



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 2

[OGC-2022-0885; FRL 5630-02-OGC]

RIN 2015-AA05

Freedom of Information Act Regulations Update

AGENCY: Environmental Protection Agency (EPA)

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA or agency) proposes revisions to the agency's regulations under the Freedom of Information Act (FOIA or Act). This action is based on EPA's targeted reconsideration of the 2023 Freedom of Information Act (FOIA) Regulations Update, Phase II. EPA proposes to eliminate the inclusion of the newly minted Environmental Justice Expedited Processing (EJ EP) criteria.

DATES: Written comments on this proposal will be accepted on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may send comments, identified by Docket ID No. **OGC-2022-0885**, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov/> (our preferred method). Follow the online instructions for submitting comments.
- Mail: U.S. Environmental Protection Agency, EPA Docket Center, Office of General Counsel Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- Hand Delivery or Courier: EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. The Docket Center's

hours of operations are 8:30 a.m. through 4:30 p.m., Monday through Friday
(except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Justace Keller, Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, (2310A), Washington, DC 20460; telephone, 202-564-5306; email, keller.justace@epa.gov.

SUPPLEMENTARY INFORMATION:

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I. Public Participation

Submit your comments, identified by Docket ID No. **OGC-2022-0885**, at <https://www.regulations.gov> (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit to EPA’s docket at <https://www.regulations.gov> any information you consider to be Confidential Business Information (CBI), Proprietary Business Information (PBI), or other information whose disclosure is restricted by statute. Multimedia submissions

(audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). Please visit <https://www.epa.gov/dockets/commenting-epa-dockets> for additional submission methods; the full EPA public comment policy; information about CBI, PBI, or multimedia submissions; and general guidance on making effective comments.

II. Does this action apply to me?

This discussion is not intended to be exhaustive but rather provides a guide for readers regarding entities likely to be regulated by this action. This discussion includes the types of entities that the EPA is now aware could potentially be regulated by this action. Other types of entities not included could also be regulated. This action may also specifically apply to communities that relied on the EJ EP provision and the wider public in general as it impacts the circumstances under which EPA can provide expedited processing to FOIA requests. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria found in 40 CFR part 2. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

III. Scope of This Action

This action proposes changes to EPA's FOIA regulations at 40 CFR part 2. The proposed changes would remove the EJ EP provision. EPA proposes changes to align with government-wide policy consistent with Executive Order 14151, Ending radical and Wasteful Government DEI Programs and Preferencing.

IV. Background

This action proposes removing the EJ EP provision which was finalized and implemented on November 13, 2023 as part of the Phase II Rule updating EPA's FOIA

regulations. This provision provides expedited processing and a fee waiver for requests if the records sought pertain to an environmental justice-related need and will be used to inform an affected community. The provision was added to the FOIA regulations to provide timely access to information contained in EPA records by communities with environmental justice concerns. To determine whether an application for expedited processing qualifies under this provision, the Agency considers: 1) whether the requested records relate to actual or alleged Federal Government activity, including Agency records containing environmental information or data; 2) the extent to which there is a pressing need to inform the community about the Federal Government activity; 3) the extent to which the community is potentially experiencing disproportionate and adverse human health or environmental effects; and 4) the requester's ability and intention to effectively convey the information to members of the community. The Agency stated that it intended to use EJScreen to aid in determining whether the identified community is potentially experiencing a disproportionate and adverse human health or environmental effect.

No other changes are being made to the FOIA regulations at this time.

V. Rescinding Environmental Justice Expedited Processing

EPA proposes to remove the provision that allows requesters to seek expedited processing of their request if the records sought pertain to an environmental justice-related need and will be used to inform an affected community.

When revising a policy, as EPA is doing in this proposed action, an agency must only show that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515.

Here, the FOIA Statute allows an agency to issue regulations for expediting processing of requests for records in cases of compelling need and “in other cases determined by the agency” 5 U.S.C. 552(a)(6)(E)(i). The statute does not require

adoption of regulations for such “other cases.” Removing this provision provides cost-reduction benefits to the agency. The staff and management time spent on review and analysis of these requests and any subsequent appeals, particularly without the use of EJScreen, outweighs the benefit to the public, as less than 2.7% of EJ EP requests were granted from November 13, 2023, to August 31, 2025. Further, EPA’s conscious change of course shows that the agency now believes removing the EJ EP provision to be the better policy. This action will not remove or modify the expedited processing for requests demonstrating a “compelling need,” which the FOIA provides at 5 U.S.C.

552(a)(6)(E)(i)(I). Requesters will still be able to request expedited processing under the EPA FOIA Regulations under the compelling need standard which is provided for in the FOIA Statute. 40 CFR 2.104(g)(1)(i); 5 U.S.C. 552(a)(6)(E)(i). The compelling need standard grants expedited processing to requests in one of two situations: 1) where there is an imminent threat to the life or physical safety of an individual; or 2) there is urgency to inform the public about an actual or alleged Federal Government activity, and the information is requested by a person primarily engaged in disseminating information to the public. Additionally, requesters will still be able to request a fee waiver per EPA FOIA regulations. 40 CFR 2.104(n).

This proposal is consistent with Executive Order 14151, Ending radical and Wasteful Government DEI Programs and Preferencing, which calls for “the termination of all discriminatory programs, including illegal DEI and ‘diversity, equity, inclusion, and accessibility’ (DEIA) mandates, policies, programs, preferences, and activities in the Federal Government, under whatever name they appear.”

Request for Comment 1: EPA specifically seeks comment on removing the expedited processing category for requests seeking environmental justice-related information. For example, EPA requests comment on the effects of removing this provision on the FOIA requester community.

VI. Statutory and Executive Orders Reviews

Additional information about these statutes and Executive Orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Executive Order 14192: Unleashing Prosperity Through Deregulation

This action is expected to be an Executive Order 14192 deregulatory action. This proposed rule is expected to provide burden reduction by eliminating the agency's Environmental Justice Expedited Progress procedures at 40 CFR part 2 to comply with Executive Order 14151.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because it does not contain any information collection activities.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. Submission of a FOIA request is a voluntary action that any member of the public, including small entities, can elect to do and the rule relates to the procedures for submitting and processing a FOIA request for EPA records.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandates as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. It will not have substantial direct effects on Indian Tribal governments or on the relationship between the national government and the Indian Tribal governments. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

List of Subjects in 40 CFR Part 2

Environmental protection, Administrative practice and procedure, Confidential business information, Freedom of information, Government employees.

Lee Zeldin,

Administrator.

For the reasons set out in the preamble, title 40 of the Code of Federal Regulations, part 2, is proposed to be amended as follows.

PART 2—PUBLIC INFORMATION

1. The authority citation for part 2 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 553; 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717.

2. Revise and republish §2.104(g) to read as follows:

§ 2.104 Responses to requests.

(g) *Expedited processing.*

(1) EPA will take requests or appeals out of order and give expedited treatment whenever EPA determines that such requests or appeals involve a compelling need. A compelling need is defined as either:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about an actual or alleged Federal government activity, if the information is requested by a person primarily engaged in disseminating information to the public.

(2) Requesters must make a written request for expedited processing at the time of the initial request for records or at the time of appeal.

(3) If the requester seeks expedited processing, the requester must submit a statement, certified to be true and correct to the best of the requester's knowledge and belief, explaining in detail the basis for the request.

(i) For example, if the requester fits within the category described in paragraph (g)(1)(i) of this section and is not a full-time member of the news media, the requester

must establish that they are a person whose primary professional activity or occupation is information dissemination, although it need not be the requester's sole occupation.

(ii) If the requester fits within the category described in paragraph (g)(1)(i) of this section, the requester must also establish a particular urgency to inform the public about the government activity involved in the request, beyond the public's right to know about government activity generally.

(4) Within 10 calendar days from the date of the request for expedited processing, the Chief FOIA Officer, or the Chief FOIA Officer's delegates, will decide whether to grant the request and will notify the requester of the decision. If the Agency grants the request for expedited processing, the Agency will give the request priority and will process the request as soon as practicable. If the Agency denies the request for expedited processing, the Agency will act on any appeal of that decision expeditiously.

[FR Doc. 2026-01511 Filed: 1/26/2026 8:45 am; Publication Date: 1/27/2026]