, including ways to avoid or mitigate potential harm or destruction such as excluding sites from the permit area. Any mitigation measures which are adopted shall be incorporated into the terms and conditions of the permit under § 1104.8.

(4) When the Commissioner determines that a permit applied for under this part must be issued immediately because of an imminent threat of loss or destruction of an archaeological resource, the Commissioner shall so notify the appropriate tribe.

(b)(1) In order to identify sites of religious or cultural importance, the Commissioner shall seek to identify all Indian tribes having aboriginal or historic ties to the lands under the Commissioner's jurisdiction and seek to determine, from the chief executive officer or other designated official of any such tribe, the location and nature of specific sites of religious or cultural importance so that such information may be on file for land management purposes. Information on site eligible for or included in the National Register of Historic Places may be withheld from public disclosure pursuant to section 304 of the Act of October 15, 1966, as amended (16 U.S.C. 470w-3).

(2) If the Commissioner becomes aware of a Native American group that is not an Indian tribe as defined in this part but has aboriginal or historic ties to public lands under the Commissioner's jurisdiction, the Commissioner may seek to communicate with official representatives of that group to obtain information on sites they may consider to be of religious or cultural importance.

(3) The Commissioner may enter into agreement with any Indian tribe or other Native American group for determining locations for which such tribe or group wishes to receive notice under this section.

§ 1104.7 Issuance of permits.

(a) The Commissioner may issue a permit, for a specified period of time appropriate to the work to be conducted, upon determining that:

(1) The applicant is appropriately qualified, as evidenced by training, education, and/or experience, and pos-

sesses demonstrable competence in archaeological theory and methods, and in collecting, handling, analyzing, evaluating, and reporting archaeological data, relative to the type and scope of the work proposed, and also meets the following minimum qualifications:

(i) A graduate degree in anthropology or archaeology, or equivalent training and experience;

(ii) The demonstrated ability to plan, equip, staff, organize, and supervise activity of the type and scope proposed;

(iii) The demonstrated ability to carry research to completion, as evidenced by timely completion of theses, research reports, or similar documents;

(iv) Completion of at least 16 months of professional experience and/or specialized training in archaeological field, laboratory, or library research, administration, or management, including at least 4 months experience and/or specialized training in the kind of activity the individual proposes to conduct under authority of a permit; and

(v) Applicants proposing to engage in historical archaeology should have had at least one year of experience in research concerning archaeological resources of the prehistoric period.

(2) The proposed work is to be undertaken for the purpose of furthering archaeological knowledge in the public interest, which may include but need not be limited to, scientific or scholarly research, and preservation of archaeological data;

(3) The proposed work, including time, scope, location, and purpose, is not inconsistent with any management plan or established policy, objectives, or requirements applicable to the management of the public lands concerned;

(4) Where the proposed work consists of archaeological survey and/or data recovery undertaken in accordance with other approved uses of the public lands, and the proposed work has been agreed to in writing by the Commissioner pursuant to section 106 of the National Historic Preservation Act (16 U.S.C. 470f), paragraphs (a)(2) and (a)(3) of this section shall be deemed satisfied by the prior approval;

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(5) Evidence is submitted to the Commissioner that any university, museum, or other scientific or educational institution proposed in the application as the repository possesses adequate curatorial capability for safeguarding and preserving the archaeological resources and all associated records; and

(6) The applicant has certified that, not later than 90 days after the date the final report is submitted to the Commissioner, the following will be delivered to the appropriate official of the approved university, museum, or other scientific or educational institution, which shall be named in the permit:

(i) All artifacts, samples, collections, and copies of records, data, photographs, and other documents resulting from work conducted under the requested permit where the permit is for the excavation and/or removal of archaeological resources from public lands.

(b) When the area of the proposed work would cross jurisdictional boundaries, so that permit applications must be submitted to more than one Federal agency, the Commissioner shall coordinate the review and evaluation of applications and the issuance of permits.

§ 1104.8 Terms and conditions of permits.

(a) In all permits issued, the Commissioner shall specify:

(1) The nature and extent of work allowed and required under the permit, including the time, duration, scope, location, and purpose of the work;

(2) The name of the individual(s) responsible for conducting the work and, if different, the name of the individual(s) responsible for carrying out the terms and conditions of the permit;

(3) The name of any university, museum, or other scientific or educational institutions in which any collected materials and data shall be deposited; and

(4) Reporting requirements.

(b) The Commissioner may specify such terms and conditions as deemed necessary, consistent with this part, to protect public safety and other values and/or resources, to secure work areas, to safeguard other legitimate land uses, and to limit activities incidental to work authorized under a permit.

(c) Initiation of work or other activities under the authority of a permit signifies the permittee's acceptance of the terms and conditions of the permit.

(d) The permittee shall not be released from requirements of a permit until all outstanding obligations have been satisfied, whether or not the term of the permit has expired.

(e) The permittee may request that the Commissioner extend or modify a permit.

(f) The permittee's performance under any permit issued for a period greater than 1 year shall be subject to review by the Commissioner, at least annually.

§ 1104.9 Suspension and revocation of permits.

(a) *Suspension or revocation for cause.*

(1) The Commissioner may suspend a permit issued pursuant to this part upon determining that the permittee has failed to meet any of the terms and conditions of the permit or has violated any prohibition of the Act or § 1104.3. The Commissioner shall provide written notice to the permittee of the suspension, the cause thereof, and the requirements which must be met before the suspension will be removed.

(2) The Commissioner may revoke a permit upon assessment of a civil penalty under § 1104.14 upon the permittee's conviction under section 6 of the Act, or upon determining that the permittee has failed after notice under this section to correct the situation which led to suspension of the permit.

(b) *Suspension or revocation for management purposes.* The Commissioner may suspend or revoke a permit, without liability to the United States, its agents, or employees, when continuation of work under the permit would be in conflict with management requirements not in effect when the permit was issued. The Commissioner shall provide written notice to the permittee stating the nature of and basis for the suspension or revocation.

§ 1104.10 Appeals relating to permits.

Any affected person may appeal permit issuance, denial of permit issuance, suspension, revocation, and terms and conditions of a permit.

§ 1104.11 Relationship to section 106 of the National Historic Preservation Act.

Issuance of a permit in accordance with the Act and this part does not constitute an undertaking requiring compliance with section 106 of the Act of October 15, 1966 (16 U.S.C. 470f). However, the mere issuance of such a permit does not excuse the Commissioner from compliance with section 106 where otherwise required.

§ 1104.12 Custody of archaeological resources.

(a) Archaeological resources excavated or removed from the public lands remain the property of the United States.

(b) The Commissioner may provide for the exchange of archaeological resources among suitable universities, museums, or other scientific or educational institutions, when such resources have been excavated or removed from public lands under the authority of a permit issued by the Commissioner.

§ 1104.13 Determination of archaeological or commercial value and cost of restoration and repair.

(a) *Archaeological value.* For purposes of this part, the archaeological value of any archaeological resource involved in a violation of the prohibitions in § 1104.3 of this part or conditions of a permit issued pursuant to this part shall be the value of the information associated with the archaeological resource. This value shall be appraised in terms of the costs of the retrieval of the scientific information which would have been obtainable prior to the violation. These costs may include, but need not be limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential.

(b) *Commercial value.* For purposes of this part, the commercial value of any archaeological resource involved in a violation of the prohibitions in § 1104.3 of this part or conditions of a permit issued pursuant to this part shall be its fair market value. Where the violation has resulted in damage to the archae-

ological resource, the fair market value should be determined using the condition of the archaeological resource prior to the violation, to the extent that its prior condition can be ascertained.

(c) *Cost of restoration and repair.* For purposes of this part, the cost of restoration and repair of archaeological resources damaged as a result of a violation of prohibitions or conditions pursuant to this part, shall be the sum of the costs already incurred for emergency restoration or repair work, plus those costs projected to be necessary to complete restoration and repair, which may include, but need not be limited to, the costs of the following:

- (1) Reconstruction of the archaeological resource;
- (2) Stabilization of the archaeological resource;
- (3) Ground contour reconstruction and surface stabilization;
- (4) Research necessary to carry out reconstruction or stabilization;
- (5) Physical barriers or other protective devices, necessitated by the disturbance of the archaeological resource, to protect it from further disturbance;
- (6) Examination and analysis of the archaeological resource including recording remaining archaeological information, where necessitated by disturbance, in order to salvage remaining values which cannot be otherwise conserved;
- (7) Reinterment of human remains in accordance with religious custom and State, local, or tribal law, where appropriate, as determined by the Commissioner;
- (8) Preparation of reports relating to any of the above activities.

§ 1104.14 Assessment of civil penalties.

(a) The Commissioner may assess a civil penalty against any person who has violated any prohibition contained in § 1104.3 or who has violated any term or condition included in a permit issued in accordance with the Act and this part.

(b) *Notice of violation.* The Commissioner shall serve a notice of violation upon any person believed to be subject to a civil penalty, either in person or by registered or certified mail (return

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receipt requested). The Commissioner shall include in the notice:

(1) A concise statement of the facts believed to show a violation;

(2) A specific reference to the provision(s) of this part or to a permit issued pursuant to this part allegedly violated;

(3) The amount of penalty proposed to be assessed, including any initial proposal to mitigate or remit where appropriate, or a statement that notice of a proposed penalty amount will be served after the damages associated with the alleged violation have been ascertained;

(4) Notification of the right to file a petition for relief pursuant to paragraph (d) of this section, or to await the Commissioner's notice of assessment, and to request a hearing in accordance with paragraph (g) of this section. The notice shall also inform the person of the right to seek judicial review of any final administrative decision assessing a civil penalty.

(c) The person served with a notice of violation shall have 45 calendar days from the date of its service (or the date of service of a proposed penalty amount, if later) in which to respond. During this time the person may:

(1) Seek informal discussions with the Commissioner;

(2) File a petition for relief in accordance with paragraph (d) of this section;

(3) Take no action and await the Commissioner's notice of assessment;

(4) Accept in writing or by payment the proposed penalty, or any mitigation or remission offered in the notice. Acceptance of the proposed penalty or mitigation or remission shall be deemed a waiver of the notice of assessment and of the right to request a hearing under paragraph (g) of this section.

(d) *Petition for relief.* The person served with a notice of violation may request that no penalty be assessed or that the amount be reduced, by filing a petition for relief with the Commissioner within 45 calendar days of the date of service of the notice of violation (or of a proposed penalty amount, if later). The petition shall be in writing and signed by the person served with the notice of violation. If the person is a corporation, the petition must

be signed by an officer authorized to sign such documents. The petition shall set forth in full the legal or factual basis for the requested relief.

(e) *Assessment of penalty.* (1) The Commissioner shall assess a civil penalty upon expiration of the period for filing a petition for relief, upon completion of review of any petition filed, or upon completion of informal discussions, whichever is later.

(2) The Commissioner shall take into consideration all available information, including information provided pursuant to paragraphs (c) and (d) of this section or furnished upon further request by the Commissioner.

(3) If the facts warrant a conclusion that no violation has occurred, the Commissioner shall so notify the person served with a notice of violation, and no penalty shall be assessed.

(4) Where the facts warrant a conclusion that a violation has occurred, the Commissioner shall determine a penalty amount in accordance with § 1104.15.

(f) *Notice of assessment.* The Commissioner shall notify the person served with a notice of violation of the penalty amount assessed by serving a written notice of assessment, either in person or by registered or certified mail (return receipt requested). The Commissioner shall include in the notice of assessment:

(1) The facts and conclusions from which it was determined that a violation did occur;

(2) The basis in § 1104.15 for determining the penalty amount assessed and/or any offer to mitigate or remit the penalty; and

(3) Notification of the right to request a hearing, including the procedures to be followed, and to seek judicial review of any final administrative decision assessing a civil penalty.

(g) *Hearings.* (1) Except where the right to request a hearing is deemed to have been waived as provided in paragraph (c)(4) of this section, the person served with a notice of assessment may file a written request for a hearing with the adjudicatory body specified in the notice. The person shall enclose with the request for hearing a copy of

the notice of assessment, and shall deliver the request as specified in the notice of assessment, personally or by registered or certified mail (return receipt requested).

(2) Failure to deliver a written request for a hearing within 45 days of the date of service of the notice of assessment shall be deemed a waiver of the right to a hearing.

(3) Any hearing conducted pursuant to this section shall be held in accordance with 5 U.S.C. 554. In any such hearing, the amount of civil penalty assessed shall be determined in accordance with this part, and shall not be limited by the amount assessed by the Commissioner under paragraph (f) of this section or any offer of mitigation or remission made by the Commissioner.

(h) *Final administrative decision.* (1) Where the person served with a notice of violation has accepted the penalty pursuant to paragraph (c)(4) of this section, the notice of violation shall constitute the final administrative decision;

(2) Where the person served with a notice of assessment has not filed a timely request for a hearing pursuant to paragraph (g)(1) of this section, the notice of assessment shall constitute the final administrative decision;

(3) Where the person served with a notice of assessment has filed a timely request for a hearing pursuant to paragraph (g)(1) of this section, the decision resulting from the hearing or any applicable administrative appeal therefrom shall constitute the final administrative decision.

(i) *Payment of penalty.* (1) The person assessed a civil penalty shall have 45 calendar days from the date of issuance of the final administrative decision in which to make full payment of the penalty assessed, unless a timely request for appeal has been filed with a United States District Court as provided in section 7(b)(1) of the Act.

(2) Upon failure to pay the penalty, the Commissioner may request the Attorney General to institute a civil action to collect the penalty in a United States District Court for any district in which the person assessed a civil penalty is found, resides, or transacts business. Where the Commissioner is

not represented by the Attorney General, a civil action may be initiated directly by the Commissioner.

(j) *Other remedies not waived.* Assessment of a penalty under this section shall not be deemed a waiver of the right to pursue other available legal or administrative remedies.

§ 1104.15 Civil penalty amounts.

(a) *Maximum amount of penalty.* (1) Where the person being assessed a civil penalty has not committed any previous violation of any prohibition in §1104.3 or of any term or condition included in a permit issued pursuant to this part, the maximum amount of the penalty shall be the full cost of restoration and repair of archaeological resources damaged plus the archaeological or commercial value of archaeological resources destroyed or not recovered.

(2) Where the person being assessed a civil penalty has committed any previous violation of any prohibition in §1104.3 or of any term or condition included in a permit issued pursuant to this part, the maximum amount of the penalty shall be double the cost of restoration and repair plus double the archaeological or commercial value of archaeological resources destroyed or not recovered.

(3) Violations limited to the removal of arrowheads located on the surface of the ground shall not be subject to the penalties prescribed in this section.

(b) *Determination of penalty amount, mitigation, and remission.* The Commissioner may assess a penalty amount less than the maximum amount of penalty and may offer to mitigate or remit the penalty.

(1) Determination of the penalty amount and/or a proposal to mitigate or remit the penalty may be based upon any of the following factors:

(i) Agreement by the person being assessed a civil penalty to return to the Commissioner archaeological resources removed from public lands;

(ii) Agreement by the person being assessed a civil penalty to assist the Commissioner in activity to preserve, restore, or otherwise contribute to the protection and study of archaeological resources on public lands;

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(iii) Agreement by the person being assessed a civil penalty to provide information which will assist in the detection, prevention, or prosecution of violations of the Act or this part;

(iv) Demonstration of hardship or inability to pay, provided that this factor shall only be considered when the person being assessed a civil penalty has not been found to have previously violated the regulations in this part;

(v) Determination that the person being assessed a civil penalty did not willfully commit the violation;

(vi) Determination that the proposed penalty would constitute excessive punishment under the circumstances;

(vii) Determination of other mitigating circumstances appropriate to consideration in reaching a fair and expeditious assessment.

(2) When the penalty is for a violation which may have had an effect on a known Indian tribal religious or cultural site on public lands, the Commissioner should consult with and consider the interests of the affected tribe(s) prior to proposing to mitigate or remit the penalty.

§ 1104.16 Other penalties and rewards.

(a) Section 6 of the Act contains criminal prohibitions and provisions for criminal penalties. Section 8(b) of the Act provides that archaeological resources, vehicles, or equipment involved in a violation may be subject to forfeiture.

(b) Section 8(a) of the Act provides for rewards to be made to persons who furnish information which leads to conviction for a criminal violation or to assessment of a civil penalty. The Commissioner may certify to the Secretary of the Treasury that a person is eligible to receive payment. Officers and employees of Federal, State, or local government who furnish information or render service in the perform-

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ance of their official duties, and persons who have provided information under § 1104.15(b)(1)(iii) shall not be certified eligible to receive payment of rewards.

§ 1104.17 Confidentiality of archaeological resource information.

(a) The Commissioner shall not make available to the public, under subchapter II of chapter 5 of title 5 of the United States Code or any other provision of law, information concerning the nature and location of any archaeological resource, with the following exceptions:

(1) The Commissioner may make information available, provided that the disclosure will further the purposes of the Act and this part, or the Act of June 27, 1960, as amended (16 U.S.C. 469-469c), without risking harm to the archaeological resource or to the site in which it is located.

(2) The Commissioner shall make information available, when the Governor of any State has submitted to the Commissioner a written request for information, concerning the archaeological resources within the requesting Governor's State, provided that the request includes:

(i) The specific archaeological resource or area about which information is sought;

(ii) The purpose for which the information is sought; and

(iii) The Governor's written commitment to adequately protect the confidentiality of the information.

§ 1104.18 Report to the Secretary of the Interior.

The Commissioner, when requested by the Secretary of the Interior, shall submit such information as is necessary to enable the Secretary to comply with section 13 of the Act.