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(6) Engineered barrier system degradation, flow, and transport characteristics, which include:

(i) Colloid formation and stability—for example, the formation of colloidal particles and the ability of radionuclides to adhere to these particles as they may migrate through the remaining barriers; and

(ii) Engineered barrier transport—for example, the movement of radionuclides dissolved in water or adhering to colloidal particles to be transported through the remaining engineered barriers and in the underlying unsaturated zone.

(7) Unsaturated zone flow and transport characteristics, which include:

(i) Unsaturated zone transport—for example, the movement of water with dissolved radionuclides or colloidal particles through the unsaturated zone underlying the repository, including retardation mechanisms such as sorption on rock or mineral surfaces;

(ii) Thermal hydrology—for example, effects of heat from the waste on water flow through the site.

(8) Saturated zone flow and transport characteristics, which include:

(i) Saturated zone transport—for example, the movement of water with dissolved radionuclides or colloidal particles through the saturated zone underlying and beyond the repository, including retardation mechanisms such as sorption on rock or mineral surfaces; and

(ii) Dilution—for example, diffusion of radionuclides into pore spaces, dispersion of radionuclides along flow paths, and mixing with non-contaminated ground water.

(9) Biosphere characteristics, which include:

(i) Reference biosphere and reasonably maximally exposed individual—for example, biosphere water pathways, location and behavior of reasonably maximally exposed individual; and

(ii) Biosphere transport and uptake—for example, the consumption of ground or surface waters through direct extraction or agriculture, including mixing with non-contaminated waters and exposure to contaminated agricultural products.

(b) DOE will evaluate the postclosure suitability of the Yucca Mountain disposal system using criteria that consider disruptive processes and events important to the total system performance of the geologic repository. The applicable criteria related to disruptive processes and events include:

(1) Volcanism—for example, the probability and potential consequences of a volcanic eruption intersecting the repository;

(2) Seismic events—for example, the probability and potential consequences of an earthquake on the underground facilities or hydrologic system; and

(3) Nuclear criticality—for example, the probability and potential consequences of a self-sustaining nuclear reaction as a result of chemical or physical processes affecting the waste either in or after release from breached waste packages.

PARTS 964–999 [RESERVED]

CHAPTER X—DEPARTMENT OF ENERGY (GENERAL PROVISIONS)

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PART 1000—TRANSFER OF PROCEEDINGS TO THE SECRETARY OF ENERGY AND THE FEDERAL ENERGY REGULATORY COMMISSION

§ 1000.1 Transfer of proceedings.

(a) *Scope*. This part establishes the transfer of proceedings pending with regard to those functions of various agencies which have been consolidated in the Department of Energy and identifies those proceedings which are transferred into the jurisdiction of the Secretary and those which are transferred into the jurisdiction of the Federal Energy Regulatory Commission.

(b) *Proceedings transferred to the Secretary*. The following proceedings are transferred to the Secretary:

(1) All Notices of Proposed Rulemaking, pending and outstanding, which have been proposed by the Department of Energy and the Department of Energy;

(2) All Notices of Inquiry which have been issued by the Department of Energy;

(3) All Requests for Interpretations which have been filed pursuant to 10 CFR part 205, subpart F, and on which no interpretation has been issued, with the Office of General Counsel of the Department of Energy;

(4) All Applications for Exception Relief which have been filed pursuant to 10 CFR part 205, subpart D, and on which no final decision and order has been issued, with the Office of Exceptions and Appeals of the Department of Energy;

(5) All petitions for special redress, relief or other extraordinary assistance which have been filed pursuant to 10 CFR part 205, subpart R, and on which no order has been issued, with the Office of Private Grievances and Redress of the Department of Energy;

(6) All appeals from Remedial Orders, Exception Decisions and Orders, Interpretations issued by the Office of General Counsel, and other agency orders which have been filed pursuant to 10 CFR part 205, subpart H, and on which no order has been issued prior to October 1, 1977, with the Office of Exceptions and Appeals of the Department of Energy;

(7) All applications for modification or rescission of any DOE order or interpretation which have been filed pursuant to 10 CFR part 205, subpart J, and on which no order has been issued prior to October 1, 1977, with the Office of Exceptions and Appeals of the Federal Energy Administation;

NOTE: For a document relating to procedures for natural gas import and export proceedings see 42 FR 61856, Dec. 7, 1977.

(8) All applications for temporary stays and stays which have been filed pursuant to 10 CFR part 205, subpart I, and on which no order has been issued, with the Office of Exceptions and Appeals of the Department of Energy;

(9) All applications which have been filed with the Office of Regulatory Programs of the Department of Energy and on which no final order has been issued;

(10) All investigations which have been instituted and have not been resolved by the Office of Compliance of the Department of Energy;

(11) All Notices of Probable Violation which have been issued prior to October 1, 1977, by the Office of Compliance of Department of Energy;

(12) All Notices of Proposed Disallowance which have been issued prior to October 1, 1977, by the Office of Compliance of Department of Energy;

(13) All Prohibition Orders which have been issued pursuant to 10 CFR part 303 and as to which no Notice of Effectiveness has been issued;

(14) From the Department of the Interior:

(i) The tentative power rate adjustments for the Central Valley Project, California, proposed on September 12, 1977 (42 FR 46619, September 16, 1977).

(15) From the Interstate Commerce Commission:

(i) Ex Parte No. 308 (Sub-No. 1)—Investigation of Common Carrier Pipelines.

(16) From the Federal Power Commission:

(i) Cases:

(A) Northwest Pipeline Corporation, Docket No. CP75–340.

(B) Midwestern Gas Transmission Co., Docket No. CP77–458, *et al*.

(C) St. Lawrence Gas Company, Docket No. G–17500.

(D) U.S.D.I. Bonneville Power Administration, Docket No. E–9563.

(E) U.S.D.I. Southwestern Power Administration, Docket No. E–7201.

(F) U.S.D.I. Southeastern Power Administration, Docket No. E–6957.

(G) Tenneco InterAmerica, Inc., Docket No. CP77–561.

(ii) Applications:

(A) Maine Public Service Co., Docket No. E–6751. (ERA Docket No. IE–78–1).

(B) Northern States Power Co., Docket No. E–9589, (ERA Docket No. IE–78–2).

(C) Arizona Public Service Co., Docket No. IT–5331. (ERA Docket No. IE–78–3).

(D) Niagara Mohawk Power Corp., Docket No, E–7022. (ERA Docket No. IE–77–6).

(E) Maine Public Service Co., Docket No. IT–6027. (ERA Docket No. PP–12).

(F) Boise Cascade, Docket No. E–7765. (ERA Docket No. PP–52).

(G) Bonneville Power Administration, Docket No. IT–5959. (ERA Docket No. PP–10).

(H) EPR—Oregon (Geothermal Steam Leases).

(I) EPR—Utah (Geothermal Steam Leases).

(J) EPR—Idaho (Geothermal Steam Leases).

(K) EPR—Oregon (Geothermal Steam Leases).

(L) EPR—Idaho (Geothermal Steam Leases).

(iii) Rulemakings:

(A) Implementation of sections 382(b) and 382(c) of the Energy Policy and Conservation Act of 1975. Docket No. RM77–3.

(B) New Form Nos:

151, Docket No. RM76–19.
153, Docket No. RM76–27.
154, Docket No. RM76–33.
156, Docket No. RM76–32.
157, Docket No. RM76–21.
158, Docket No. RM76–31.
159, Docket No. RM76–23.
160, Docket No. RM76–20.
161, Docket No. RM76–26.
162, Docket No. RM76–34.
155, Docket No. RM76–28.
163, Docket No. RM76–30.
164, Docket No. RM76–25.

(C) Procedures for the Filing of Federal Rate Schedules Docket No. RM77–9.

(iv) Project withdrawals and power site revocations:

(A) Project 1021, 1226, 1606, and 1772—(Wyoming)—U.S. Forest Service (Applicant).

(B) Project Nos. 1021, 1226, 1606, and 1772—(Wyoming)—U.S. Forest Service (Applicant).

(C) Project Nos. 220 and 691—(Wyoming)—Cliff Gold Mining Co. (Applicant for P–691) The Colowyo Gold Mining Co. (Applicant for P–220).

(D) Project No. 1203—(Wyoming)—F. D. Foster (Applicant).

(E) Project No. 1241—(Wyoming)—F. B. Hommel (Applicant).

(F) Project No. 847—(Oregon)—H. L. Vorse (Applicant).

(G) Project No. 907—(Colorado)—S. B. Collins (Applicant).

(H) Project No. 941—(Colorado)—Marian Mining Company (Applicant).

(I) Project Nos. 347 and 418—(Colorado)—Jones Brothers (Applicant for P–347) Frank Gay et al. (Applicant for P–418).

(J) Project Nos. 373, 521, 937, 1024, 1415, 1546, 1547, and 1025—( )—U.S. Forest (Applicant).

(K) Project No. 163—(Colorado)—James F. Meyser and Edward E. Drach (Applicants).

(L) Project Nos. 385, 445, 506, 519, 1220, 1296, 1418, 1519, 1576, 1615, 1616, 1618, 1678, 1682, and 1750—(Colorado)—U.S. Forest Service (Applicant).

(M) DA–117—(Alaska)—Bureau of Land Management (Applicant).

(N) Project No. 114—(Alaska)—Elizabeth H. Graff et al. (Applicant).

(O) DA–222—(Washington)—Bureau of Land Management (Applicant).

(P) DA–562—(Oregon)—U.S. Geological Survey (Applicant).

(Q) DA–601—(Idaho)—Bureau of Land Management (Applicant).

(R) DA–509—(Colorado)—Fed. Highway Admin. (Applicant).

(S) DA–616—(Idaho)—U.S. Forest Service (Applicant).

(T) DA–1—(South Carolina)—U.S. Forest Service (Applicant).

(U) DA–1116—(California)—U.S. Geological Survey (Applicant).

(V) DA–154—(Arizona)—U.S. Geological Survey (Applicant).

(W) DA–1098—(California)—Merced Irrigation District (Applicant).

(c) *Proceedings transferred to the Commission*. There are hereby transferred to the jurisdiction of the Federal Energy Regulatory Commission the following proceedings:

(1) From the Interstate Commerce Commission:

(i) Ex Parte No. 308—Valuation of Common Carrier Pipelines.

(ii) I&S 9164—Trans Alaska Pipeline System—Rate Filings (including I&S 9164 (Sub-No. 1), NOR 36611, NOR 36611 (Sub-No. 1), NOR 36611 (Sub-No. 2), NOR 36611 (Sub-No. 3), NOR 36611 (Sub-No. 4)).

(iii) I&S 9089—General Increase, December 1975, Williams Pipeline Company.

(iv) I&S 9128—Anhydrous Ammonia, Gulf Central Pipeline Company.

(v) NOR 35533 (Sub-No. 3)—Petroleum Products, Southwest & Midwest Williams Pipeline.

(vi) NOR 35794—Northville Dock Pipeline Corp. et al.

(vii) NOR 35895—Inexco Oil Company v. Belle Fourche Pipeline Co. et al.

(viii) NOR 36217—Department of Defense v. Interstate Storage & Pipeline Corp.

(ix) NOR 36423—Petroleum Products Southwest to Midwest Points.

(x) NOR 36520—Williams Pipeline Company—Petroleum Products Midwest.

(xi) NOR 36553—Kerr-McGee Refining Corporation v. Texoma Pipeline Co.

(xii) Suspension Docket 67124—Williams Pipe Line Co.—General Increase.

(xiii) Valuation Docket 1423—Williams Pipeline Company (1971–1974 inclusive).

(2) To remain with the Commission until forwarding to the Secretary:

The following proceedings will continue in effect under the jurisdiction of the Commission until the timely filing of all briefs on and opposing exceptions to the initial decision of the presiding Administration Law Judge, at which time the Commission shall forward the record of the proceeding to the Secretary for decision on those matters within his jurisdiction:

(i) *El Paso Eastern Co., et al.*, Docket No. CP 77–330, *et al.*

(ii) *Tenneco Atlantic Pipeline Co., et al.*, Docket No. CP 77–100, *et al.*

(iii) *Distrigas of Massachusetts Corp., et al.*, Docket No. CP 70–196, *et al.*

(iv) *Distrigas of Massachusetts Corp., et al.*, Docket No. CP 77–216, *et al.*

(v) *Eascogas LNG, Inc., et al.*, Docket No. CP 73–47, *et al.*

(vi) *Pacific Indonesia LNG Co., et al.*, Docket No. CP74–160, *et al.*, (except as provided in paragraph (c)(3) of this section).

(3) The Amendment to Application of Western LNG Terminal Associates, filed on November 11, 1977, in *Pacific Indonesia LNG Co., et al.*, FPC Docket No. CP74–160, et al., ERA Docket No. 77–001–LNG, is transferred to the jurisdiction of the Commission until timely filing of all briefs on and opposing exceptions to the Initial Decision of the presiding Administrative Law Judge on that Amendment, at which time the Commission shall forward a copy of the record of that proceeding to the Secretary of Energy for decision on those matters within his jurisdiction. (If the Commission waives the preparation of an initial decision, the Commission will forward a copy of the record after completion of the hearing, or after the timely filing of any briefs submitted to the Commission, whichever occurs later.)

(d) *Residual clause*. All proceedings (other than proceedings described in paragraphs (b) and (c) of this section) pending with regard to any function of the Department of Energy, the Department of Energy, Department of the Interior, the Department of Commerce, the Department of Housing and Urban Development, the Department of Navy, and the Naval Reactor and Military Applications Programs which is transferred to the Department of Energy (DOE) by the DOE Organization Act, will be conducted by the Secretary. All proceedings (other than proceedings described in paragraphs (b) and (c) of this section) before the Federal Power Commission or Interstate Commerce Commission will be conducted by the

Federal Energy Regulatory Commission.

(Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 567 (42 U.S.C. 7101 *et seq.*); E.O. 12009, 42 FR 46267)

[42 FR 55534, Oct. 17, 1977, as amended at 43 FR 21434, May 18, 1978; 43 FR 21658, May 19, 1978]

PART 1002—OFFICIAL SEAL AND DISTINGUISHING FLAG

Subpart A—General

Sec.
1002.1 Purpose.
1002.2 Definitions.
1002.3 Custody of official seal and distinguishing flags.

Subpart B—Official Seal

1002.11 Description of official seal.
1002.12 Use of replicas, reproductions, and embossing seals.

Subpart C—Distinguishing Flag

1002.21 Description of distinguishing flag.
1002.22 Use of distinguishing flag.

Subpart D—Unauthorized Uses

1002.31 Unauthorized uses of the seal and flag.

AUTHORITY: 42 U.S.C. 7264.

SOURCE: 43 FR 20782, May 15, 1978, unless otherwise noted.

Subpart A—General

§ 1002.1 Purpose.

The purpose of this part is to describe the official seal and distinguishing flag of the Department of Energy, and to prescribe rules for their custody and use.

§ 1002.2 Definitions.

For purposes of this part—

(a) *DOE* means all organizational units of the Department of Energy.

(b) *Embossing seal* means a display of the form and content of the official seal made on a die so that the seal can be embossed on paper or other medium.

(c) *Official seal* means the original(s) of the seal showing the exact form, content, and colors therof.

(d) *Replica* means a copy of the official seal displaying the identical form, content, and colors thereof.

(e) *Reproduction* means a copy of the official seal displaying the form and content thereof, reproduced in only one color.

(f) *Secretary* means the Secretary of DOE.

§ 1002.3 Custody of official seal and distinguishing flags.

The Secretary or his designee shall:

(a) Have custody of:

(1) The official seal and prototypes thereof, and masters, molds, dies, and all other means of producing replicas, reproductions, and embossing seals; and

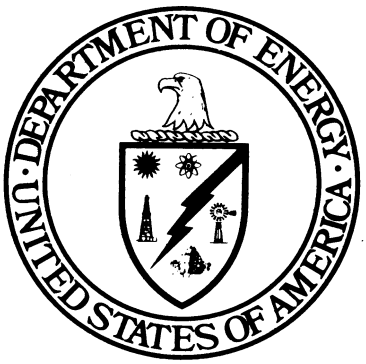
(2) Production, inventory and loan records relating to items specified in paragraph (a)(1) of this section; and

(b) Have custody of distinguishing flags, and be responsible for production, inventory, and loan records thereof.

Subpart B—Official Seal

§ 1002.11 Description of official seal.

The Department of Energy hereby prescribes as its official seal, of which judicial notice shall be taken pursuant to section 654 of the Department of Energy Organization Act of 1977, 42 U.S.C. 7264, the imprint illustrated below and described as follows:



(a)(1) The official seal includes a green shield bisected by a gold-colored lightning bolt, on which is emblazoned a gold-colored symbolic sun, atom, oil derrick, windmill, and dynamo. It is

crested by the white head of an eagle, atop a white rope. Both appear on a blue field surrounded by concentric circles in which the name of the agency, in gold, appears on a green background. Detailing is in black.

(2) The colors used in the configuration are dark green, dark blue, gold, black, and white.

(3) The eagle represents the care in planning and the purposefulness of efforts required to respond to the Nation's increasing demands for energy. The sun, atom, oil derrick, windmill, and dynamo serve as representative technologies whose enhanced development can help meet these demands. The rope represents the cohesiveness in the development of the technologies and their link to our future capabilities. The lightning bolt represents the power of the natural forces from which energy is derived and the Nation's challenge in harnessing the forces.

(4) The color scheme is derived from nature, symbolizing both the source of energy and the support of man's existence. The blue field represents air and water, green represents mineral resources and the earth itself, and gold represents the creation of energy in the release of natural forces. By invoking this symbolism, the color scheme represents the Nation's commitment to meet its energy needs in a manner consistent with the preservation of the natural environment.

§ 1002.12 Use of replicas, reproductions, and embossing seals.

(a) The Secretary and his designees are authorized to affix replicas, reproductions, and embossing seals to appropriate documents, certifications, and other material for all purposes as authorized by this section.

(b) Replicas may be used only for:

(1) Display in or adjacent to DOE facilities, in Department auditoriums, presentation rooms, hearing rooms, lobbies, and public document rooms.

(2) Offices of senior officials.

(3) Official DOE distinguishing flags, adopted and utilized pursuant to subpart C.

(4) Official awards, certificates, medals, and plaques.

(5) Motion picture film, video tape and other audiovisual media prepared by or for DOE and attributed thereto.

(6) Official prestige publications which represent the achievements or mission of DOE.

(7) Non-DOE facilities in connection with events and displays sponsored by DOE, and public appearances of the Secretary or other designated senior DOE Officials.

(8) For other such purposes as determined by the Director of the Office of Administrative Services.

(c) Reproductions may be used only on:

(1) DOE letterhead stationery.

(2) Official DOE identification cards and security credentials.

(3) Business cards for DOE employees.

(4) Official DOE signs.

(5) Official publications or graphics issued by and attributed to DOE, or joint statements of DOE with one or more Federal agencies, State or local governments, or foreign governments.

(6) Official awards, certificates, and medals.

(7) Motion picture film, video tape, and other audiovisual media prepared by or for DOE and attributed thereto.

(8) For other such purposes as determined by the Director of the Office of Administrative Services.

(d) Embossing seals may be used only on:

(1) DOE legal documents, including interagency or intergovernmental agreements, agreements with States, foreign patent applications, and similar documents.

(2) For other such purposes as determined by the General Counsel or the Director of Administration.

(e) Any person who uses the official seal, replicas, reproductions, or embossing seals in a manner inconsistent with this part shall be subject to the provisions of 18 U.S.C. 1017, providing penalties for the wrongful use of an official seal, and to other provisions of law as applicable.

(f) The official seal is being registered with the World Intellectual Property Organization through the U.S. Patent and Trademark Office.

Subpart C—Distinguishing Flag

§ 1002.21 Description of distinguishing flag.

(a) The base or field of the flag shall be white, and a replica of the official seal shall appear on both sides thereof.

(b)(1) The indoor flag shall be of rayon banner, measure 4′4″ on hoist by 5′6″ on the fly, exclusive of heading and hems, and be fringed on three edges with yellow rayon fringe, 2½″ wide.

(2) The outdoor flag shall be of heavy weight nylon, and measure either 3′ on the hoist by 5′ on the fly or 5′ on the hoist by 8′ on the fly, exclusive of heading and hems.

(c) Each flag shall be manufactured in accordance with U.S. Department of Defense Military Specification Mil-F-2692. The official seal shall be screen printed on both sides, and on each side, the lettering shall read from left to right. Headings shall be Type II in accordance with the Institute of Heraldry Drawing No. 5–1–45E.

§ 1002.22 Use of distinguishing flag.

(a) DOE distinguishing flags may be used only:

(1) In the offices of the Secretarial officers, Chairman of the Federal Energy Regulatory Commission, and heads of field locations designated below:

Power Administrations.
Regional Offices.
Operations Offices.
Certain Field Offices and other locations as designated by the Director of Administration.

(2) At official DOE ceremonies.

(3) In Department auditoriums, official presentation rooms, hearing rooms, lobbies, public document rooms, and in non-DOE facilities in connection with events or displays sponsored by DOE, and public appearances of DOE officials.

(4) On or in front of DOE installation buildings.

(5) Other such purposes as determined by the Director of Administration.

Subpart D—Unauthorized Uses

§ 1002.31 Unauthorized uses of the seal and flag.

The official seal and distinguishing flag shall not be used except as authorized by the Director of Administration in connection with:

(a) Contractor-operated facilities.

(b) Souvenir or novelty items.

(c) Toys or commercial gifts or premiums.

(d) Letterhead design, except on official Departmental stationery.

(e) Matchbook covers, calendars, and similar items.

(f) Civilian clothing or equipment.

(g) Any article which may disparage the seal or flag or reflect unfavorably upon DOE.

(h) Any manner which implies Departmental endorsement of commercial products or services, or of the user's policies or activities.

PART 1003—OFFICE OF HEARINGS AND APPEALS PROCEDURAL REGULATIONS

Subpart A—General Provisions

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1003.7 Service.
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1003.12 Ratification of prior directives, orders and actions.
1003.13 Public reference room.
1003.14 Notice of proceedings.

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1003.23 Notice.
1003.24 Contents.
1003.25 OHA evaluation.
1003.26 Decision and Order.
1003.27 Appeal of exception order.

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1003.30 Purpose and scope.

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AUTHORITY: 15 U.S.C. 761 *et seq.;* 42 U.S.C. 7101 *et seq.*

SOURCE: 60 FR 15006, Mar. 21, 1995, unless otherwise noted.

Subpart A—General Provisions

§ 1003.1 Purpose and scope.

This part establishes the procedures to be utilized and identifies the sanctions that are available in most proceedings before the Office of Hearings and Appeals of the Department of Energy. These procedures provide standard rules of practice in a variety of informal adjudications when jurisdiction is vested in the Office of Hearings and Appeals. Any or all of the procedures contained in this part may be incorporated by reference in another DOE rule or regulation which invokes the adjudicatory authority of the Office of Hearings and Appeals. The procedures may also be made applicable at the direction of an appropriate DOE official if incorporated by reference in the delegation. These rules do not apply in instances in which DOE regulations themselves contain procedures governing OHA proceedings conducted under authority of those particular regulations. (E.g., 10 CFR part 708–DOE Contractor Employee Protection Program; 10 CFR part 710–Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.) These rules also do not apply to matters before the DOE Board of Contract Appeals or other procurement and financial assistance appeals boards, which are covered by their own rules.

[60 FR 15006, Mar. 21, 1995, as amended at 61 FR 35114, July 5, 1996]

§ 1003.2 Definitions.

(a) As used in this part:

Action means an order issued, or a rulemaking undertaken, by the DOE.

Aggrieved, with respect to a person, means adversely affected by an action of the DOE.

Conference means an informal meeting between the Office of Hearings and Appeals and any person aggrieved by an action of the DOE.

Director means the Director of the Office of Hearings and Appeals or duly authorized delegate.

DOE means the Department of Energy, created by the Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*).

Duly authorized representative means a person who has been designated to appear before the Office of Hearings and Appeals in connection with a proceeding on behalf of a person interested in or aggrieved by an action of the DOE. Such appearance may consist of the submission of a written document, a personal appearance, verbal communication, or any other participation in the proceeding.

Exception means the waiver or modification of the requirements of a rule, regulation or other DOE action having the effect of a rule as defined by 5

U.S.C. 551(4) under a specific set of facts, pursuant to subpart B of this part.

Federal legal holiday means the first day of January, the third Monday of January, the third Monday of February, the last Monday of May, the fourth day of July, the first Monday of September, the second Monday of October, the eleventh day of November, the fourth Thursday of November, the twenty-fifth day of December, or any other calendar day designated as a holiday by federal statute or Executive order.

OHA means the Office of Hearings and Appeals of the Department of Energy.

Order means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of DOE in a matter other than rulemaking but including licensing. This definition does not include internal DOE orders and directives issued by the Secretary of Energy or delegate in the management and administration of departmental elements and functions.

Person means any individual, firm, estate, trust, sole proprietorship, partnership, association, company, joint-venture, corporation, governmental unit or instrumentality thereof, or a charitable, educational or other institution, and includes any officer, director, owner or duly authorized representative thereof.

Proceeding means the process and activity, and any part thereof, instituted by the OHA, either on its own initiative or in response to an application, complaint, petition or request submitted by a person, that may lead to an action by the OHA.

SRO means a special report order issued pursuant to §1003.8(b) of this part.

(b) Throughout this part the use of a word or term in the singular shall include the plural, and the use of the male gender shall include the female gender.

§1003.3 Appearance before the OHA.

(a) A person may make an appearance, including personal appearances in the discretion of the OHA, and participate in any proceeding described in this part on his own behalf or by a duly authorized representative. Any application, appeal, petition, or request filed by a duly authorized representative shall contain a statement by such person certifying that he is a duly authorized representative. Falsification of such certification will subject such person to the sanctions stated in 18 U.S.C. 1001.

(b) *Suspension and disqualification*. The OHA may deny, temporarily or permanently, the privilege of participating in proceedings, including oral presentation, to any individual who is found by the OHA—

(1) To have made false or misleading statements, either verbally or in writing;

(2) To have filed false or materially altered documents, affidavits or other writings;

(3) To lack the specific authority to represent the person seeking an OHA action; or

(4) To have engaged in or to be engaged in contumacious conduct that substantially disrupts a proceeding.

§1003.4 Filing of documents.

(a) Any document filed with the OHA must be addressed as required by §1003.11, and should conform to the requirements contained in §1003.9. All documents and exhibits submitted become part of an OHA file and will not be returned.

(b) A document submitted in connection with any proceeding transmitted by first class United States mail and properly addressed is considered to be filed upon mailing.

(c) Hand-delivered documents to be filed with the OHA shall be submitted to 950 L'Enfant Plaza, SW., Washington, DC, during normal business hours.

(d) Documents hand delivered or received electronically after regular business hours are deemed filed on the next regular business day.

[60 FR 15006, Mar. 21, 1995, as amended at 63 FR 58289, Oct. 30, 1998]

§1003.5 Computation of time.

(a) *Days*. (1) Except as provided in paragraph (b) of this section, in computing any period of time prescribed or allowed by these regulations or by an order of the OHA, the day of the act,

event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or federal legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or a federal legal holiday.

(2) Saturdays, Sundays and federal legal holidays shall be excluded from the computation of time when the period of time allowed or prescribed is 7 days or less.

(b) *Hours.* If the period of time prescribed in an order issued by the OHA is stated in hours rather than days, the period of time shall begin to run upon actual notice of such order, whether by verbal or written communication, to the person directly affected, and shall run without interruption, unless otherwise provided in the order, or unless the order is stayed, modified, suspended or rescinded. When a written order is transmitted by verbal communication, the written order shall be served as soon thereafter as is feasible.

(c) *Additional time after service by mail.* Whenever a person is required to perform an act, to cease and desist therefrom, or to initiate a proceeding under this part within a prescribed period of time after issuance to such person of an order, notice or other document and the order, notice or other document is served solely by mail, 3 days shall be added to the prescribed period.

§ 1003.6 Extension of time.

When a document is required to be filed within a prescribed time, an extension of time to file may be granted by the OHA upon good cause shown.

§ 1003.7 Service.

(a) All documents required to be served under this part shall be served personally or by first class United States mail, except as otherwise provided.

(b) Service upon a person's duly authorized representative shall constitute service upon that person.

(c) Official United States Postal Service receipts from certified mailing shall constitute evidence of service.

§ 1003.8 Subpoenas, special report orders, oaths, witnesses.

(a) In accordance with the provisions of this section and as otherwise authorized by law, the Director may sign, issue and serve subpoenas; administer oaths and affirmations; take sworn testimony; compel attendance of and sequester witnesses; control dissemination of any record of testimony taken pursuant to this section; subpoena and reproduce books, papers, correspondence, memoranda, contracts, agreements, or other relevant records or tangible evidence including, but not limited to, information retained in computerized or other automated systems in possession of the subpoenaed person.

(b) The Director may issue a Special Report Order requiring any person subject to the jurisdiction of the OHA to file a special report providing information relating to the OHA proceeding, including but not limited to written answers to specific questions. The SRO may be in addition to any other reports required.

(c) The Director, for good cause shown, may extend the time prescribed for compliance with the subpoena or SRO and negotiate and approve the terms of satisfactory compliance.

(d) Prior to the time specified for compliance, but in no event more than 10 days after the date of service of the subpoena or SRO, the person upon whom the document was served may file a request for review of the subpoena or SRO with the Director. The Director then shall provide notice of receipt to the person requesting review, may extend the time prescribed for compliance with the subpoena or SRO, and may negotiate and approve the terms of satisfactory compliance.

(e) If the subpoena or SRO is not modified or rescinded within 10 days of the date of the Director's notice of receipt:

(1) The subpoena or SRO shall be effective as issued; and

(2) The person upon whom the document was served shall comply with the subpoena or SRO within 20 days of the date of the Director's notice of receipt, unless otherwise notified in writing by the Director.

(f) There is no administrative appeal of a subpoena or SRO.

(g) A subpoena or SRO shall be served upon a person named in the document by delivering a copy of the document to the person named.

(h) Delivery of a copy of a subpoena or SRO to a natural person may be made by:

(1) Handing it to the person;

(2) Leaving it at the person's office with the person in charge of the office;

(3) Leaving it at the person's dwelling or usual place of abode with a person of suitable age and discretion who resides there;

(4) Mailing it to the person by certified mail, at his last known address; or

(5) Any method that provides the person with actual notice prior to the return date of the document.

(i) Delivery of a copy of a subpoena or SRO to a person who is not a natural person may be made by:

(1) Handing it to a registered agent of the person;

(2) Handing it to any officer, director, or agent in charge of any office of such person;

(3) Mailing it to the last known address of any registered agent, officer, director, or agent in charge of any office of the person by certified mail; or

(4) Any method that provides any registered agent, officer, director, or agent in charge of any office of the person with actual notice of the document prior to the return date of the document.

(j) A witness subpoenaed by the OHA may be paid the same fees and mileage as paid to a witness in the district courts of the United States.

(k) If in the course of a proceeding a subpoena is issued at the request of a person other than an officer or agency of the United States, the witness fees and mileage shall be paid by the person who requested the subpoena. However, at the request of the person, the witness fees and mileage may be paid by the OHA if the person shows:

(1) The presence of the subpoenaed witness will materially advance the proceeding; and

(2) The person who requested that the subpoena be issued would suffer a serious hardship if required to pay the witness fees and mileage.

(l) If any person upon whom a subpoena or SRO is served pursuant to this section refuses or fails to comply with any provision of the subpoena or SRO, an action may be commenced in the appropriate United States District Court to enforce the subpoena or SRO.

(m) Documents produced in response to a subpoena shall be accompanied by the sworn certification, under penalty of perjury, of the person to whom the subpoena was directed or his authorized agent that:

(1) A diligent search has been made for each document responsive to the subpoena; and

(2) To the best of his knowledge, information, and belief each document responsive to the subpoena is being produced.

(n) Any information furnished in response to an SRO shall be accompanied by the sworn certification, under penalty of perjury, of the person to whom it was directed or his authorized agent who actually provides the information that:

(1) A diligent effort has been made to provide all information required by the SRO; and

(2) All information furnished is true, complete, and correct.

(o) If any document responsive to a subpoena is not produced or any information required by an SRO is not furnished, the certification shall include a statement setting forth every reason for failing to comply with the subpoena or SRO. If a person to whom a subpoena or SRO is directed withholds any document or information because of a claim of attorney-client or other privilege, the person submitting the certification required by paragraph (m) or (n) of this section also shall submit a written list of the documents or the information withheld indicating a description of each document or information, the date of the document, each person shown on the document as having received a copy of the document, each person shown on the document as having prepared or been sent the document, the privilege relied upon as the basis for withholding the document or information, and an identification of

the person whose privilege is being asserted.

(p) If testimony is taken pursuant to a subpoena, the Director shall determine whether the testimony shall be recorded and the means by which the testimony is recorded.

(q) A witness whose testimony is recorded may procure a copy of his testimony by making a written request for a copy and paying the appropriate fees. However, the Director may deny the request for good cause. Upon proper identification, any witness or his attorney has the right to inspect the official transcript of the witness' own testimony.

(r) The Director may sequester any person subpoenaed to furnish documents or give testimony. Unless permitted by the Director, neither a witness nor his attorney shall be present during the examination of any other witnesses.

(s) A witness whose testimony is taken may be accompanied, represented and advised by his attorney as follows:

(1) Upon the initiative of the attorney or witness, the attorney may advise his client, in confidence, with respect to the question asked his client, and if the witness refuses to answer any question, the witness or his attorney is required to briefly state the legal grounds for such refusal; and

(2) If the witness claims a privilege to refuse to answer a question on the grounds of self-incrimination, the witness must assert the privilege personally.

(t) The Director shall take all necessary action to regulate the course of testimony and to avoid delay and prevent or restrain contemptuous or obstructionist conduct or contemptuous language. OHA may take actions as the circumstances may warrant in regard to any instances where any attorney refuses to comply with directions or provisions of this section.

§ 1003.9 General filing requirements.

(a) *Purpose and scope*. The provisions of this section shall apply to all documents required or permitted to be filed with the OHA. One copy of each document must be filed with the original, except as provided in paragraph (f) of this section. A telefax filing of a document will be accepted only if immediately followed by the filing by mail or hand-delivery of the original document.

(b) *Signing*. Any document that is required to be signed, shall be signed by the person filing the document. Any document filed by a duly authorized representative shall contain a statement by such person certifying that he is a duly authorized representative. (A false certification is unlawful under the provisions of 18 U.S.C. 1001.) The signature by the person or duly authorized representative constitutes a certificate by the signer that the signer has read the document and that to the best of the signer's knowledge, information and belief formed after reasonable inquiry, the document is well grounded in fact, warranted under existing law, and submitted in good faith and not for any improper purpose such as to harass or to cause unnecessary delay. If a document is signed in violation of this section, OHA may impose the sanctions specified in section 1003.3 and other sanctions determined to be appropriate.

(c) *Labeling*. An application, petition, or other request for action by the OHA should be clearly labeled according to the nature of the action involved both on the document and on the outside of the envelope in which the document is transmitted.

(d) *Obligation to supply information*. A person who files an application, petition, appeal or other request for action is under a continuing obligation during the proceeding to provide the OHA with any new or newly discovered information that is relevant to that proceeding. Such information includes, but is not limited to, information regarding any other application, petition, appeal or request for action that is subsequently filed by that person with any DOE office.

(e) *The same or related matters*. A person who files an application, petition, appeal or other request for action by the OHA shall state whether, to the best knowledge of that person, the same or related issue, act or transaction has been or presently is being considered or investigated by any other

DOE office, other federal agency, department or instrumentality; or by a state or municipal agency or court; or by any law enforcement agency, including, but not limited to, a consideration or investigation in connection with any proceeding described in this part. In addition, the person shall state whether contact has been made by the person or one acting on his behalf with any person who is employed by the DOE with regard to the same issue, act or transaction or a related issue, act or transaction arising out of the same factual situation; the name of the person contacted; whether the contact was verbal or in writing; the nature and substance of the contact; and the date or dates of the contact.

(f) *Request for confidential treatment.* (1) If any person filing a document with the OHA claims that some or all of the information contained in the document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552), is information referred to in 18 U.S.C. 1905, or is otherwise exempt by law from public disclosure, and if such person requests the OHA not to disclose such information, such person shall file together with the document two copies of the document from which has been deleted the information for which such person wishes to claim confidential treatment. The person shall indicate in the original document that it is confidential or contains confidential information and must file a statement specifying the justification for non-disclosure of the information for which confidential treatment is claimed. If the person states that the information comes within the exception codified at 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information, such person shall include a statement specifying why such information is privileged or confidential. If the person filing a document does not submit two copies of the document with the confidential information deleted, the OHA may assume that there is no objection to public disclosure of the document in its entirety.

(2) The OHA retains the right to make its own determination with regard to any claim of confidentiality, under criteria specified in 10 CFR 1004.11. Notice of the decision by the OHA to deny such claim, in whole or in part, and an opportunity to respond shall be given to a person claiming confidentiality of information no less than five days prior to its public disclosure.

(g) Each application, petition or request for OHA action shall be submitted as a separate document, even if the applications, petitions, or requests deal with the same or a related issue, act or transaction, or are submitted in connection with the same proceeding.

§ 1003.10 Effective date of orders.

Any order issued by the OHA under this part is effective as against all persons having actual or constructive notice thereof upon issuance, in accordance with its terms, unless and until it is stayed, modified, suspended, or rescinded. An order is deemed to be issued on the date, as specified in the order, on which it is signed by the Director of the OHA or his designee, unless the order provides otherwise.

§ 1003.11 Address for filing documents.

All applications, requests, petitions, appeals, written communications and other documents to be submitted to or filed with the OHA, as provided in this part or otherwise, shall be addressed to the Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0107. The OHA has facilities for the receipt of transmissions via FAX, at FAX Number (202) 426–1415.

[60 FR 15006, Mar. 21, 1995, as amended at 63 FR 58289, Oct. 30, 1998]

§ 1003.12 Ratification of prior directives, orders and actions.

All orders and other directives issued, all proceedings initiated, and all other actions taken in accordance with 10 CFR part 205 prior to the effective date of this part, are hereby confirmed and ratified, and shall remain in full force and effect as if issued under this part, unless or until they are altered, amended, modified or rescinded in accordance with the provisions of this part.

§ 1003.13 Public reference room.

A public reference room shall be maintained at the OHA, 950 L'Enfant Plaza, S.W., Washington, DC. In this room, the following information shall be made available for public inspection and copying, during normal business hours:

(a) A list of all persons who have applied for an exception, or filed an appeal or petition, and a digest of each application;

(b) Each Decision and Order, with confidential information deleted, issued in response to an application for an exception, petition or other request, or at the conclusion of an appeal; and

(c) Any other information in the possession of OHA which is required by statute to be made available for public inspection and copying, and any other information that the OHA determines should be made available to the public.

[60 FR 15006, Mar. 21, 1995, as amended at 63 FR 58289, Oct. 30, 1998]

§ 1003.14 Notice of proceedings.

At regular intervals, the OHA shall publish on its Internet World Wide Web site, a digest of the applications, appeals, petitions and other requests filed, and a summary of the Decisions and Orders issued by the OHA, pursuant to proceedings conducted under this part. The OHA's web site is located at *http://www.oha.doe.gov*.

[60 FR 15006, Mar. 21, 1995, as amended at 63 FR 58289, Oct. 30, 1998]

Subpart B—Exceptions

§ 1003.20 Purpose and scope.

(a) This subpart establishes the procedures for applying for an exception or exemption, as provided for in section 504 (42 U.S.C. 7194) of the Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*), from a rule, regulation or DOE action having the effect of a rule as defined by 5 U.S.C. 551(4), based on an assertion of serious hardship, gross inequity or unfair distribution of burdens, and for consideration of such application by the OHA. The procedures contained in this subpart may be incorporated by reference in another DOE rule or regulation which invokes the adjudicatory authority of the Office of Hearings and Appeals. The procedures may also be made applicable to proceedings undertaken at the direction of an appropriate DOE official if incorporated by reference in the delegation.

(b) The filing of an application for an exception shall not constitute grounds for noncompliance with the requirements from which an exception is sought, unless a stay has been issued in accordance with subpart D of this part.

[60 FR 15006, Mar. 21, 1995, as amended at 61 FR 35114, July 5, 1996]

§ 1003.21 What to file.

A person seeking relief under this subpart shall file an ''Application for Exception,'' which should be clearly labeled as such both on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing. The general filing requirements stated in § 1003.9 shall be complied with in addition to the requirements stated in this subpart.

§ 1003.22 Where to file.

All applications for exception shall be filed with the OHA at the address provided in § 1003.11.

§ 1003.23 Notice.

(a) The applicant shall send by United States mail a copy of the application and any subsequent amendments or other documents relating to the application, or a copy from which confidential information has been deleted in accordance with § 1003.9(f), to each person who is reasonably ascertainable by the applicant as a person who would be aggrieved by the OHA action sought. The copy of the application shall be accompanied by a statement that the person may submit comments regarding the application within 10 days. The application filed with the OHA shall include certification to the OHA that the applicant has complied with the requirements of this paragraph and shall include the names and addresses of each person to whom a copy of the application was sent.

(b) Notwithstanding the provision of paragraph (a) of this section, if an applicant determines that compliance with paragraph (a) of this section would be impracticable, the applicant shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and practicable to notify; and

(2) Include with the application a description of the persons or class or classes of persons to whom notice was sent. The OHA may require the applicant to provide additional or alternative notice, may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the FEDERAL REGISTER.

(c) The OHA shall serve notice on any other person readily identified by the OHA as one who would be aggrieved by the OHA action sought and may serve notice on any other person that written comments regarding the application will be accepted if filed within 10 days of service of such notice.

(d) Any person submitting written comments to the OHA with respect to an application filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with §1003.9(f), to the applicant. The person shall certify to the OHA that he has complied with the requirements of this paragraph. The OHA may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

§1003.24 Contents.

(a) The application shall contain a full and complete statement of all relevant facts pertaining to the circumstances, act or transaction that is the subject of the application and to the OHA action sought. Such facts shall include the names and addresses of all affected persons (if reasonably ascertainable); a complete statement of the business or other reasons that justify the act or transaction; a description of the acts or transactions that would be affected by the requested OHA action; and a full discussion of the pertinent provisions and relevant facts contained in the documents submitted with the application. Copies of all relevant contracts, agreements, leases, instruments, and other documents shall be submitted with the application.

(b) The applicant shall state whether he requests or intends to request that there be a conference or hearing regarding the application. Any request not made at the time the application is filed shall be made as soon thereafter as possible. The request and the OHA determination on the request shall be made in accordance with subpart F of this part.

(c) The application shall include a discussion of all relevant authorities, including, but not limited to, DOE rules, regulations, and decisions on appeals and exceptions relied upon to support the particular action sought therein.

(d) The application shall specify the exact nature and extent of the relief requested.

§1003.25 OHA evaluation.

(a)(1) OHA may initiate an investigation of any statement in an application and utilize in its evaluation any relevant facts obtained by such investigation. The OHA may solicit and accept submissions from third persons relevant to any application provided that the applicant is afforded an opportunity to respond to all third person submissions. In evaluating an application, the OHA may consider any other source of information. The OHA on its own initiative may convene a hearing or conference, if, in its discretion, it considers that such hearing or conference will advance its evaluation of the application. The OHA may issue appropriate orders as warranted in the proceeding.

(2) If the OHA determines that there is insufficient information upon which to base a decision and if upon request additional information is not submitted by the applicant, the OHA may dismiss the application without prejudice. If the failure to supply additional information is repeated or willful, the OHA may dismiss the application with prejudice. If the applicant fails to provide the notice required by §1003.23, the OHA may dismiss the application without prejudice.

(b)(1) The OHA shall consider an application for an exception only when it determines that a more appropriate proceeding is not provided by DOE regulations.

(2) An application for an exception may be granted to alleviate or prevent serious hardship, gross inequity or unfair distribution of burdens.

(3) An application for an exception shall be decided in a manner that is, to the extent possible, consistent with the disposition of previous applications for exception.

§ 1003.26 Decision and Order.

(a) Upon consideration of the application and other relevant information received or obtained during the proceeding, the OHA shall issue an order granting or denying the application, in whole or in part.

(b) The Decision and Order shall include a written statement setting forth the relevant facts and the legal basis of the order. The Decision and Order shall provide that any person aggrieved thereby may file an appeal in accordance with § 1003.27.

(c) The OHA shall serve a copy of the Decision and Order upon the applicant, any other person who participated in the proceeding, and upon any other person readily identifiable by the OHA as one who is aggrieved by such Decision and Order.

§ 1003.27 Appeal of exception order.

(a) Except as provided in paragraph (b) of this section, any person aggrieved by an order issued by the OHA under this subpart may file an appeal with the OHA in accordance with subpart C of this part. Any appeal filed under this paragraph must be filed within 30 days of service, or constructive service under § 1003.14, of the order from which the appeal is taken.

(b) Any person aggrieved or adversely affected by the denial of a request for exception relief filed pursuant to § 504 of the Department of Energy Organization Act (42 U.S.C. 7194) may appeal to the Federal Energy Regulatory Commission, in accordance with the Commission's regulations.

Subpart C—Appeals

§ 1003.30 Purpose and scope.

This subpart establishes the procedures for the filing of an administrative appeal of a DOE order and for the consideration of the appeal by the Office of Hearings and Appeals. Unless a program rule or regulation or a DOE delegation of authority provides otherwise, a person aggrieved by a DOE order appealable under this subpart has not exhausted his or her administrative remedies until an appeal has been filed under this subpart and an order granting or denying the appeal has been issued. A person filing an appeal must also file an ''Application for Stay'' under subpart D of this part if the grant of a stay is necessary under Section 10(c) of the Administrative Procedure Act (5 U.S.C. 704) to preclude judicial review pending final action on the appeal.

§ 1003.31 Who may file.

Any person may file an appeal under this subpart who is so authorized by § 1003.27, a program rule or regulation, or a DOE delegation of authority.

§ 1003.32 What to file.

A person filing under this subpart shall file an ''Appeal of Order'' which should be clearly labeled as such both on the appeal and on the outside of the envelope in which the appeal is transmitted, and shall be in writing. The general filing requirements stated in § 1003.9 shall be complied with in addition to the requirements stated in this subpart.

§ 1003.33 Where to file.

The appeal shall be filed with the OHA at the address provided in § 1003.11.

§ 1003.34 Notice.

(a) The appellant shall send by United States mail a copy of the appeal and any subsequent amendments or other documents relating to the appeal, or a copy from which confidential information has been deleted in accordance with § 1003.9(f), to each person who is reasonably ascertainable by the appellant as a person who would be aggrieved by the OHA action sought, including those who participated in the process that led to the issuance of the order from which the appeal has been taken. The copy of the appeal shall be accompanied by a statement that the person may submit comments regarding the appeal to the OHA within 10

days. The appeal filed with the OHA shall include certification to the OHA that the appellant has complied with the requirements of this paragraph and shall include the names and addresses of each person to whom a copy of the appeal was sent.

(b) Notwithstanding the provisions of paragraph (a) of this section, if any appellant determines that compliance with paragraph (a) of this section would be impracticable, the appellant shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and possible to notify; and

(2) Include with the appeal a description of the persons or class or classes of persons to whom notice was not sent. The OHA may require the appellant to provide additional or alternative notice, may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the FEDERAL REGISTER.

(c) The OHA shall serve notice on any other person readily identifiable by the OHA as one who would be aggrieved by the OHA action sought and may serve notice on any other person that written comments regarding the appeal will be accepted if filed within 10 days of the service of that notice.

(d) Any person submitting written comments to the OHA with respect to an appeal filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 1003.9(f), to the appellant. The person shall certify to the OHA that he has complied with the requirements of this paragraph. The OHA may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

§ 1003.35 Contents.

(a) The appeal shall contain a concise statement of grounds upon which it is brought and a description of the relief sought. It shall include a discussion of all relevant authorities, including, but not limited to, DOE rules, regulations, and decisions on appeals and exceptions relied upon to support the appeal. If the appeal includes a request for relief based on significantly changed circumstances, there shall be a complete description of the events, acts, or transactions that comprise the significantly changed circumstances, and the appellant shall state why, if the significantly changed circumstance is new or newly discovered facts, such facts were not or could not have been presented during the process that led to the issuance of the order from which the appeal has been taken. For purposes of this subpart, the term ''significantly changed circumstances'' shall mean—

(1) The discovery of material facts that were not known or could not have been known at the time of the process that led to the issuance of the order from which the appeal has been taken;

(2) The discovery of a law, rule, regulation, order or decision on an appeal or any exception that was in effect at the time of the process that led to the issuance of the order from which the appeal has been taken, and which, if such had been made known to DOE, would have been relevant and would have substantially altered the outcome; or

(3) A substantial change in the facts or circumstances upon which an outstanding and continuing order affecting the appellant was issued, which change has occurred during the interval between issuance of the order and the date of the appeal and was caused by forces or circumstances beyond the control of the appellant.

(b) A copy of the order that is the subject of the appeal shall be submitted with the appeal.

(c) The appellant shall state whether he requests or intends to request that there be a conference or hearing regarding the appeal. Any request not made at the time the appeal is filed shall be made as soon thereafter as possible. The request and the OHA determination on the request shall be made in accordance with subpart F of this part.

§ 1003.36 OHA evaluation.

(a)(1) The OHA may initiate an investigation of any statement in an appeal and utilize in its evaluation any relevant facts obtained by such investigation. The OHA may solicit and accept

submissions from third persons relevant to any appeal provided that the appellant is afforded an opportunity to respond to all third person submissions. In evaluating an appeal, the OHA may consider any other source of information. The OHA on its own initiative may convene a conference or hearing if, in its discretion, it considers that such conference or hearing will advance its evaluation of the appeal.

(2) If the OHA determines that there is insufficient information upon which to base a decision and if, upon request, the necessary additional information is not submitted, the OHA may dismiss the appeal with leave to refile within a specified time. If the failure to supply additional information is repeated or willful, the OHA may dismiss the appeal with prejudice. If the appellant fails to provide the notice required by § 1003.34, the OHA may dismiss the appeal without prejudice.

(b) The OHA may issue an order summarily denying the appeal if—

(1) It is not filed in a timely manner, unless good cause is shown; or

(2) It is defective on its face for failure to state, and to present facts and legal argument in support thereof, that the DOE action was erroneous in fact or in law, or that it was arbitrary or capricious.

(c) The OHA may deny any appeal if the appellant does not establish that—

(1) The appeal was filed by a person aggrieved by a DOE action;

(2) The DOE's action was erroneous in fact or in law; or

(3) The DOE's action was arbitrary or capricious.

§ 1003.37 Decision and Order.

(a) Upon consideration of the appeal and other relevant information received or obtained during the proceeding, the OHA shall enter an appropriate order, which may include the modification of the order that is the subject of the appeal.

(b) The Decision and Order shall include a written statement setting forth the relevant facts and the legal basis of the Decision and Order. The Decision and Order shall state that it is a final order of the DOE of which the appellant may seek judicial review.

(c) The OHA shall serve a copy of the Decision and Order upon the appellant, any other person who participated in the proceeding, and upon any other person readily identifiable by the OHA as one who is aggrieved by such Decision and Order.

Subpart D—Stays

§ 1003.40 Purpose and scope.

(a) This subpart establishes the procedures for applying for a stay. It also specifies the nature of the relief which may be effectuated through the approval of a stay.

(b) An application for a stay will be considered if it is incident to a submission over which OHA has jurisdiction. An application for stay may also be considered if the stay is requested pending judicial review of an order issued by the OHA.

(c) All applicable DOE rules, regulations, orders, and generally applicable requirements shall be complied with unless and until an application for a stay is granted.

§ 1003.41 What to file.

A person filing under this subpart shall file an ''Application for Stay'' which should be clearly labeled as such both on the application and on the outside of the envelope in which the application is transmitted. The application shall be in writing. The general filing requirements stated in § 1003.9 shall be complied with in addition to the requirements stated in this subpart.

§ 1003.42 Where to file.

An Application for Stay shall be filed with the OHA at the address provided in § 1003.11.

§ 1003.43 Notice.

(a) An applicant for stay shall notify each person readily identifiable as one who will be directly aggrieved by the OHA action sought that it has filed an Application for Stay. The applicant shall serve the application on each identified person and shall notify each such person that the OHA will receive and endeavor to consider, subject to

time constraints imposed by the urgency of the proceeding, written comments on the application that are submitted immediately.

(b) Any person submitting written comments to the OHA with respect to an application filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 1003.9(f), to the applicant. The person shall certify to the OHA that he has complied with the requirements of this paragraph. The OHA may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

(c) The OHA shall require the applicant to take reasonable measures depending on the circumstances and urgency of the case to notify each person readily identified as one that would be directly aggrieved by the OHA action sought of the date, time and place of any hearing or other proceedings in the matter. However, if the Director of the OHA concludes that the circumstances presented by the applicant justify immediate action, the OHA may issue a Decision on the Application for Stay prior to receipt of written comments or the oral presentation of views by adversely affected parties.

§ 1003.44 Contents.

(a) An Application for Stay shall contain a full and complete statement of all relevant facts pertaining to the act or transaction that is the subject of the application and to the OHA action sought. Such facts shall include, but not be limited to, all information that relates to satisfaction of the criteria in § 1003.45(b).

(b) The application shall include a description of the proceeding incident to which the stay is being sought. This description shall contain a discussion of all DOE actions relevant to the proceeding.

(c) The applicant shall state whether he requests that a conference or hearing be convened regarding the application, as provided in subpart F of this part.

§ 1003.45 OHA evaluation.

(a)(1) The OHA may initiate an investigation of any statement in an application and utilize in its evaluation any relevant facts obtained by such investigation. The OHA may order the submission of additional information, and may solicit and accept submissions from third persons relevant to an application provided that the applicant is afforded an opportunity to respond to all third person submissions. In evaluating an application, the OHA may also consider any other source of information, and may conduct hearings or conferences either in response to requests by parties in the proceeding or on its own initiative.

(2) If the OHA determines that there is insufficient information upon which to base a decision and if upon request additional information is not submitted by the applicant, the OHA may dismiss the application without prejudice. If the failure to supply additional information is repeated or willful, the OHA may dismiss the application with prejudice.

(3) The OHA shall process applications for stay as expeditiously as possible. When administratively feasible, the OHA shall grant or deny an Application for Stay within 10 business days after receipt of the application.

(4) Notwithstanding any other provision of the DOE regulations, the OHA may make a decision on any Application for Stay prior to the receipt of written comments.

(b) The criteria to be considered and weighed by the OHA in determining whether a stay should be granted are:

(1) Whether a showing has been made that an irreparable injury will result in the event that the stay is denied;

(2) Whether a showing has been made that a denial of the stay will result in a more immediate hardship or inequity to the applicant than a grant of the stay would cause to other persons affected by the proceeding;

(3) Whether a showing has been made that it would be desirable for public policy reasons to grant immediate relief pending a decision by OHA on the merits;

(4) Whether a showing has been made that it is impossible for the applicant

to fulfill the requirements of an outstanding order or regulatory provision; and

(5) Whether a showing has been made that there is a strong likelihood of success on the merits.

§ 1003.46 Decision and Order.

(a) In reaching a decision with respect to an Application for Stay, the OHA shall consider all relevant information in the record. An Application for Stay may be decided by the issuance of an order either during the course of a hearing or conference in which an official transcript is maintained or in a separate written Decision and Order. Any such order shall include a statement of the relevant facts and the legal basis of the decision. The approval or denial of a stay is not an order of the OHA that is subject to administrative or judicial review.

(b) In its discretion and upon a determination that it would be desirable to do so in order to further the objectives stated in the regulations or in the statutes the DOE is responsible for administering, the OHA may order a stay on its own initiative.

Subpart E—Modification or Rescission

§ 1003.50 Purpose and scope.

This subpart establishes the procedures for the filing of an application for modification or rescission of a DOE order. An application for modification or rescission is a summary proceeding that will be initiated only if the criteria described in § 1003.55(b) are satisfied.

§ 1003.51 What to file.

A person filing under this subpart shall file an ''Application for Modification (or Rescission),'' which should be clearly labeled as such both on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing. The general filing requirements stated in § 1003.9 shall be complied with in addition to the requirements stated in this subpart.

§ 1003.52 Where to file.

The application shall be filed with the OHA at the address provided in § 1003.11.

§ 1003.53 Notice.

(a) The applicant shall send by United States mail a copy of the application and any subsequent amendments or other documents relating to the application, from which confidential information has been deleted in accordance with § 1003.9(f), to each person who is reasonably ascertainable by the applicant as a person who would be aggrieved by the OHA action sought, including persons who participated in the process that led to the issuance of the order for which the modification or rescission is sought. The copy of the application shall be accompanied by a statement that the person may submit comments regarding the application to the OHA within 10 days. The application filed with the OHA shall include certification to the OHA that the applicant has complied with the requirements of this paragraph and shall include the names and addresses of all persons to whom a copy of the application was sent.

(b) If an applicant determines that compliance with paragraph (a) of this section would be impracticable, the applicant shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and possible to notify; and

(2) Include with the application a description of the persons or class or classes of persons to whom notice was not sent. The OHA may require the applicant to provide additional or alternative notice, may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the FEDERAL REGISTER.

(c) The OHA shall serve notice on any other person readily identifiable by the OHA as one who would be aggrieved by the OHA action sought and may serve notice on any other person that written comments regarding the application will be accepted if filed within 10 days of service of that notice.

(d) Any person submitting written comments to the OHA with respect to

an application filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with §1003.9(f), to the applicant. The person shall certify to the OHA that he has complied with the requirement of this paragraph. The OHA may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

§1003.54 Contents.

(a) The application shall contain a full and complete statement of all relevant facts pertaining to the circumstances, act or transaction that is the subject of the application and to the OHA action sought. Such facts shall include the names and addresses of all affected persons (if reasonably ascertainable), a complete statement of the business or other reasons that justify the act or transaction, a description of the acts or transactions that would be affected by the requested action, and a full description of the pertinent provisions and relevant facts contained in any relevant documents. Copies of all contracts, agreements, leases, instruments, and other documents relevant to the application shall be submitted to the OHA upon its request. A copy of the order of which modification or rescission is sought shall be included with the application.

(b) The applicant shall state whether he requests or intends to request that there be a conference regarding the application. Any request not made at the time the application is filed shall be made as soon thereafter as possible. The request and the OHA determination on the request shall be made in accordance with subpart F of this part.

(c) The applicant shall fully describe the events, acts, or transactions that comprise the significantly changed circumstances, as defined in §1003.55(b)(2), upon which the application is based. The applicant shall state why, if the significantly changed circumstance is new or newly discovered facts, such facts were not or could not have been presented during the process that led to the issuance of the order for which modification or rescission is sought.

(d) The application shall include a discussion of all relevant authorities, including, but not limited to, DOE rules, regulations, and decisions on appeal and exceptions relied upon to support the action sought therein.

§1003.55 OHA evaluation.

(a)(1) The OHA may initiate an investigation of any statement in an application and utilize in its evaluation any relevant facts obtained by such investigation. The OHA may solicit and accept submissions from third persons relevant to any application for modification or rescission provided that the applicant is afforded an opportunity to respond to all third person submissions. In evaluating an application for modification or rescission, the OHA may convene a conference, on its own initiative, if, in its discretion, it considers that such conference will advance its evaluation of the application.

(2) If the OHA determines that there is insufficient information upon which to base a decision and if upon request the necessary additional information is not submitted, the OHA may dismiss the application without prejudice. If the failure to supply additional information is repeated or willful, the OHA may dismiss the application with prejudice. If the applicant fails to provide the notice required by §1003.53, the OHA may dismiss the application without prejudice.

(b)(1) An application for modification or rescission of an order shall be processed only if—

(i) The application demonstrates that it is based on significantly changed circumstances; and

(ii) The period within which a person may file an appeal has lapsed or, if an appeal has been filed, a final order has been issued.

(2) For purposes of this subpart, the term ''significantly changed circumstances'' shall mean—

(i) The discovery of material facts that were not known or could not have been known at the time of the proceeding and action upon which the application is based;

(ii) The discovery of a law, rule, regulation, order or decision on appeal or exception that was in effect at the time

of the proceeding upon which the application is based and which, if such had been made known to the OHA, would have been relevant to the proceeding and would have substantially altered the outcome; or

(iii) There has been a substantial change in the facts or circumstances upon which an outstanding and continuing order of the OHA affecting the applicant was issued, which change has occurred during the interval between issuance of such order and the date of the application and was caused by forces or circumstances beyond the control of the applicant.

§ 1003.56 Decision and Order.

(a) Upon consideration of the application and other relevant information received or obtained during the proceeding, the OHA shall issue a Decision and Order granting or denying the application.

(b) The Decision and Order shall include a written statement setting forth the relevant facts and the legal basis of the Decision and Order. When appropriate, the Decision and Order shall state that it is a final order of which the applicant may seek judicial review.

(c) The OHA shall serve a copy of the Decision and Order upon the applicant, any other person who participated in the proceeding and upon any other person readily identifiable by the OHA as one who is aggrieved by such Decision and Order.

Subpart F—Conferences and Hearings

§ 1003.60 Purpose and scope.

This subpart establishes the procedures for requesting and conducting an OHA conference or hearing. Such proceedings shall be convened in the discretion of the OHA, consistent with OHA requirements.

§ 1003.61 Conferences.

(a) The OHA in its discretion may direct that a conference be convened, on its own initiative or upon request by a person, when it appears that such conference will materially advance the proceeding. The determination as to who may attend a conference convened under this subpart shall be in the discretion of the OHA, but a conference will usually not be open to the public.

(b) A conference may be requested in connection with any proceeding of the OHA by any person who would be aggrieved by that proceeding. The request may be made in writing or verbally, but must include a specific showing as to why such conference will materially advance the proceeding. The request shall be addressed to the OHA, as provided in § 1003.11.

(c) A conference may only be convened after actual notice of the time, place and nature of the conference is provided to the person who requested the conference.

(d) When a conference is convened in accordance with this section, each person may present views as to the issues involved. Documentary evidence may be presented at the conference, but will be treated as if submitted in the regular course of the proceeding. A transcript of the conference will not usually be prepared. However, the OHA in its discretion may have a verbatim transcript prepared.

(e) Because a conference is solely for the exchange of views incident to a proceeding, there will be no formal reports or findings unless the OHA in its discretion determines that such would be advisable.

§ 1003.62 Hearings.

(a) The OHA in its discretion may direct that a hearing be convened on its own initiative or upon request by a person, when it appears that such hearing will materially advance the proceeding. All hearings convened pursuant to this subpart shall be conducted by the Director of the OHA or his designee. The determination as to who may attend a hearing convened under this subpart shall be in the discretion of OHA. Hearings will be open to the public, but may be closed at the discretion of OHA if the reason is put in the record.

(b) A hearing may be requested by an applicant, appellant, or any other person who would be aggrieved by the OHA action sought. The request shall be in writing and shall include a specific showing as to why such hearing will materially advance the proceeding. The request shall be addressed

to the OHA at the address provided in § 1003.11.

(c) A hearing may be convened only after actual notice of the time, place, and nature of the hearing is provided both to the applicant or appellant and to any other person readily identifiable by the OHA as one who would be aggrieved by the OHA action involved. The notice shall include, as appropriate:

(1) A statement that such person may participate in the hearing; or

(2) A statement that such person may request a separate conference or hearing regarding the application or appeal.

(d) When a hearing is convened in accordance with this section, each person may present views as to the issue or issues involved. Documentary evidence may be presented at the hearing, but will be treated as if submitted in the regular course of the proceeding. A transcript of the hearing will be prepared.

(e) If material factual issues remain in dispute after an application or appeal has been filed, the Director of the OHA or his designee may issue an order convening an evidentiary hearing in which witnesses shall testify under oath, subject to cross-examination, for the record and in the presence of a Presiding Officer. A Motion for Evidentiary Hearing should specify the type of witness or witnesses whose testimony is sought, the scope of questioning that is anticipated, and the relevance of the questioning to the proceeding. A motion may be summarily denied for lack of sufficient specificity, because an evidentiary hearing would place an undue burden on another person or the DOE, or because an evidentiary hearing would cause undue delay.

(f) A Motion for Evidentiary Hearing must be served on any person from whom information is sought and on parties to the underlying administrative action. Any person who wishes to respond to a Motion for Evidentiary Hearing must do so within ten days of service.

(g) In reaching a decision with respect to a request for a hearing or motion filed under this subpart, the OHA shall consider all relevant information in the record. If an order is issued granting a hearing or evidentiary hearing, in whole or in part, the order shall specify the parties, any limitations on the participation of a party, and the issues to be considered. An order of the OHA issued under this section is an interlocutory order which is subject to further administrative review or appeal only upon issuance of a final Decision and Order in the proceeding concerned.

(h) At any evidentiary hearing, the parties shall have the opportunity to present material evidence that directly relates to a particular issue set forth for hearing. The Presiding Officer may administer oaths or affirmations, rule on objections to the presentation of evidence, receive relevant material, require the advance submission of documents offered as evidence, dispose of procedural requests, determine the format of the hearing, modify any order granting a Motion for Evidentiary Hearing, direct that written motions, documents or briefs be filed with respect to issues raised during the course of the hearing, ask questions of witnesses, issue subpoenas, direct that documentary evidence be served upon other parties (under protective order if such evidence is deemed confidential) and otherwise regulate the conduct of the hearing.

Subpart G—Private Grievances and Redress

§ 1003.70 Purpose and scope.

The OHA shall receive and consider petitions that seek special redress relief or other extraordinary assistance as provided for in the Federal Energy Administration Act of 1974, Section 21 (15 U.S.C. 780), apart from or in addition to the other proceedings described in this part. This subpart may also apply if cross referenced in another DOE rule or regulation, or in a DOE delegation of authority. Petitions under this subpart shall include those seeking special assistance based on an assertion that DOE is not complying with its rules, regulations, or orders.

§ 1003.71 Who may file.

Any person may file a petition under this subpart who is adversely affected by any DOE rule, regulation or order

subject to 15 U.S.C. 780 or who is so authorized by a program rule or regulation or a DOE delegation of authority.

§ 1003.72 What to file.

The person seeking relief under this subpart shall file a ''Petition for Special Redress or Other Relief,'' which shall be clearly labeled as such both on the petition and on the outside of the envelope in which it is transmitted, and shall be in writing. The general filing requirements stated in § 1003.9 shall be complied with in addition to the requirements stated in this subpart.

§ 1003.73 Where to file.

A petition shall be filed with the OHA at the address provided in § 1003.11.

§ 1003.74 Notice.

(a) The person filing the petition, except a petition that asserts that the DOE is not complying with agency rules, regulations, or orders, shall send by United States mail a copy of the petition and any subsequent amendments or other documents relating to the petition, or a copy from which confidential information has been deleted in accordance with § 1003.9(f), to each person who is reasonably ascertainable by the petitioner as a person who would be aggrieved by the OHA action sought. The copy of the petition shall be accompanied by a statement that the person may submit comments regarding the petition to the OHA within 10 days. The copy filed with the OHA shall include certification that the requirements of this paragraph have been complied with and shall include the names and addresses of each person to whom a copy of the petition was sent.

(b) Notwithstanding the provisions of paragraph (a) of this section, if the petitioner determines that compliance with paragraph (a) of this section would be impracticable, the petitioner shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and practicable to notify; and

(2) Include with the petition a description of the persons or class or classes of persons to whom notice was not sent.

(3) The OHA may require the petitioner to provide additional or alternative notice, or may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the FEDERAL REGISTER.

(c) The OHA shall serve notice on any other person readily identifiable by the OHA as one who would be aggrieved by the OHA action sought and may serve notice on any other person that written comments regarding the petition will be accepted if filed within 10 days of service of that notice.

(d) Any person submitting written comments to the OHA regarding a petition filed under his subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 1003.9(f), to the petitioner. The person shall certify to the OHA that he has complied with the requirements of this paragraph. The OHA may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

§ 1003.75 Contents.

The petition shall contain a full and complete statement of all relevant facts pertaining to the circumstances, act or transaction that is the subject of the petition and to the OHA action sought. Such facts shall include, but not be limited to, the names and addresses of all affected persons (if reasonably ascertainable); a complete statement of the business or other reasons that justify the act or transaction, if applicable; a description of the act or transaction, if applicable; a description of the acts or transactions that would be affected by the requested action; a full discussion of the pertinent provisions and relevant facts contained in the documents submitted with the petition, and an explanation of how the petitioner is aggrieved by DOE's position. Copies of all contracts, agreements, leases, instruments, and other documents relevant to the petition shall be submitted to the OHA upon its request.

§ 1003.76 OHA evaluation of request.

(a)(1) The OHA may initiate an investigation of any statement in a petition

and utilize in its evaluation any relevant facts obtained by such investigation. The OHA may solicit and accept submissions from third persons relevant to any petition provided that the petitioner is afforded an opportunity to respond to all third person submissions. In evaluating a petition, the OHA may consider any other source of information. The OHA on its own initiative may convene a conference, if, in its discretion, it considers that such will advance its evaluation of the petition.

(2) If the OHA determines that there is insufficient information upon which to base a decision and if, upon request, the necessary additional information is not submitted, the OHA may dismiss the petition without prejudice. If the failure to supply additional information is repeated or willful, the OHA may dismiss the petition with prejudice. If the petitioner fails to provide the notice required by §1003.74, the OHA may dismiss the petition without prejudice.

(b)(1) The OHA will dismiss without prejudice a ''Petition for Special Redress or Other Relief'' if it determines that another more appropriate proceeding is provided by this part.

(2) The OHA will dismiss with prejudice a ''Petition for Special Redress or Other Relief'' filed by a person who has exhausted his administrative remedies with respect to any proceeding provided by this part, and received a final order therefrom that addresses the same issue or transaction.

§ 1003.77 Decision and Order.

(a) Upon consideration of the petition and other relevant information received or obtained during the proceeding, the OHA will issue a Decision and Order granting or denying the petition.

(b) The Decision and Order denying or granting the petition shall include a written statement setting forth the relevant facts and legal basis for the Decision and Order. Such Decision and Order shall state that it is a final order of the DOE of which the petitioner may seek judicial review.

PART 1004—FREEDOM OF INFORMATION ACT (FOIA)

Sec.
1004.1 Purpose and scope.
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AUTHORITY: 5 U.S.C. 552.

SOURCE: 53 FR 15661, May 3, 1988, unless otherwise noted.

§ 1004.1 Purpose and scope.

This part contains the regulations of the Department of Energy (DOE) that implement Freedom of Information (FOIA) 5 U.S.C. 552, Pub. L. 89–487, as amended by Pub. L. 93–502, 88 Stat. 1561, by Pub. L. 94–409, 90 Stat. 1241, and by Pub. L. 99–570, 100 Stat. 3207–49, by Pub. L. 104–231, 110 Stat. 3048, by Pub. L. 110–175, 121 Stat. 2524, and by Pub. L. 111–83 564, 123 Stat. 2142, 2184. The regulations of this part provide information concerning the procedures by which records may be requested from all DOE offices, excluding the Federal Energy Regulatory Commission (FERC). Records of the DOE made available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public as prescribed by this part. Persons seeking information or records of the DOE may find it helpful to consult with a DOE FOIA Officer before invoking the formal procedures set out below. To the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22857, Apr. 25, 2014]

§ 1004.2 Definitions.

As used in this part:

(a) *Appeal Authority* means the Office of Hearings and Appeals.

(b) *Authorizing or Denying Official* means that DOE officer as identified by the Directorate of Administration by separate directive, having custody of or responsibility for records requested under 5 U.S.C. 552. In DOE Headquarters, the term refers to The Freedom of Information Officer as defined below and officials who report directly to either the Office of the Secretary or a Secretarial Officer as also defined below. In the Field Offices, the term refers to the head of a field location identified in §1004.2(h) and the heads of field offices to which they provide administrative support and have delegated this authority.

(c) *'Commercial use' request* refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, agencies must determine how the requester will use the documents requested. Moreover, where DOE has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not evident from the request itself, the DOE will seek additional clarification before assigning the request to a specific category.

(d) *Department* or *Department of Energy (DOE)* means all organizational entities which are a part of the executive department created by Title II of the DOE Organization Act, Pub L. 95–91. This specifically excludes the FERC.

(e) *Direct costs* means those expenditures which the DOE 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 the 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 in which the records are stored.

(f) *Duplication* refers to the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of, but are not limited to, paper copy, microform, audiovisual materials, or machine readable documentation (e.g., magnetic tape or disk). The copy provided must be in a form that can be reasonably used by requesters.

(g) *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.

(h) *Freedom of Information Act (FOIA) Officer* means the person designated to administer the Freedom of Information Act at the following DOE offices:

(1) Bonneville Power Administration, P.O. Box 3621, Portland, OR 97232.

(2) Carlsbad Field Office, P.O. Box 3090, Carlsbad, NM 88221.

(3) Chicago Office, 9800 S. Cass Avenue, Argonne, IL 60439.

(4) Environmental Management Consolidated Business Center, 250 East 5th Street, Suite 500, Cincinnati, OH 45202.

(5) Golden Field Office, 1617 Cole Boulevard, Golden, CO 80401.

(6) Headquarters, Department of Energy, Washington, DC 20585.

(7) Idaho Operations Office, 1955 Fremont Avenue, MS 1203, Idaho Falls, ID 83401.

(8) National Nuclear Security Administration Albuquerque Complex, P.O. Box 5400, Albuquerque, NM 87185–5400.

(9) National Energy Technology Laboratory, 3610 Collins Ferry Road, Morgantown, WV 26507–0800.

(10) Naval Reactors Laboratory Field Office, P.O. Box 109, West Mifflin, PA 15122–0109.

(11) Oak Ridge Office, P.O. Box 2001, Oak Ridge, TN 37831.

(12) Office of Naval Reactors, Headquarters, 1240 Isaac Hull Avenue SE., Washington Navy Yard, DC 20376–0822.

(13) Office of Scientific and Technical Information, P.O. Box 2001, Oak Ridge, TN 37831.

(14) Richland Operations Office, P.O. Box 550, Mail Stop A7–75, Richland, WA 99352.

(15) Savannah River Operations Office, P.O. Box A, Aiken, SC 29801.

(16) Southeastern Power Administration, 1166 Athens Tech Road, Elberton, GA 30635–6711.

(17) Southwestern Power Administration, One West Third, S1200, Tulsa, OK 74103.

(18) Strategic Petroleum Reserve Project Management Office, 900 Commerce Road East–MS FE–455, New Orleans, LA 70123.

(19) Western Area Power Administration, 12155 W. Alameda Parkway, P.O. Box 281213, Lakewood, CO 80228–8213.

(i) *General Counsel* means the General Counsel provided for in section 202(b) of the DOE Organization Act, or any DOE attorney designated by the General Counsel as having responsibility for counseling the Department on Freedom of Information Act matters.

(j) *Headquarters* means all DOE facilities functioning within the Washington metropolitan area except the Office of Naval Reactors.

(k) *Non-commercial scientific institution* refers to an institution that is not operated on a ''commercial'' basis as that term is referenced in §1004.2(c), 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.

(l) *Office* means any administrative or operating unit of the DOE, including those in field offices.

(m) *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 entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of ''news'') who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive.

Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. 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. A publication contract would be the clearest proof, but agencies may also look to the past publication record of a requester in making this determination.

(n) *Review* refers to the process of examining documents located in response to a commercial use request (see §1004.2(c)) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise pepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(o) *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. The DOE will search for material in the most efficient and least expensive manner in order to minimize cost for both DOE and the requester. For example, DOE will not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. ''Search'' will be distinguished, moreover, from ''review'' of material in order to determine whether the material is exempt from disclosure. Searches may be done manually or by computer using existing programming.

(p) *Secretarial Officer* means the Under Secretary; Under Secretary for Science; Administrator, Energy Information Administration; Administrator, National Nuclear Security Administration; Assistant Secretary for Congressional and Intergovernmental Affairs;

Assistant Secretary for Energy Efficiency and Renewable Energy; Assistant Secretary for Environmental Management; Assistant Secretary for Fossil Energy; Assistant Secretary for Policy and International Affairs; Assistant Secretary for Nuclear Energy; Chief Financial Officer; Chief Health, Safety and Security Officer; Chief Human Capital Officer; Chief Information Officer; ''Director, Advanced Research Projects Agency—Energy'', ''Director, Office of Indian Energy Policy and Programs'', and ''Director, Loan Programs Office, Director, Office of Economic Impact and Diversity; Director, Office of Electricity Delivery and Energy Reliability; Director, Office of Hearings and Appeals; Director, Office of Legacy Management; Director, Office of Management; Director, Office of Public Affairs; Director, Office of Science; General Counsel; Inspector General; and Senior Intelligence Officer.

(q) *Statute specifically providing for setting the level of fees for particular types of records,* at 5 U.S.C. 552(a)(4)(A)(vi), means any statute that specifically requires a government agency, such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set the level of fees for particular types of records, in order to:

(1) Serve both the general public and private sector organizations by conveniently making available government information;

(2) Ensure that groups and individuals pay the cost of publications and other services which are for their special use so that these costs are not borne by the general taxpaying public;

(3) Operate an information dissemination activity on a self-sustaining basis to the maximum extent possible; or

(4) Return revenue to the Treasury for defraying, wholly or in part, appropriated funds used to pay the cost of disseminating government information.

[53 FR 15661, May 3, 1988, as amended at 71 FR 68734, Nov. 28, 2006; 79 FR 22857, Apr. 25, 2014]

§ 1004.3 Public reading facilities and policy on contractor records.

(a) The DOE Headquarters will maintain, in the public reading facilities, the materials which are required by 5 U.S.C. 552(a)(2) to be made available for public inspection and copying. The principal public reading facility will be located at the Office of Information Resources Office, 1000 Independence Avenue, SW, Washington, DC. The DOE Headquarters will maintain an electronic public reading room that can be accessed at *http://energy.gov/management/office-management/operational-management/freedom-information-act/reading-room.* A complete listing of other facilities is available from the Office of Information Resources Officer at DOE Headquarters.

(b) Each of the designated field offices will maintain in public reading facilities certain materials maintained in the Headquarters facility and other materials associated with the particular field offices.

(c) Each of these public reading facilities will maintain and make available for public inspection and copying current indices of the materials at that facility which are required to be indexed by 5 U.S.C. 552(a)(2) or other applicable statutes.

(d) [Reserved]

(e) Contractor Records. (1) When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. 552(b)(2).

(2) Notwithstanding paragraph (e)(1) of this section, records owned by the Government under contract that contain information or technical data having commercial value as defined in § 1004.3(e)(4) or information for which the contractor claims a privilege recognized under Federal or State law shall be made available only when they are in the possession of the Government and not otherwise exempt under 5 U.S.C. 552(b).

(3) The policies stated in this paragraph:

(i) Do not affect or alter contractors' obligations to provide to DOE upon request any records that DOE owns under contract, or DOE's rights under contract to obtain any contractor records and to determine their disposition, including public dissemination; and

(ii) Will be applied by DOE to maximize public disclosure of records that pertain to concerns about the environment, public health or safety, or employee grievances.

(4) For purposes of §1004.3(e)(2), ''technical data and information having commercial value'' means technical data and related commercial or financial information which is generated or acquired by a contractor and possessed by that contractor, and whose disclosure the contractor certifies to DOE would cause competitive harm to the commercial value or use of the information or data.

[53 FR 15661, May 3, 1988, as amended at 59 FR 63884, Dec. 12, 1994; 79 FR 22858, Apr. 25, 2014]

§1004.4 Elements of a request.

(a) *Addressed to the FOIA Officer*. A request for a record of the DOE which is not available in a public reading facility, as described in §1004.3, shall be: Addressed to the Headquarters or appropriate field FOIA Officer at the DOE at a location listed in §1004.2(h) of this part, and both the envelope and the letter shall be clearly marked ''Freedom of Information Act Request;'' or submitted electronically on the Headquarters or appropriate field FOIA Web sites. Except as provided in §1004.4(e), a request will be considered to be received by the DOE for purposes of 5 U.S.C. 552(a)(6) and the 20-day response period will start upon actual receipt by the appropriate FOIA Officer, or not later than 10 days after receipt by a designated FOIA Officer at any location in §1004.2(h). Requests delivered after regular business hours of the FOIA Officer are considered received on the next regular business day.

(b) *Request must be in writing and for reasonably described records*. A request for access to records must be submitted in writing and must reasonably describe the records requested to enable DOE personnel to locate them with a reasonable amount of effort. Where possible, specific information regarding dates, titles, file designations, and other information which may help identify the records should be supplied by the requester, including the names and titles of any DOE officers or employees who have been contacted regarding the request prior to the submission of a written request. If the request relates to a matter in pending litigation, the court and its location should be identified to aid in locating the documents. If the records are known to be in a particular office of the DOE, the request should identify that office.

(c) *Categorical requests*. (1) Must meet reasonably described records requirement. A request for all records falling within a reasonably specific and well-defined category shall be regarded as conforming to the statutory requirement that records be reasonably described if DOE personnel can reasonably determine which particular records are sought in the request. The request must enable the DOE to identify and locate the records sought by a process that is not unreasonably burdensome or disruptive of DOE operations. The FOIA Officer may take into consideration problems of search which are associated with the files of an individual office within the Department and determine that a request is not one for reasonably described documents as it pertains to that office.

(2) *Assistance in reformulating a nonconforming request*. If a request does not reasonably describe the records sought, as specified in paragraph (c)(1) of this section, the DOE response will specify the reasons why the request failed to meet the requirements of paragraph (c)(1) of this section and will invite the requester to confer with knowledgeable DOE personnel in an attempt to restate the request or reduce the request to managable proportions by reformulation or by agreeing on an orderly procedure for the production of the records. If DOE responds that additional information is needed from the requester to render records reasonably described, any reformulated request submitted by the requester will be treated as an initial request for purposes of calculating the time for DOE response.

(d) *Nonexistent records.* (1) 5 U.S.C. 552 does not require the compilation or creation of a record for the purpose of satisfying a request for records.

(2) 5 U.S.C. 552 does not require the DOE to honor a request for a record not yet in existence, even where such a document may be expected to come into existence at a later time.

(3) If a requested record is known to have been destroyed or otherwise disposed of, or if no such record is known to exist, the requester will be so notified.

(e) *Assurance of willingness to pay fees.* A request shall include (1) an assurance to pay whatever fees will be assessed in accordance with §1004.9, (2) an assurance to pay those fees not exceeding some specified dollar amount, or (3) a request for a waiver or reduction of fees. No request will be deemed to have been received until the DOE has received some valid assurance of willingness to bear fees anticipated to be associated with the processing of the request or a specific request of a waiver or reduction of fees.

(f) *Requests for records or information of other agencies.* Some of the records in the files of the DOE have been obtained from other Federal agencies or contain information obtained from other Federal agencies.

(1) Where a document originated in another Federal agency, the Authorizing Official will refer the request to the originating agency and so inform the requester, unless the originator agrees to direct release by DOE.

(2) Requests for DOE records containing information received from another agency, or records prepared jointly by DOE and other agencies, will be treated as requests for DOE records except that the Authorizing Official will coordinate with the appropriate official of the other agency. The notice of determination to the requester, in the event part or all of the record is recommended for denial by the other agency, will cite the other agency Denying Official as well as the appropriate DOE Denying Official if a denial by DOE is also involved.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, Apr. 25, 2014]

§ 1004.5 Processing requests for records.

(a) FOIA Officers will be responsible for processing requests for records submitted pursuant to this part. Upon receiving such a request, the FOIA Officer will, except as provided in paragraph (c) of this section, ascertain which Authorizing Official has responsibility for, custody of, or concern with the records requested. The FOIA Officer will review the request, consulting with the Authorizing Official where appropriate, to determine its compliance with §1004.4. Where a request complies with §1004.4, the FOIA Officer will acknowledge receipt of the request to the requester and forward the request to the Authorizing Official for action.

(b) The Authorizing Official will promptly identify and review the records encompassed by the request. The Authorizing Official or FOIA Officer will prepare a written response (1) granting the request, (2) denying the request, (3) granting/denying it in part, (4) replying with a response stating that the request has been referred to another agency under §1004.4(f) or §1004.6(e), (5) informing the requester that responsive records cannot be located or do not exist.

(c) Where a request involves records which are in the custody of or are the concern of more than one Authorizing Official or FOIA Officer, the FOIA Officer will identify all concerned all Authorizing Officials, send copies of the request to them and forward the request for action to the Authorizing Official or FOIA Officer that can reasonably be expected to have custody of most of the requested records. This Authorizing Official or FOIA Officer will prepare a DOE response to the requester consistent with paragraph (b) of this section, which will identify any other Authorizing Official or FOIA Officer, having responsibility for the denial of records.

(d) *Time for processing requests.* (1) Action pursuant to paragraph (b) of this section will be taken within 20 working days of receipt of a request for DOE records (''receipt'' is defined in §1004.4(a)), except that,

(i) One request can be made to the requester for information and the DOE can toll the 20-day response period

while it waits for the requester's response;

(ii) If necessary to clarify with the requester issues regarding fee assessment and the DOE can toll the 20-day response period; or

(iii)If unusual circumstances require an extension of time before a decision on a request can be reached and the person requesting records is promptly informed in writing by the Authorizing Official or FOIA Officer of the reasons for such extension and the date on which a determination is expected to be dispatched, then the Authorizing Official or FOIA Officer may take an extension not to exceed 10 working days.

(2) For purposes of this section and §1004.8(d), the term ''unusual circumstances'' may include but is not limited to the following:

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

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

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

(3) The requester must be promptly notified in writing of the extension, the reasons for the extension, and the date on which a determination is expected to be made.

(4) If no determination has been made at the end of the 20-day period, or the last extension thereof, the requester may deem his adminstrative remedies to have been exhausted, giving rise to a right of review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be made within the applicable time limit, the responsible Authorizing Official or FOIA Officer will nevertheless continue to process the request. If the DOE is unable to provide a response within the statutory period, the Authorizing Official or FOIA Officer will inform the requester of the reason for the delay; the date on which a determination may be expected to be made; that the requester can seek remedy through the courts, but ask the requester to forego such action until a determination is made.

(5) Nothing in this part shall preclude the Authorizing Official or FOIA Officer and a requester from agreeing to an extension of time for the initial determination on a request. Any such agreement will be confirmed in writing and will clearly specify the total time agreed upon.

(6) Expedited processing. Generally, the DOE will respond to requests in the order of receipt. Requests will be processed out of order and processed as soon as practicable when it is determined, based upon information supplied by the requester or otherwise known to the DOE, that a compelling need exists to provide the records in an expeditious manner. The FOIA states that a compelling need exists when failure to obtain records expeditiously could reasonably be expected to pose a threat to the life or physical safety of an individual or, when a request is submitted by a person primarily engaged in disseminating information and there is an urgency to inform the public about actual or alleged Federal Government activity.

(7) A determination to grant or deny a request for expedited processing will be made by the appropriate FOIA Officer within 10 days after receipt of the request. The requester will be notified of the determination and informed that any denial may be appealed within 30 calendar days to the Office of Hearings and Appeals.''

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, Apr. 25, 2014]

§1004.6 Requests for classified records.

(a) All requests for classified records will be subject to the provisions of this part with the special qualifications noted below.

(b) All requests for records made in accordance with this part, except those requests for access to classified records which are made specifically pursuant to the mandatory review provisions of Executive Order 13526 and §1045 or any

successor thereto, may be automatically considered a FOIA Act request.

(c) Concurrence of the Director of Classification is required on all responses involving the denial of classified information. The Director of Classification will be informed of the request by either the FOIA Officer or the Authorizing Official to whom the action is assigned, and will advise the office originating the records, or having responsibility for the records, and consult with such office or offices prior to making a determination under this section.

(d) The written notice of a determination to deny records, or portions of records, which contain both classified material and other exempt material, will be concurred in by the Director of Classification who will be the Denying Official for the classified portion of such records in accordance with §§ 1004.5(c) and 1004.7(b)(2). If other DOE officials or appropriate officials of other agencies are responsible for denying any portion of the record, their names and titles or positions will be listed in the notice of denial in accordance with §§ 1004.5(c) and 1004.7(b)(2) and it will be clearly indicated what portion or portions they were responsible for denying.

(e) Requests for DOE records containing classified information received from another agency, and requests for classified documents originating in another agency, will be coordinated with or referred to the other agency consistent with the provisions of § 1004.4(f). Coordination or referral of information or documents subject to this section will be effected by the Director of Classification (in consultation with the Authorizing Official) with the appropriate official of the other agency.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, Apr. 25, 2014]

§ 1004.7 Responses by authorizing officials: Form and content.

(a) *Form of grant.* Records requested pursuant to § 1004.4 will be made available promptly, when they are identified and determined to be nonexempt under this Regulation, the FOIA, and where the applicable fees are $15 or less or where it has been determined that the payment of applicable fees should be waived. Where the applicable fees exceed $15, the records may be made available before all charges are paid.

(b) *Form of denial.* A reply denying a request for a record will be in writing. It will be signed by a FOIA Officer the Denying Official pursuant to § 1004.5 (b) or (c) and will include:

(1) *Reason for denial.* A statement of the reason for denial, containing a reference to the specific exemption under the FOIA authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld, and a statement of why a discretionary release is not appropriate. The amount of information deleted and the applicable exemption will be indicated on the released portion of the record, unless the indication would harm an interest protected by the exemption.

(2) *Persons responsible for denial.* A statement setting forth the name and the title or position of each Denying Official and identifying the portion of the denial for which each Denying Official is responsible.

(3) *Segregation of nonexempt material.* A statement or notation addressing the issue of whether there is any segregable nonexempt material in the documents or portions thereof identified as being denied.

(4) *Adequacy of search.* Although a determination that no such record is known to exist is not a denial, the requester will be informed that a challenge may be made to the adequacy of the search by appealing within 30 calendar days to the Office of Hearings and Appeals.

(5) *Administrative appeal.* A statement that the determination to deny documents made within the statutory time period, may be appealed within 30 calendar days to the Office of Hearings and Appeals.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, Apr. 25, 2014]

§ 1004.8 Appeal of initial denials.

(a) *Appeal to Office of Hearings and Appeals.* When the Authorizing or Denying Official or FOIA Officer Official has denied a request for records in whole or in part or has responded that there are no documents responsive to the request consistent with § 1004.4(d),

or when the Freedom of Information Officer has denied a request for expedited processing consistent with §1004.5(d) for waiver of fees consistent with §1004.9, the requester may, within 30 calendar days of its receipt, appeal the determination to the Office of Hearings and Appeals.

(b) *Elements of appeal.* The appeal must be in writing, addressed to the Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585 –1615 and both the envelope and letter must be clearly marked ''Freedom of Information Act Appeal.'' The appeal may be delivered by U.S Mail or commercial delivery service, by electronic mail to *OHA.Filings@hq.doe.gov,* or by facsimile to (202) 287–1415. The appeal must contain a concise statement of grounds upon which it is brought and a description of the relief sought. It should also include a discussion of all relevant authorities, including, but not limited to, DOE (and predecessor agencies) rulings, regulations, interpretations and decisions on appeals and any judicial determinations being relied upon to support the appeal. A copy of the letter containing the determination which is being appealed, must be submitted with the appeal. The appeal also should provide a telephone number, electronic mail address, or other means for communicating with the requester during business hours.

(c) *Receipt of appeal.* An appeal will be considered to be received for purposes of 5 U.S.C. 552(a)(6) upon receipt by the Appeal Authority. Documents delivered after regular business hours of the Office of Hearings and Appeals are considerd received on the next regular business day.

(d) *Action within 20 working days.* (1) The Appeal Authority will act upon the appeal within 20 working days of its receipt, except that if unusual circumstances (as defined in §1004.5(d)(2)) require an extension of time before a decision on a request can be reached, the Appeal Authority may extend the time for final action for an additional 10 working days less the number of days of any statutory extension which may have been taken by the Authorizing Official during the period of initial determination.

(2) The requester must be promptly notified in writing of the extension, setting forth the reasons for the extension, and the date on which a determination is expected to be issued.

(3) If no determination on the appeal has been issued at the end of the 20-day period or the last extension thereof, the requester may consider his administrative remedies to be exhausted and seek a review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be issued within the applicable time limit, the appeal will nevertheless continue to be processed; on expiration of the time limit the requester will be informed of the reason for the delay, of the date on which a determination may be expected to be issued, and of his right to seek judicial review in the United States district court in the district in which he resides or has his principal place of business, the district in which the records are situated, or the District of Columbia. The requester may be asked to forego judicial review until determination of the appeal.

(4) Nothing in this part will preclude the Appeal Authority and a requester from agreeing to an extension of time for the decision on an appeal. Any such agreement will be confirmed in writing by the Appeal Authority and will clearly specify the total time agreed upon for the appeal decision.

(e) *Form of action on appeal.* The Appeal Authority's action on an appeal will be in writing and will set forth the reason for the decision. It will also contain a statement that it constitutes final agency action on the request and that judicial review will be available either in the district in which the requester resides or has a principal place of business, the district in which the records are situated, or in the District of Columbia. Documents determined by the Appeal Authority to be documents subject to release will be made promptly available to the requester upon payment of any applicable fees.

(f) *Classified records and records covered by section 148 of the Atomic Energy Act.* The Secretary of Energy or his or her designee will make the final determination concerning appeals involving the denial of requests for classified information or the denial of requests for

information falling within the scope of section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

(g) *Appeal of the denial of expedited processing*. Any appeal of the determination to deny a request for expedited processing will be acted on expeditiously.''

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, Apr. 25, 2014]

§ 1004.9 Fees for providing records.

(a) *Fees to be charged*. The DOE will charge fees that recoup the full allowable direct costs incurred. The DOE will use the most efficient and least costly methods to comply with requests for documents made under the FOIA. The DOE may contract with private sector services to locate, reproduce and disseminate records in response to FOIA requests when that is the most efficient and least costly method. When doing so, however, the DOE will ensure that the ultimate cost to the requester is no greater than it would be if the DOE itself had performed these tasks. In no case will the DOE contract out responsibilities which the FOIA provides that only the agency may discharge, such as determining the applicability of an exemption, or determining whether to waive or reduce fees, which are determinations by Authorizing Officials or FOIA Officers. Where the DOE can identify documents that are responsive to a request and are maintained for public distribution by other agencies such as the National Technical Information Service and the Government Printing Office, the FOIA Officer will inform requesters of the procedures to obtain records from those sources.

(1) *Manual searches for records*. Whenever feasible, the DOE will charge for manual searches for records at the salary rate(s) (i.e. basic pay plus 16 percent) of the employee(s) making the search.

(2) *Computer searches for records*. The DOE will charge at the actual direct cost of providing the service. This will include the cost of operating the central processing unit (CPU) for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary.

(3) *Review of records*. The DOE will charge requesters who are seeking documents for commercial use for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges will be assessed only for the initial review (i.e., the review undertaken the first time the DOE analyzes the applicability of a specific exemption to a particular record or portion of a record. The DOE will not charge for review at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption which is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable.

(4) *Duplication of records*. The DOE will make a per-page charge for paper copy reproduction of documents. At present, the charge for paper to paper copies will be ten cents per page and the charge for microform to paper copies will be ten cents per page. For computer generated copies, such as tapes or printouts, the DOE will charge the actual cost, including operator time, for production of the tape or printout. For other methods of reproduction or duplication, we will charge the actual direct costs of producing the document(s).

(5) *Other charges*. It shall be noted that complying with requests for special services such as those listed below is entirely at the discretion of this agency. Neither the FOIA nor its fee structure cover these kinds of services. The DOE will recover the full direct costs of providing services such as those enumerated below to the extent that we elect to provide them:

(i) Certifying that records are true copies;

(ii) Sending records by special methods such as express mail, etc.

(6) *Restrictions on assessing fees*. (i) With the exception of requesters seeking documents for a commercial use, section (a)(4)(A)(iv) of the FOIA, as amended, DOE will provide the first 100 pages of duplication and the first two hours of search time without charge. Moreover, DOE will not charge fees to

any requester, including commercial use requesters, if the cost of collecting the fee would be equal to or greater than the fee itself. These provisions work together, so that except for commercial use requesters, DOE will not begin to assess fees until after the Department has provided the free search and reproduction. For example, if a request involves two hours and ten minutes of search time and results in 105 pages of documents, DOE will charge for only 10 minutes of search time and only five pages of reproduction. If this cost is equal to or less than $15.00, the amount DOE incurs to process a fee collection, no charges would be assessed. For purposes of these restrictions on assessment of fees, the word ''pages'' refers to paper copies of a standard agency size which will be normally be ''8–½ × 11'' or ''11 × 14.'' Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout, however, might meet the terms of the restriction. Similarly, the term ''search time'' is based on a *manual search*. To apply this term to searches made by computer, the DOE will determine the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of the search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of two hours of the salary of the computer operator conducting the search, DOE will begin assessing charges for computer search.

(ii) When unusual or exceptional circumstances do not apply and time limits specified in the FOIA are not met, the DOE will not charge any search fees, or duplication fees for educational and non-commercial scientific institution requesters and requesters who are representatives of the news media.

(7) *Notification of charges*. If the DOE determines or estimates that the fees to be assessed under this section may amount to more than $25.00, the requester will be informed of the estimated amount of fees, unless the requester has previously indicated a willingness to pay the amount estimated by the agency. In cases where a requester has been notified that actual or estimated fees may amount to more than $25.00, the request will be deemed not to have been received until the requester has agreed to pay the anticipated total fee. A notice to a requester pursuant to this paragraph will offer the opportunity to confer with DOE personnel in order to reformulate the request to meet his or her needs at a lower cost.

(8) *Waiving or reducing fees*. The DOE will furnish documents without charge or at reduced charges if 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 disclosure is not primarily in the commercial interest of the requester. This fee waiver standard thus sets forth two basic requirements, both of which must be satisfied before fees will be waived or reduced. First it must be established that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government. Second, it must be established that disclosure of the information is not primarily in the commercial interest of the requester. When these requirements are satisfied, based upon information supplied by a requester or otherwise made known to the DOE, the waiver or reduction of a FOIA fee will be granted. In determining when fees should be waived or reduced the appropriate FOIA Officer should address the following two criteria:

(i) 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.'' Factors to be considered in applying this criteria include but are not limited to:

(A) The subject of the request: Whether the subject of the requested records concerns ''the operations or activities of the government'';

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

(C) The contribution to an understanding by the general public of the subject likely to result from disclosure; and

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

(ii) If Disclosure of the Information ''is Not Primarily in the Commercial Interest of the Requester.'' Factors to be considered in applying this criteria include but are not limited to:

(A) 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

(B) 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) *Fees to be charged—categories of requesters.* There are four categories of FOIA requesters: Commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The FOIA Officers will make determinations regarding categories of requesters as defined at §1004.2. The Headquarters FOIA Officers will assist field FOIA Officers in categorizing requesters, and will resolve conflicting categorizations. The FOIA prescribes specific levels of fees for each of these categories:

(1) *Commercial use requesters.* When the DOE receives a request for documents which appears to be for commercial use, charges will be assessed to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commerical use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. The DOE will recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records.

(2) *Educational and non-commercial scientific institution requesters.* The DOE will provide documents to requesters in this category for the cost of reproduction only, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made as 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.

(3) *Requesters who are representatives of the news media.* The DOE will provide documents to requesters in this category for the cost of reproduction only, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in §1004.2(m), and his or her request must not be made for a commercial use. With respect to this class of requesters, a request for records supporting the news dissemination function of the requester will not be considered to be a request for a commercial use.

(4) *All other requesters.* The DOE will charge requesters who do not fall into any of the above categories 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 will be furnished without charge. Moreover, requests from individuals for records about themselves filed in DOE systems of records will continue to be processed under the fee provisions of the Privacy Act of 1974.

(5) *Charging interest—notice and rate.* Interest will be charged those requesters who fail to pay fees. The DOE will begin to assess interest charges on the amount billed on the 31st day following the day on which the billing was sent to the requester. Interest will be at the rate prescribed in section 3717 of Title 31 U.S.C. and will accrue from the date of the billing.

(6) *Charges for unsuccessful search.* The DOE will assess charges for time spent searching even if the search fails to identify responsive records or if records located are determined to be

exempt from disclosure. If the DOE estimates that search charges are likely to exceed $25, it will notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice will offer the requester the opportunity to confer with agency personnel in order to reformulate the request to reduce the cost of the request.

(7) *Aggregating requests.* A requester may not file multiple requests each seeking portions of a document or documents, solely to avoid payment of fees. When the DOE 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 DOE will aggregate any such requests and charge the appropriate fees. The DOE may consider the time period in which the requests have been made in its determination to aggregate the related requests. In no case will DOE aggregate multiple requests on unrelated subjects from one requester.

(8) *Advance payments.* Requesters are not required to make an advance payment (i.e., payment before action is commenced or continued on a request) unless:

(i) The DOE estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250.00. In such cases, the DOE will notify the requester of the likely cost and obtain a 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.

(ii) A requester has previously failed to pay a fee in a timely fashion (i.e., within 30 days of the date of the billing). The DOE will require the requester to pay the full amount delinquent plus any applicable interest as provided in paragraph (b)(5) of this section, or demonstrate that he or she has, in fact, paid the delinquent fee; and to make an advance payment of the full amount of the estimated current fee before we begin to process a new request or a pending request from that requester.

When the DOE acts under paragraphs (b)(8) (i) or (ii) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., 20 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denials, plus permissible extensions of these time limits) will begin only after the DOE has received fee payments described above.

(c) *Effect of the Debt Collection Act of 1982 (Pub. L. 97–365).* The DOE will use the authorities of the Debt Collection Act, including disclosure to consumer reporting agencies and the use of collection agencies, where appropriate, to encourage payment of fees.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, 22859, Apr. 25, 2014]

§ 1004.10 Exemptions.

(a) 5 U.S.C. 552 exempts from all of its publication and disclosure requirements nine categories of records which are described in paragraph (b) of that section. These categories include such matters as national defense and foreign policy information; investigatory records; internal procedures and communications; materials exempted from disclosure by other statutes; confidential, commercial, and financial information; and matters involving personal privacy.

(b) Specifically, the exemptions in 5 U.S.C. 552(b) will be applied consistent with § 1004.1 of these regulations to matters that are:

(1) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of the national defense or foreign policy and are in fact properly classified pursuant to such Executive Order;

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

(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)), provided that such statute–

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

(ii) Establishes particular criteria for withholding or refers to particular

types of matters to be withheld; for example Restricted Data and Formerly Restricted Data under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*) are covered by this exemption; or

(iii) If enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3).

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

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

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

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

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

(c) Any reasonably segregated nonexempt portion of a record will be provided to a requester. The DOE will delete portions which are withholdable under the exemptions listed above.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22859, Apr. 25, 2014]

§ 1004.11 Handling information of a private business, foreign government, or an international organization.

(a) Whenever a document submitted to the DOE contains information which may be exempt from public disclosure, it will be handled in accordance with the procedures in this section. While the DOE is responsible for making the final determination with regard to the disclosure or nondisclosure of information contained in requested documents, the DOE will consider the submitter's views (as that term is defined in this section) in making its determination. Nothing in this section will preclude the submission of a submitter's views at the time of the submission of the document to which the views relate, or at any other time.

(b) When the DOE may determine, in the course of responding to a FOIA request, not to release information submitted to the DOE (as described in paragraph (a) of this section, and contained in a requested document) without seeking any or further submitter's views, no notice will be given the submitter.

(c) When the DOE, in the course of responding to a FOIA request, cannot make the determination described in paragraph (b) of this section without having for consideration the submitter's views, the submitter shall be promptly notified and provided an opportunity to submit his views on whether information contained in the requested document (1) is exempt from the mandatory public disclosure requirements of the FOIA Act, (2) contains information referred to in 18 U.S.C. 1905, or (3) is otherwise exempt by law from public disclosure. The DOE

will make its own determinations as to whether any information is exempt from disclosure. Notice of a determination by the DOE that a claim of exemption made pursuant to this paragraph is being denied will be given to a person making such a claim no less than seven (7) calendar days prior to intended public disclosure of the information in question. For purposes of this section, notice is deemed to be given when mailed to the submitter at the submitter's last known address.

(d) When the DOE, in the course of responding to a FOIA request, cannot make the determination described in paragraph (b) of this section and, without recourse to paragraph (c) of this section, previously has received the submitter's views, the DOE will consider such submitter's views and will not be required to obtain additional submitter's views under the procedure described in paragraph (c) of this section. The DOE will make its own determination with regard to any claim that information be exempted from disclosure. Notice of the DOE's determination to deny a claim of exemption made pursuant to this paragraph will be given to a person making such a claim no less than seven (7) calendar days prior to its intended public disclosure.

(e) Notwithstanding any other provision of this section, DOE offices may require a person submitting documents containing information that may be exempt by law from mandatory disclosure to (1) submit copies of each document from which information claimed to be confidential has been deleted or (2) require that the submitter's views be otherwise made known at the time of the submission. Notice of a determination by the DOE that a claim of exemption is being denied will be given to a person making such a claim no less than seven (7) calendar days prior to intended public disclosure of the information in question. For purposes of this section, notice is deemed to be given when mailed to the submitter at the submitter's last known address.

(f) *Criteria for determining the applicability of 5 U.S.C. 552(b)(4).* Subject to subsequent decisions of the Appeal Authority, criteria to be applied in determining whether information is exempt from mandatory disclosure pursuant to Exemption 4 of the Freedom of Information Act include:

(1) Whether the information has been held in confidence by the person to whom it pertains;

(2) Whether the information is of a type customarily held in confidence by the person to whom it pertains and whether there is a reasonable basis therefore;

(3) Whether the information was transmitted to and received by the Department in confidence;

(4) Whether the information is available in public sources;

(5) Whether disclosure of the information is likely to impair the Government's ability to obtain similar information in the future; and

(6) Whether disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.

(g) When the DOE, in the course of responding to a Freedom of Information request, determines that information exempt from the mandatory public disclosure requirements of the Freedom of Information Act is to be released in accordance with §1004.1, the DOE will notify the submitter of the intended discretionary release no less than seven (7) days prior to intended public disclosure of the information in question.

(h) As used in this section, the term *submitter's views* means, with regard to a document submitted to the DOE, an item-by-item indication, with accompanying explanation, addressing whether the submitter considers the information contained in the document to be exempt from the mandatory public disclosure requirements of the Freedom of Information Act, to be information referred to in 18 U.S.C. 1905, or to be otherwise exempt by law from mandatory public disclosure. The accompanying explanation shall specify the justification for nondisclosure of any information under consideration. If the submitter states that the information comes within the exemption in 5 U.S.C.

552(b)(4) for trade secrets and commercial or financial information, the submitter shall include a statement specifying why such information is privileged or confidential and, where appropriate, shall address the criteria in paragraph (f) of this section excluding paragraph (f)(5). In all cases, the submitter shall address the question of whether or not discretionary disclosure would be in the public interest.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, 22859, Apr. 25, 2014]

§ 1004.12 Computation of time.

Except as otherwise noted, in computing any period of time prescribed or allowed by this part, the day of the event from which the designated period of time begins to run is not to be included; the last day of the period so computed is to be included; and Saturdays, Sundays, and legal holidays are excepted.

PART 1005—INTERGOVERNMENTAL REVIEW OF DEPARTMENT OF ENERGY PROGRAMS AND ACTIVITIES

Sec.

1005.1 What is the purpose of these regulations?
1005.2 What definitions apply to these regulations?
1005.3 What programs and activities of the Department are subject to these regulations?
1005.4 What are the Secretary's general responsibilities under the Order?
1005.5 What is the Secretary's obligation with respect to Federal interagency coordination?
1005.6 What procedures apply to the selection of programs and activities under these regulations?
1005.7 How does the Secretary communicate with state and local officials concerning the Department's programs and activities?
1005.8 How does the Secretary provide states an opportunity to comment on proposed Federal financial assistance and direct Federal development?
1005.9 How does the Secretary receive and respond to comments?
1005.10 How does the Secretary make efforts to accommodate intergovernmental concerns?
1005.11 What are the Secretary's obligations in interstate situations?
1005.12 How may a state simplify, consolidate, or substitute federally required state plans?
1005.13 May the Secretary waive any provision of these regulations?

AUTHORITY: E. O. 12372, July 14, 1982, 47 FR 30959, as amended April 8, 1983, 48 FR 15887; sec. 401 of the Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506).

SOURCE: 48 FR 29182, June 24, 1983, unless otherwise noted.

§ 1005.1 What is the purpose of these regulations?

(a) The regulations in this part implement Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' issued July 14, 1982 and amended on April 8, 1983. These regulations also implement applicable provisions of section 401 of the Intergovernmental Cooperation Act of 1968.

(b) These regulations are intended to foster an intergovernmental partership and a strengthened Federalism by relying on state processes and on state, areawide, regional and local coordination for review of proposed federal financial assistance and direct federal development.

(c) These regulations are intended to aid the internal management of the Department, and are not intended to create any right or benefit enforceable at law by a party against the Department or its officers.

§ 1005.2 What definitions apply to these regulations?

Department means the U.S. Department of Energy.

Order means Executive Order 12372, issued July 14, 1982, and amended April 8, 1983 and titled ''Intergovernmental Review of Federal Programs.''

Secretary means the Secretary of the U.S. Department of Energy or an official or employee of the Department acting for the Secretary under a delegation of authority.

State means any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.

§ 1005.3 What programs and activities of the Department are subject to these regulations?

(a) The Secretary publishes in the FEDERAL REGISTER a list of the Department's program and activities that are subject to the order and these regulations.

(b) Unless otherwise stated in the FEDERAL REGISTER listing identified in paragraph (a) of this section, these regulations do not apply to the Department's financial assistance transactions with other than governmental entities.

(c) The Bonneville Power Administration shall satisfy the requirements of these regulations by compliance with the consultation requirements of the Pacific Northwest Electric Power Planning and Conservation Act, Public Law 96–501.

§ 1005.4 What are the Secretary's general responsibilities under the Order?

(a) The Secretary provides opportunities for consultation by elected officials of those state and local governments that would provide the nonfederal funds, for, or that would be directly affected by, proposed federal financial assistance from, or direct federal development by, the Department.

(b) If a state adopts a process under the Order to review and coordinate proposed federal financial assistance and direct federal development, the Secretary, to the extent permitted by law:

(1) Uses the state process to determine official views of state and local elected officials;

(2) Communicates with state and local elected officials as early in a program planning cycle as is reasonably feasible to explain specific plans and actions;

(3) Make efforts to accommodate state and local elected official's concerns with proposed federal financial assistance and direct federal development that are communicated through the state process;

(4) Allows the states to simplify and consolidate existing federally required state plan submissions;

(5) Where state planning and budgeting systems are sufficient and where permitted by law, encourages the substitution of State plans for federally required state plans;

(6) Seeks the coordination of views of affected state and local elected officials in one state with those of another state when proposed federal financial assistance or direct federal development has an impact on interstate metropolitan urban centers or other interstate areas; and

(7) Supports state and local governments by discouraging the reauthorization or creation of any planning organization which is federally-funded, which has a limited purpose, and which is not adequately representative of, or accountable to, state or local elected officials.

§ 1005.5 What is the Secretary's obligation with respect to Federal interagency coordination?

The Secretary, to the extent practicable, consults with and seeks advice from all other substantially affected federal departments and agencies in an effort to assure full coordination between such agencies and the Department regarding programs and activities covered under these regulations.

§ 1005.6 What procedures apply to the selection of programs and activities under these regulations?

(a) A state may select any program or activity published in the FEDERAL REGISTER in accordance with § 1005.3 of this part for intergovernmental review under these regulations. Each state, before selecting programs and activities, shall consult with local elected officials.

(b) Each state that adopts a process shall notify the Secretary of the Department's programs and activities selected for that process.

(c) A state may notify the Administrator of changes in its selections at any time. For each change, the state shall submit to the Secretary an assurance that the state has consulted with local elected officials regarding the change. The Department may establish deadlines by which states are required to inform the Secretary of changes in their program selections.

(d) The Secretary uses a state's process as soon as feasible, depending on individual programs and activities, after

the Secretary is notified of its selections.

§ 1005.7 How does the Secretary communicate with state and local officials concerning the Department's programs and activities?

(a) [Reserved]

(b) The Secretary provides notice to directly affected state, areawide, regional, and local entities in a state of proposed Federal financial assistance or direct Federal development if:

(1) The state has not adopted a process under the Order; or

(2) The assistance or development involves a program or activity not selected for the state process. This notice may be made by publication in the FEDERAL REGISTER or other appropriate means, which the Department in its discretion deems appropriate.

§ 1005.8 How does the Secretary provide states an opportunity to comment on proposed Federal financial assistance and direct Federal development?

(a) Except in unusual circumstances, the Secretary gives state processes or directly affected State, areawide, regional and local officials and entities—

(1) At least 30 days from the date established by the Secretary to comment on proposed Federal financial assistance in the form of noncompeting continuation awards; and

(2) At least 60 days from the date established by the Secretary to comment on proposed direct Federal development or Federal financial assistance other than noncompeting continuation awards.

(b) This section also applies to comments in cases in which the review, coordination, and communication with the Department have been delegated.

§ 1005.9 How does the Secretary receive and respond to comments?

(a) The Secretary follows the procedures in § 1005.10 if:

(1) A state office or official is designated to act as a single point of contact between a state process and all federal agencies, and

(2) That office or official transmits a state process recommendation for a program selected under § 1005.6.

(b)(1) The single point of contact is not obligated to transmit comments from state, areawide, regional or local officials and entities where there is no state process recommendation.

(2) If a state process recommendation is transmitted by a single point of contact, all comments from, state, areawide, regional, and local officials and entities that differ from it must also be transmitted.

(c) If a state has not established a process, or is unable to submit a state process recommendation, state, areawide, regional and local officials and entities may submit comments either to the applicant or to the Department.

(d) If a program or activity is not selected for a state process, state, areawide, regional and local officials and entities may submit comments either to the applicant or to the Department. In addition, if a state process recommendation for a nonselected program or activity is transmitted to the Department by the single point of contact, the Secretary follows the procedures of § 1005.10 of this part.

(e) The Secretary considers comments which do not constitute a state process recommendation submitted under these regulations and for which the Secretary is not required to apply the procedures of § 1005.10 of this part, when such comments are provided by a single point of contact, by the applicant, or directly to the Department by a commenting party.

§ 1005.10 How does the Secretary make efforts to accommodate intergovernmental concerns?

(a) If a state process provides a state process recommendation to the Department through its single point of contact, the Secretary either:

(1) Accepts the recommendation;

(2) Reaches a mutually agreeable solution with the state process; or

(3) Provides the single point of contact with such written explanation of the decision, as the Secretary in his or her discretion deems appropriate. The Secretary may also supplement the written explanation by providing the explanation to the single point of contact by telephone, other telecommunication, or other means.

(b) In any explanation under paragraph (a)(3) of this section, the Secretary informs the single point of contact that:

(1) The Department will not implement its decision for at least ten days after the single point of contact receives the explanation; or

(2) The Secretary has reviewed the decision and determined that, because of unusual circumstances, the waiting period of at least ten days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification 5 days after the date of mailing of such notification.

§ 1005.11 What are the Secretary's obligations in interstate situations?

(a) The Secretary is responsible for:

(1) Identifying proposed federal financial assistance and direct federal development that have an impact on interstate areas;

(2) Notifying appropriate officials and entities in states which have adopted a process and which select the Department's program or activity;

(3) Making efforts to identify and notify the affected state, areawide, regional, and local officials and entities in those states that have not adopted a process under the Order or do not select the Department's program or activity;

(4) Responding pursuant to § 1005.10 of this part if the Secretary receives a recommendation from a designated areawide agency transmitted by a single point of contact, in cases in which the review, coordination, and communication with the Department have been delegated.

(b) The Secretary uses the procedures in § 1005.10 if a state process provides a state process recommendation to the Department through a single point of contact.

§ 1005.12 How may a state simplify, consolidate, or substitute federally required state plans?

(a) As used in this section:

(1) *Simplify* means that a state may develop its own format, choose its own submission date, and select the planning period for a state plan.

(2) *Consolidate* means that a state may meet statutory and regulatory requirements by combining two or more plans into one document and that the state can select the format, submission date, and planning period for the consolidated plan.

(3) *Substitute* means that a state may use a plan or other document that it has developed for its own purposes to meet Federal requirements.

(b) If not inconsistent with law, a state may decide to try to simplify consolidate, or substitute federally required state plans without prior approval by the Secretary.

(c) The Secretary reviews each state plan that a state has simplified, consolidated, or substituted and accepts the plan only if its contents meet federal requirements.

§ 1005.13 May the Secretary waive any provision of these regulations?

In an emergency, the Secretary may waive any provision of these regulations.

PART 1008—RECORDS MAINTAINED ON INDIVIDUALS (PRIVACY ACT)

Subpart A—General Provisions

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1008.20 Content of systems of records.
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1008.24 Criminal penalties—failure to publish a system notice.

AUTHORITY: 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.;* 5 U.S.C. 552a.

SOURCE: 45 FR 61577, Sept. 16, 1980, unless otherwise noted.

Subpart A—General Provisions

§ 1008.1 Purpose and scope.

(a) This part establishes the procedures to implement the Privacy Act of 1974 (Pub. L. 93–579, 5 U.S.C. 552a) within the Department of Energy.

(b) This part applies to all systems of records, as defined in § 1008.2(m), maintained by DOE.

(c) This part applies to all divisions within the DOE, and to the personnel records of the Federal Energy Regulatory Commission (FERC), which are maintained by DOE on behalf of FERC. These regulations do not apply to other systems of records maintained by FERC. These regulations also apply to DOE contractors and their employees to the extent required by 5 U.S.C. 552a(m).

§ 1008.2 Definitions.

(a) *Department* or *Department of Energy (DOE)* means all organizational entities which are a part of the executive department created by title II of the Department of Energy Organization Act, Public Law 95–91, except the Federal Energy Regulatory Commission (FERC).

(b) *Director, Office of Hearings and Appeals* means the Director or his delegate.

(c) *DOE locations* means each of the following DOE components:

(1) Bonneville Power Administration, P.O. Box 3621–KDP–7, Portland, OR 97232.

(2) Carlsbad Field Office, P.O. Box 3090, Carlsbad, NM 88221.

(3) Chicago Office, 9800 S. Cass Avenue, Argonne, IL 60439.

(4) Environmental Management Consolidated Business Center, 250 East 5th Street, Suite 500, Cincinnati, OH 45202.

(5) Golden Field Office, 1617 Cole Boulevard, Golden, CO 80401.

(6) Headquarters, Department of Energy, Washington, DC 20585.

(7) Idaho Operations Office, 1955 Fremont Avenue, MS 1203, Idaho Falls, ID 83401.

(8) National Nuclear Security Administration Service Center, P.O. Box 5400, Albuquerque, NM 87185–5400.

(9) National Nuclear Security Administration Nevada Site Office, P.O. Box 98518, Las Vegas, NV 89193–3521.

(10) National Energy Technology Laboratory, 3610 Collins Ferry Road, Morgantown, WV 26507–0800.

(11) Oak Ridge Office, P.O. Box 2001, Oak Ridge, TN 37831.

(12) Office of Scientific and Technical Information, 175 S. Oak Ridge Turnpike, P.O. Box 62, Oak Ridge, TN 37830.

(13) Pacific Northwest Site Office, P.O. Box 350, Mail Stop K8–50, Richland, WA 99352.

(14) Pittsburgh Naval Reactors, P.O. Box 109, West Mifflin, PA 15122–0109.

(15) Richland Operations Office, P.O. Box 550, Mail Stop A7–75, Richland, WA 99352.

(16) Savannah River Operations Office, P.O. Box A, Aiken, SC 29801.

(17) Schenectady Naval Reactors, P.O. Box 1069, Schenectady, NY 12301.

(18) Southeastern Power Administration, 1166 Athens Tech Road, Elberton, GA 30635–6711.

(19) Southwestern Power Administration, One West Third, S1200, Tulsa, OK 74103.

(20) Strategic Petroleum Reserve Project Management Office, 900 Commerce Road East–MS FE–455, New Orleans, LA 70123.

(21) Western Area Power Administration, 12155 W. Alameda Parkway, P.O. Box 281213, Lakewood, CO 80228–8213.

(d) *General Counsel* means the General Counsel provided for in section 202(b) of the Department of Energy Organization Act, or any DOE attorney designated by the General Counsel.

(e) *Headquarters* means all DOE facilities functioning within the Washington, DC metropolitan area.

(f) *Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence, but does not include proprietorships, businesses, or corporations. Where appropriate, the term *individual* also includes a duly authorized representative of an individual.

(g) *Maintain* means maintain, collect, use, or disseminate.

(h) *Privacy Act Officer* means the person designated by the Director, Office of Administration, as responsible for administering the DOE's program for implementing the requirements of the Privacy Act of 1974 at the DOE locations listed at § 1008.2(c).

(i) *Record* means any item, collection, or grouping of information about an individual that is maintained by or for the DOE including, but not limited, to education, financial transactions, medical history, and criminal or employment history, and that contains that individual's name, or other identifying number, symbol, or other identifying particulars assigned to the individual, such as a finger or voice print or photograph. See subsection (a)(4) of the Act.

(j) *Routine use* means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected. See subsection (a)(7) of the Act.

(k) *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. See subsection (a)(6) of the Act.

(l) *System Manager* means the DOE official who is responsible for a system of records as designated in the system notice of that system of records published by DOE.

(m) *System of records* means a group of any records under DOE control from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual. See subsection (a)(5) of the Act.

(n) *Act* means the Privacy Act of 1974, Public Law 93–579; references to subsections of the Act mean subsections of section 3 of the Act.

[45 FR 61577, Sept. 16, 1980, as amended at 71 FR 68735, Nov. 28, 2006]

§ 1008.3 Employee standards of conduct with regard to privacy.

(a) The Headquarters DOE Privacy Act Officer shall assure that DOE personnel are advised of the provisions of the Privacy Act, including the criminal penalties and civil liabilities provided therein, (subsections (g) and (i) of the Act), and that DOE 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; and to insure that no system of records concerning individuals, no matter how insignificant or specialized, is maintained without public notice.

(b) DOE personnel shall:

(1) Collect or maintain no information of a personal nature about individuals unless relevant and necessary to achieve a purpose or carry out a responsibility of the DOE as required by statute or by Executive Order. See subsection (e)(1) of the Act and § 1008.18(a).

(2) Collect information, wherever possible, directly from the individual to whom it pertains. See subsection (e)(2) of the Act and § 1009.19(a).

(3) Inform individuals from whom information is collected of the authority for collection, the principal purposes for which the information will be used, the routine uses that will be made of the information, and the effects of not furnishing the information. See subsection (e)(3) of the Act and § 1008.19(b).

(4) Collect, maintain, use or disseminate no information concerning an individual's rights guaranteed by the First Amendment, unless:

(i) The individual has volunteered such; or

(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 law enforcement activity. See subsection (e)(7) of the Act and § 1008.18(b).

(5) Advise their supervisors of the existence or proposal of any system of records which retrieves information about individuals by the individual's name or other identifying number, symbol, or identifying particulars assigned to the individual.

(6) Maintain an accounting, in the prescribed form, of all disclosures of information other than those to officers or employees who have a need for the record in the performance of their duties and those required under the Freedom of Information Act. See subsection (c) of the Act.

(7) Disclose no records other than to DOE personnel without the advance written consent of the individual, except as authorized by 5 U.S.C. 552a(b) including routine uses published in the FEDERAL REGISTER.

(8) Maintain and process information concerning individuals with care to insure that no inadvertent disclosure of the information is made. See subsection (e)(10) of the Act.

(9) Inform the proper DOE authorities of any information maintained in a DOE system of records which is not authorized by the Privacy Act of 1974.

(c) Heads of Headquarters Divisions and Offices and heads of the other DOE locations shall review annually the systems of records subject to their responsibility to insure compliance with the requirements of the Privacy Act of 1974.

§ 1008.4 Procedures for identifying the individual making a request for access to or amendment of records.

(a) When a request for information about or for access to or correction of a record pertaining to an individual and contained in a system of records has been made pursuant to § 1008.6, valid identification of the individual making the request shall be required before information will be given, access granted or a correction considered, to insure that information is given, corrected, or records disclosed or corrected only at the request of the proper person.

(b) Subject to paragraphs (c) and (d) of this section, an individual making a request may establish his identity by:

(1) Including with his request, if submitted by mail, a photocopy of two identifying documents bearing his name and signature, one of which shall bear his current home or business address and date of birth; or

(2) Appearing at the appropriate DOE location during the regular business hours and presenting either of the following:

(i) One identifying document bearing the individual's photograph and signature, such as a driver's license or passport; or

(ii) Two identifying documents bearing the individual's name and signature, one of which shall bear the individual's current home or business address and date of birth; or

(3) Providing such other proof of identity as the Privacy Act Officer deems satisfactory in the circumstances of a particular request.

(c) If the Privacy Act Officer or the appropriate System Manager determines that the information in a record is so sensitive that unauthorized access could cause harm or embarrassment to the individual whose record in involved, or if the individual making the request is unable to produce satisfactory evidence of identity under paragraph (b) or (d) of this section, the individual making the request may be required to submit a notarized statement attesting to his identity and his understanding of the criminal penalties provided under section 1001 of title 18 of the United States Code for making false statements to a Government agency and under subsection (i)(3) of the Act for obtaining records under false pretenses. Copies of these statutory provisions and forms of such notarized statements may be obtained upon request from the Privacy Act Officer, Headquarters, Department of Energy, Washington, DC.

(d) When an individual acting as the parent of a minor or the legal guardian of the person to whom a record pertains makes a request pursuant to § 1008.6 of this part:

(1) Such an individual shall establish his personal identity in the same manner required in either paragraph (b) or (c) of this section.

(2) In addition, such an individual shall establish his 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 the legal guardian of a person 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 order from a court of competent jurisdiction.

(3) A parent or legal guardian may act only for a living individual, not for a decedent. Requests for the records of decedents will be handled under the Freedom of Information Act (5 U.S.C. 552).

§ 1008.5 Effect of the Freedom of Information Act (FOIA).

(a) DOE shall not rely on any exemption contained in the Freedom of Information Act (5 U.S.C. 552) to withhold from the individual to whom it pertains, any record which is otherwise accessible to such individual under this part.

(b) DOE shall rely on subsection (b) of the Privacy Act to withhold information from a person other than the person to whom the record pertains only when the information is also exempt from disclosure under the FOIA.

(c) Where a request for access to records is submitted pursuant to both the FOIA and the Privacy Act, the DOE shall, to the maximum extent possible, process the request under the provisions of this part, including the time limits of this part.

Subpart B—Requests for Access or Amendment

§ 1008.6 Procedures for Privacy Act requests.

(a) Any individual may—

(1) Ask the DOE whether a system of records maintained by the DOE contains records about him or her;

(2) Request access to information pertaining to him or her that is maintained in a DOE system of records;

(3) Request that information about him or her in a DOE system of records be amended or corrected. Requests for correction or amendment may include inquiries concerning:

(i) Whether such information is relevant or necessary to accomplish a purpose that DOE is required to accomplish by statute or Executive Order; or

(ii) If the information is to be used by the DOE in making a determination about the individual, whether the information is as accurate, relevant, timely, or complete as is reasonably necessary to assure fairness in the determination.

(b) Requests submitted pursuant to this section shall:

(1) Be in writing and signed by the individual making the request;

(2) State that the request is a ''Privacy Act Access'' or ''Privacy Act Amendment'' request;

(3) Include the identification information required by § 1008.4;

(4) Specify, if possible, the title and identifying number of the system of records as listed in DOE's published notices of system of records;

(5) Provide if possible any additional information to aid DOE in responding to the request, for example, a description of the records sought;

(6) Indicate, as appropriate, the time, place, and form of access sought.

(c) Any request not addressed and marked as specified in paragraph (a) of this section shall be forwarded immediately to the appropriate Privacy Act Officer. An improperly addressed request will not be deemed to have been received for purposes of measuring time periods pursuant to §§ 1008.7 and 1008.10 until actual receipt by the appropriate Privacy Act Officer. The individual making the request shall be notified that the request was improperly addressed and the date when the request was received by the Privacy Act Officer.

(d) Assistance in preparing an access request pursuant to this section may be obtained from any DOE Privacy Act Officer at the locations listed at § 1008.2(e).

(e) An individual shall not be required to state a reason or otherwise justify his request for information or access to a record pertaining to him/her that is contained in a system of records.

§ 1008.7 Processing of requests.

(a) Receipt of a request made in accordance with § 1008.6 shall be promptly acknowledged by the Privacy Act Officer.

(b) Each request shall be acted upon promptly. Every effort will be made to respond within ten working days of the date of receipt by the System Manager or designee. If a response cannot be made within ten working days, the appropriate Privacy Act Officer shall send an interim response providing information on the status of the request, including an estimate of the time within which action is expected to be taken on the request and asking for any further information as may be necessary to respond to the request. Action will be completed as soon as possible, but not later than 20 working days after receipt of the original specific inquiry. In unusual circumstances and for good cause, the appropriate Privacy Act Officer may decide that action cannot be completed within the initial 20 working days. In such case, the appropriate Privacy Act Officer will advise the individual of the reason for the delay and the date (not to exceed an additional 20 working days) by which action can be expected to be completed.

(c) The term *unusual circumstances* as used in this section includes situations where a search for requested records from inactive storage is necessary; cases where a voluminous amount of data is involved; instances where information on other individuals must be separated or expunged from the particular record; and cases where consultation with other agencies which have substantial interest in the response to the request is necessary.

(d) Upon receiving a request, the Privacy Act Officer shall ascertain which System Manager or Managers of the DOE have primary responsibility for, custody of, or concern with the system or systems of records subject to the request and shall forward the request to such System Manager or Managers. The System Manager or Managers shall promptly identify and, in consultation with the General Counsel, review the records encompassed by the request.

(e) Where the request is for access to or information about records, after reviewing the material the System Manager or Managers concerned shall transmit to the Privacy Act Officer the requested material. The transmission to the Privacy Act Officer shall include any recommendation that the request be granted or wholly or partially denied and shall set forth any exemption categories supporting denials. Any denial recommendation must be concurred in by the appropriate General Counsel.

(f) Where the request is for correction or amendment of records, after reviewing the material the System Manager or Managers shall transmit a recommended decision to the Privacy Act Officer. Any recommendation that the request be granted or wholly or partially denied shall cite the exemption relied on and set forth the policy considerations supporting a denial. Any recommendation of denial must be concurred in by General Counsel.

§ 1008.8 Action in response to a request for access: disclosure of requested information to subject individuals.

(a) Consistent with the recommendation of the System Manager and the concurrence of the appropriate General Counsel, the Privacy Act Officer shall provide to the requesting individual the information about or access to a record or information pertaining to the individual contained in a system of records, unless the request is being denied in accordance with § 1008.9 of this part. The Privacy Act Officer shall notify the individual of such determination and provide the following information:

(1) Whether there is information or a record pertaining to him that is contained in a system of records;

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

(3) The place at which the record or information may be inspected;

(4) The earliest date on which the record or information may be inspected and the period of time that the record

or information will remain available for inspection. In no event shall the earliest date be later than thirty calendar days from the date of notification.

(5) An indication that copies of the records are enclosed, or the estimated date by which a copy of the record could be mailed and the estimate of fees that would be charged to provide other than the first copy of the record, pursuant to § 1008.13.

(6) The fact that the individual, if he wishes, may be accompanied by another person during the in-person review of the record or information, provided that the individual shall first furnish to the Privacy Act Officer a written statement authorizing disclosure of that individual's record in the accompanying person's presence; and

(7) Any additional requirements that must be satisfied in order to provide information about or to grant access to the requested record or information.

(b) The following methods of access to records or information pertaining to an individual and contained in a system of records may be available to that individual depending on the circumstances of a particular request:

(1) A copy of the record may be enclosed with the initial response in accordance with paragraph (a) of this section;

(2) Inspection in person may be arranged during the regular business hours of the DOE in the office specified by the Privacy Act Officer;

(3) Transfer of records to a Federal facility more convenient to the individual may be arranged, but only if the Privacy Act 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 or information to that facility will not unduly interfere with operations of the DOE or involve unreasonable costs, in terms of money or manpower; and

(4) The requested number of copies in addition to the initial copy may be mailed at the request of the individual, subject to payment of the fees prescribed in § 1008.13.

(c) If the Privacy Act Officer believes, based upon a recommendation of the System Manager and the agency's medical officer, that disclosure of medical and/or psychological information directly to an individual could have an adverse effect upon that individual, the individual may be asked:

(1) To designate in writing a physician or mental health professional to whom he would like the records to be disclosed; or

(2) To submit a signed statement by his physician or a mental health professional indicating that, in his view, disclosure of the requested records or information directly to the individual will not have an adverse effect upon the individual. If the individual refuses to designate a physician or mental health professional, or to submit a signed statement from his physician or mental health professional as provided in paragraphs (c) (1) and (2) of this section, the request will be considered denied, and the appeal rights provided in § 1008.11 will be available to the individual.

(d) The Privacy Act Officer shall supply such other information and assistance at the time of an individual's review of his record as is necessary to make the record intelligible to the individual.

(e) The DOE will, as required by subsection (d)(1), assure an individual's right ''to review his or her record and have a copy made of all or any portion thereof in a form comprehensible to him.'' However, original records will be made available to individuals only under the supervision of the Privacy Act Officer or his designee. Individuals will be provided at their request with a copy, but not the original, of records pertaining to them.

§ 1008.9 Action in response to a request for access: initial denial of access.

(a) A request by an individual for information about or access to a record or information pertaining to that individual that is contained in a system of records may be denied only upon a determination by the appropriate System Manager, with the concurrence of the appropriate General Counsel, that:

(1) The record is subject to an exemption under § 1008.12;

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

(3) The individual has unreasonably failed to comply with the procedural requirements of this part.

(b) The Privacy Act Officer shall give written notice of the denial of a request of information about or access to records or information pertaining to the individual and contained in a system of records. Such written notice shall be sent by certified or registered mail, return receipt requested and shall include the following information:

(1) The System Manager's name and title;

(2) The reasons for the denial, including citation to the appropriate sections of the Privacy Act and this part; and

(3) Notification of the individual's right to appeal the denial pursuant to § 1008.11 and to administrative and judicial review under 5 U.S.C. 552a(g)(1)(B), as limited by 552a(g)(5).

(c) Nothing in this section shall:

(1) Require the furnishing of information or records that are not retrieved by the name or by some other identifying number, symbol or identifying particular of the individual making the request;

(2) Prevent a System Manager from waiving any exemption authorizing the denial of records, in accordance with § 1008.12.

§ 1008.10 Action in response to a request for correction or amendment of records.

(a) The Privacy Act Officer must respond in writing to the requester for amendment of a record within 10 working days of receipt. This response shall inform the requester of the decision whenever possible.

(b) If the decision cannot be reached within 10 working days, the requester shall be informed of the reason for delay and the date (within 20 working days) it is expected that the decision will be made.

(c) The Privacy Act Officer, consistent with the recommendation of the System Manager or Managers, as concurred in by the appropriate General Counsel, if appropriate, shall do one of the following:

(1) Instruct the System Manager to 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 accomplished in cases where a copy cannot be provided (for example, erasure of information from a record maintained only in an electronic data bank); or

(2) Inform the individual in writing that his request is denied in whole or in part. Such denial shall be sent by certified or registered mail, return receipt requested, and shall provide the following information:

(i) The System Manager's name and title;

(ii) The reasons for the denial; including citation to the appropriate sections of the Act and this part; and

(iii) Notification of the individual's right to appeal the denial pursuant to § 1008.11 and to administrative and judicial review under 5 U.S.C. 552a(g)(1)(B), as limited by 5 U.S.C. 552a(g)(5).

(iv) Notification of the right of the individual to submit a statement of disagreement consistent with § 1008.11(g).

(d) Whenever an individual's record is amended pursuant to a request by that individual, the Privacy Act Officer or the System Manager, as appropriate, shall notify all persons and agencies to which the amended portion of the record had been disclosed prior to its amendment, if an accounting of such disclosure was required by the Act. The notification shall request a recipient agency maintaining the record to acknowledge receipt of the notification, to correct or amend the record and to apprise an agency or person to which it had disclosed the record of the substance of the amendment.

(e) The following criteria will be taken into account by the DOE in reviewing a request for 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 relation to the purpose for which it was collected;

(4) If such information is used in making any determination about the individual, whether the information is as accurate, relevant, timely, and complete as is reasonably necessary to assure fairness to the individual in such determination;

(5) The degree of possibility that denial of the request could unfairly result in a determination adverse to the individual;

(6) The nature of the record sought to be corrected or amended; and

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

(f) The DOE will not undertake to gather evidence for the individual, but does reserve the right to verify the evidence that the individual submits.

(g) Amendment of a record requested by an individual may be denied upon a determination that:

(1) The individual has failed to establish, by a preponderance of the evidence, the propriety of the amendment in relation to the criteria stated in paragraph (c) of this section;

(2) The record sought to be 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 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 amendment would violate a duly enacted statute or promulgated regulation;

(5) The individual has unreasonably failed to comply with the procedural requirements of this part; or

(6) The record has been properly exempted from the provisions of subsection (d) of the Act.

(h) Nothing in this section shall restrict the DOE from granting in part or denying in part a request for amendment of records.

[45 FR 61577, Sept. 16, 1980; 46 FR 31637, June 17, 1981]

§ 1008.11 Appeals of denials of requests pursuant to § 1008.6.

(a) Any individual may appeal the denial of a request made by him for information about or for access to or correction or amendment of records. An appeal shall be filed within 30 calendar days after receipt of the denial. When an appeal is filed by mail, the postmark is conclusive as to timeliness. The appeal shall be in writing and must be signed by the individual. The words ''PRIVACY ACT APPEAL'' should appear in capital letters on the envelope and the letter. Appeals of denials relating to records maintained in government-wide systems of records reported by the OPM, shall be filed, as appropriate, with the Assistant Director for Agency Compliance and Evaluation, Office of Personnel Management (OPM), 1900 E Street, NW., Washington, DC 20415. All other appeals relating to DOE records shall be directed to the Director, Office of Hearings and Appeals (OHA), Department of Energy, Headquarters, Washington, DC.

(b) An appeal not addressed and marked as specified in paragraph (a) of this section shall be forwarded immediately to the Assistant Director for Agency Compliance and Evaluation, OPM, or the Director, OHA, as appropriate. An appeal that is not properly addressed by an individual shall not be deemed to have been received for purposes of time periods in this section until actual receipt of the appeal by the Assistant Director, OPM, or the Director, OHA. In each instance when an appeal so forwarded is received, the individual filing the appeal shall be notified that the appeal was improperly addressed and the date when the appeal was received by the Assistant Director, OPM, or the Director, OHA.

(c) The appeal shall include the following:

(1) A copy of the original request for access or for amendment;

(2) A copy of the initial denial; and

(3) A statement of the reasons why the initial denial is believed to be in error.

(d) The records or record to which the individual was denied access, or which was requested to be corrected or amended, will be supplied to the appropriate appeal authority by the Privacy Act Officer who issued the initial denial. While such records normally will comprise the entire record on appeal,

the appeal authority may seek such additional information as is necessary to assure that the final determination is fair and equitable.

(e) No personal appearance or hearing on appeal will be allowed.

(f) The appropriate appeal authority for DOE records shall act upon the appeal and issue a final determination in writing no later than 20 working days from the date on which the appeal is received. However, the appeal authority may extend the ten-day period upon a determination that a fair and equitable review cannot be made within that period. In such cases the individual shall be advised in writing of the reason for the extension and of the estimated date by which a final determination will be issued. The final determination shall be issued not later than the 30th working day after receipt of the appeal unless unusual circumstances, as defined in § 1008.7, are present, whereupon an additional 30 days may be extended.

(g) If an appeal of a denial of access is granted, a copy of the determination shall be transmitted promptly to the individual, the Privacy Act Officer and the appropriate System Manager. Upon receipt of the determination, the Privacy Act Officer promptly shall take action consistent with § 1008.8.

(h) If an appeal of a denial of correction or amendment is granted, the final determination shall identify the specific corrections or amendments to be made. A copy of the determination shall be transmitted promptly to the individual, the Privacy Act Officer and the appropriate System Manager. Upon receipt of the determination, the Privacy Act Officer promptly shall take steps to insure that the actions set forth in § 1008.10 (a) and (b) are taken.

(i) If the appeal of a denial of access is denied, the final determination shall state the reasons for the denial and shall be transmitted promptly to the individual, the Privacy Act Officer and the appropriate System Manager. The determination shall also include a statement identifying the right of the individual to administrative and judicial review pursuant to 5 U.S.C. 552a(g)(1)(B) as limited by 5 U.S.C. 552a(g)(5).

(j) If the appeal of a denial of correction or amendment is denied, the final determination shall state the reasons for the denial and shall be transmitted promptly to the individual, the Privacy Act Officer and the appropriate System Manager.

(1) The determination also shall include the following:

(i) Notice of the right of the individual to file with the Privacy Act Officer a concise, signed statement of reasons for disagreeing with the final determination, receipt of which statement will be acknowledged by the Privacy Act Officer.

(ii) An indication that any disagreement statement filed by the individual will be noted and appended to the disputed record and that a copy of the statement will be provided by the Privacy Act Officer or the System Manager, as appropriate, to persons and agencies to which the record is disclosed subsequent to the date of receipt of such statement;

(iii) An indication that the DOE shall append to any disagreement statement filed by the individual a copy of the final determination or a summary thereof, which determination or summary also will be provided to persons and agencies to which the disagreement statement is disclosed; and,

(iv) A statement of the right of the individual to administrative and judicial review under 5 U.S.C. 552a(g)(1)(B), as limited by 5 U.S.C. 552a(g)(5).

(2) Although a copy of the final determination or a summary thereof will be treated as part of the individual's record for purposes of disclosure in instances where the individual has filed a disagreement statement, it will not be subject to correction or amendment by the individual.

(3) Where an individual files a statement of disagreement consistent with paragraph (j)(1) of this section, the Privacy Act Officer shall take steps to insure that the actions provided in paragraphs (j)(1) (i), (ii) and (iii) of this section are taken.

§ 1008.12 Exemptions.

(a) *General exemptions*(1) *Generally*. 5 U.S.C. 552a(j)(2) allows the exemption of any system of records within the

DOE from any part of section 552a except subsections (b), (c)(1) and (2), (e)(4)(A) through (F) (e)(6), (7), (9), (10), and (11), and (i) of the Act if the system of records is maintained by a DOE component which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and which consists of:

(i) Information compiled for the purpose of identifying individual criminal offenders and alleged offenders;

(ii) Information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or

(iii) Reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

(2) *Applicability of general exemptions to DOE systems of records*—(i) *Investigative Files of the Inspector General (DOE–54)*. This system of records is being exempted pursuant to subsection (j)(2) of the Act in order to aid the Office of the Inspector General in the performance of its law enforcement function. The system is exempted from subsections (c)(3) and (4); (d)(1)–(4); (e)(1)–(3); (4)(G), (H), and (I); (5) and (8); and (g) of the Act. The system is exempt from these provisions for the following reasons: notifying an individual at the individual's request of the existence of records in an investigative file pertaining to such individual, or granting access to an investigative file could (A) interfere with investigative and enforcement proceedings and with co-defendants' right to a fair trial; (B) disclose the identity of confidential sources and reveal confidential information supplied by these sources; and (C) disclose investigative techniques and procedures.

(ii) *Law Enforcement Investigative Records (DOE–84)*. This system of records is being exempted pursuant to subsection (j)(2) of the Act to enable the Office of Counterintelligence to carry out its duties and responsibilities as they pertain to its law enforcement function. The system is exempted from subsections (c)(3) and (4), (d), (e) (1), (2), and (3), (e)(4) (G) and (H), (e)(8), (f), and (g) of the Act. The system is exempt from these provisions for the following reasons: Notifying an individual at the individual's request of the existence of records in an investigative file pertaining to such individual, or granting access to an investigative file could interfere with investigative and enforcement proceedings and with co-defendants' right to a fair trial; disclose the identity of confidential sources and reveal confidential information supplied by these sources; and disclose investigative techniques and procedures.

(b) *Specific exemptions*. Subsection (k) of the Privacy Act establishes seven categories of systems of records which may be exempted from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (7) of the Act. The Department has exempted systems of records under four of these provisions, as follows:

(1) *Classified material*. (i) Subsection (k)(1) permits exemption of systems of records that are specifically authorized under criteria established under statute or Executive Order to be kept secret in the interest of national defense or foreign policy, and are in fact properly classified pursuant to such statute or Executive Order. Restricted Data and Formerly Restricted Data under the Atomic Energy Act of 1954, as amended, are included in this exemption.

(ii) The DOE systems of records listed below have been exempted under subsection (k)(1) to the extent they contain classified information, in order to prevent serious damage to the national defense or foreign policy that could arise from providing individuals access to classified information. Systems exempted under subsection (k)(1) are:

(A) Alien Visits and Participation (DOE–52).

(B) Clearance Board Cases (DOE–46).

(C) Security Correspondence Files (DOE–49).

(D) Foreign Travel Records (DOE–27)

(E) Legal Files (Claims, Litigations, Criminal Violation, Patents, and other Legal Files) (DOE–41).

(F) Personnel Security Clearance Files (DOE–43).

(G) Personnel Security Clearance Index (Automated) (DOE–42).

(H) Special Access Authorization for Categories of Classified Information (DOE–44).

(I) Administrative and Analytical Records and Reports (DOE–81).

(J) Law Enforcement Investigative Records (DOE–84).

(K) Employee Concerns Program Records (DOE–3)

(L) Whistleblower Investigation, Hearing and Appeal Records (DOE–7)

(M) Intelligence Related Access Authorization (DOE–15)

(2) *Investigatory material compiled for law enforcement purposes.* (i) Subsection (k)(2) permits the exemption of investigatory material compiled for law enforcement purposes: *Provided, however,* That if any individual is denied any right, privilege, or benefit to which he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.

(ii) The DOE systems of records listed below have been exempted under subsection (k)(2) in order to prevent subjects of investigation from frustrating the investigatory process through access to records about themselves or as a result of learning the identities of confidential informants; to prevent disclosure of investigative techniques; to maintain the ability to obtain necessary information; and thereby to insure the proper functioning and integrity of law enforcement activities. Systems of records exempted under subsection (k)(2) are:

(A) Alien Visits and Participation (DOE–52).

(B) Clearance Board Cases (DOE–46).

(C) Security Correspondence Files (DOE–49).

(D) Foreign Travel Records (DOE–27).

(E) Legal Files (Claims, Litigation, Criminal Violations, Patents, and other Legal Files) (DOE–41).

(F) Personnel Security Clearance Files (DOE–43).

(G) Personnel Security Clearance Index (Automated) (DOE–42).

(H) Special Access Authorization for Categories of Classified Information (DOE–44).

(I) DOE Personnel and General Employment Records (DOE–1) (only personnel investigative records concerning current and former DOE employees and applicants for employment by DOE).

(J) Investigative Files of the Inspector General (DOE–54) (only investigative records concerning past and present DOE employees).

(K) Administrative and Analytical Records and Reports (DOE–81).

(L) Law Enforcement Investigative Records (DOE–84).

(M) Allegation-Based Inspections Files of the Office of Inspector General (DOE–83).

(N) Employee Concerns Program Records (DOE–3)

(O) Whistleblower Investigation, Hearing and Appeal Records (DOE–7)

(P) Intelligence Related Access Authorization (DOE–15)

(3) *Investigatory material compiled for determining suitability for Federal employment.* (i) Subsection (k)(5) permits exemption of systems of records that contain investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualification for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.

(ii) The DOE systems of records listed below have been exempted under subsection (k)(5) to the extent they contain the kinds of records described in subsection (k)(5) in order to maintain DOE's ability to obtain candid information on candidates for employment, contracts, or access to classified

information and to fulfill commitments made to sources to protect the confidentiality of information, and thereby to facilitate proper selection or continuation of the best applicants or persons for a given position or contract. Systems exempted under subsection (k)(5) are:

(A) DOE Personnel and General Employment Records (DOE–1);

(B) Personnel Security Clearance Files (DOE–43);

(C) Investigative Files of the Inspector General (DOE–54);

(D) Alien Visits and Participation (DOE–52);

(E) Clearance Board Cases (DOE–46);

(F) Security Correspondence Files (DOE–49);

(G) Foreign Travel Records (DOE–27);

(H) Legal Files (Claims, Litigation, Criminal Violations, Patents, and other Legal Files) (DOE–41);

(I) Personnel Security Clearance Index (Automated) (DOE–42);

(J) Special Access Authorization for Categories of Classified Information (DOE–44);

(K) DOE Personnel: Supervisor-Maintained Personnel Records (DOE–2);

(L) Applications for DOE Employment (DOE–4);

(M) Administrative and Analytical Records and Reports (DOE–81);

(N) Law Enforcement Investigative Records (DOE–84).

(O) Allegation-Based Inspections Files of the Office of Inspector General (DOE–83).

(P) Employee Concerns Program Records (DOE–3)

(Q) Whistleblower Investigation, Hearing and Appeal Records (DOE–7)

(R) Intelligence Related Access Authorization (DOE–15)

(4) *Testing or examination material.* (i) Subsection (k)(6) permits exemption of systems of records that include testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service, the disclosure of which would compromise the objectivity or fairness of the testing of examination process.

(ii) The DOE systems of records listed below have been exempted to the extent they contain testing or examination material in order to protect the integrity of the personnel testing and evaluation process and to avoid providing individuals with unfair advantage, by premature or unfair disclosure of testing or rating information. Systems exempted under subsection (k)(6) are:

(A) (DOE–2) DOE Personnel: Supervisor-Maintained Personnel Records.

(B) (DOE–4) Applications for DOE Employment.

(C) (DOE–1) DOE Personnel and General Employment Records.

(c) *Application of exemptions to particular requests.* (1) The Privacy Act Officer, consistent with the recommendation of the System Manager and with concurrence of the appropriate General Counsel, may make available records which the DOE is authorized to withhold under this section.

(2) With respect to records containing material or information that would reveal the identity of a source who was given an assurance of confidentiality, a determination to make records available pursuant to paragraph (c)(1) of this section shall be made only if the source consents to the release of such information to the individual, or if it is determined that the material or information is not adverse or detrimental to the individual, or for good cause shown. The exercise of discretion with respect to waiver of the exemption shall be final.

(3) Prior to making a determination to deny access to a record in a system of records covered by exemption (k)(1) for classified material (see paragaph (b)(1) of this section), the System Manager shall consult with the Director, Division of Classification, to verify the current classification status of the information in the requested record.

[45 FR 61577, Sept. 16, 1980, as amended at 60 FR 35836, July 12, 1995; 62 FR 67519, Dec. 24, 1997; 67 FR 4171, Jan. 29, 2002]

§ 1008.13 Fees.

(a) The only fees to be charged to or collected from an individual under the provisions of this part are for copying records at the request of the individual. The fee charged shall be consistent with the fee schedule set forth in paragraph (b) of this section.

(1) No fees shall be charged or collected for the following: Search for and

retrieval of records; review of records; copying by the DOE incident to granting access; copying at the initiative of the DOE without a request from the individual; copying when the aggregate of fees for copying is $25 or less; time spent providing copies; transportation of records and personnel; and first class postage.

(2) It is the policy of the DOE to provide an individual with one copy of each record corrected or amended pursuant to request without charge.

(3) As required by the Office of Personnel Management in its published regulations implementing the Act, the DOE will charge no fee for a single copy of a personnel record covered by that Commission's Government-wide published notice of systems of records.

(b) The schedule of fees is as follows:

(1) $.10 per copy of each page.

(2) For other forms of copying and other forms of materials (e.g., cassettes, computer materials), the direct cost of the materials, personnel, and equipment shall be charged, but only with prior specific approval of the person making the request, when such charges would be in excess of $25.

(c) The Privacy Act Officer may, upon application by an individual, furnish any records without charge or at a reduced rate, if the Privacy Act Officer determines that such waiver or reduction of fees is in the public interest.

(d) Payment shall be made by check or money order payable to the United States Department of Energy.

(e) Advance payment of all or part of the fees may be required at the discretion of the Privacy Act Officer. Unless the individual requesting the copies specifically states that he is willing to pay whatever fees are assessed for meeting the request or, alternatively, specifies an amount in excess of $25 that he is willing to pay and which in fact covers the anticipated fees for meeting the request, a request that is expected to involve assessed fees in excess of $25 shall not be deemed to have been received, for purposes of the time periods specified in §§ 1008.7 and 1008.10 until the individual making the request is notified of the anticipated cost, agrees to bear it, and makes any advance deposit required. Such notification shall be made by the Privacy Act Officer as promptly as possible after receipt of the request.

§ 1008.14 Requests under false pretenses.

Subsection (i)(3) of the Act provides that any person who knowingly and willingly requests or obtains any record concerning an individual from an agency under false pretenses shall be quilty of a misdeamenaor and fined not more than $5,000.

§ 1008.15 Civil remedies.

Subsection (g) of the Act provides that an individual may bring suit against the DOE for a violation of the Privacy Act, as follows:

(a) If the DOE refuses to grant a request for access to an individual's records, the court may order the DOE to provide the individual with access to his or her records and award reasonable litigation costs and attorney's fees.

(b) If the DOE refuses to amend a record or fails to review an amendment request as required by subsection (d)(3) of the Act, the court may order the DOE to make the amendment and award reasonable litigation costs and attorney's fees.

(c) If the DOE makes an adverse determination based on a record which is not maintained in an accurate, timely, relevant, and complete manner, the individual may be awarded actual damages of at least $1,000. In order to prevail, the individual must show that:

(1) The DOE's action was willful and intentional; and

(2) The adverse determination was based on the faulty record.

(d) If the DOE fails to comply with any other provision of the Privacy Act or agency rule promulgated under the Act, in such a way as to have an adverse effect on the individual, the court may award actual damages of at least $1,000. In order to prevail, the individual must show that:

(1) The DOE's action was willful and intentional; and

(2) The agency's action had an adverse effort on the individual; and

(3) The adverse effect was causally related to the DOE's action.

Subpart C—Disclosure to Third Parties

§ 1008.16 Prohibition against disclosure.

Except as provided in § 1008.17, the DOE shall not disclose any record which is contained in a system of records, by any means of communication, to any agency or to any person other than the individual who is the subject of the record.

§ 1008.17 Conditions of disclosure.

(a) Notwithstanding the prohibition contained in § 1008.16, the DOE may disclose records covered by this part (1) to the individual to whom the record pertains or to an agency or (2) to a person other than the individual where he has given his prior written consent to the disclosure or has made a written request for such disclosure.

(b) Notwithstanding the prohibition contained in § 1008.16 the DOE may also disclose records covered by this part whenever the disclosure is:

(1) To officers and employees of the DOE who have a need for the record in the performance of their duties;

(2) Required under the Freedom of Information Act (5 U.S.C. 552);

(3) For a routine use (as defined in § 1008.2) which is described in the FEDERAL REGISTER notice for the system of records which the disclosure is to be made;

(4) 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 United States Code;

(5) 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;

(6) 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;

(7) 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 and if the head of the agency or instrumentality has made a written request to the DOE specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) 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;

(9) To either House of Congress, or to any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee, to the extent of matter within its jurisdiction;

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

(11) Pursuant to the order of a court of competent jurisdiction.

(c) Notwithstanding the prohibition contained in § 1008.16 of this part, the DOE may also disclose records covered by this part when disseminating a corrected or amended record or notation of a disagreement statement as required by subsection (c)(4) of the Act.

§ 1008.18 Accounting for disclosures.

(a) For each disclosure of information contained in a system of records under his control, except disclosures to authorized officers and employees of DOE and disclosures required by the Freedom of Information Act, the appropriate System Manager shall keep an accurate accounting of:

(1) The date, nature, and purposes of each disclosure of a record made to any person or to another agency; and

(2) The name and address of the person or agency to which the disclosure was made.

(b) The accounting shall be retained for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made.

(c) The accounting described in paragraph (a) of this section shall be made available to the individual named in the record upon written request to the Privacy Act Officer at the appropriate DOE location listed at § 1008.2(c) of this part. However, the accounting shall not be revealed with respect to disclosures made under § 1008.17(b)(7) of this part, pertaining to law enforcement activity; or with respect to disclosures involving system of records for which DOE had claimed an exemption from certain requirements of the Act, as provided in § 1008.12 of this part.

(d) Whenever an amendment or correction of a record or a notation of dispute concerning the accuracy of records is made by the DOE in accordance with §§ 1008.10(a)(2)(iv) and 1008.11(g) of this part, DOE shall inform any person or other agency to whom the record was previously disclosed if an accounting of the disclosure was made pursuant to the requirements of paragraph (a) of this section, unless the disclosure was made pursuant to § 1008.17(b)(7) of this part; or the disclosure involved a system of records of which DOE has claimed an exemption from certain requirements of the Act, as provided in § 1008.12 of this part.

(e) The System Manager shall make reasonable efforts to serve notice on an individual when any record containing information about such individual in a DOE system of records is disclosed to any person under compulsory legal process when such process becomes a matter of public record.

(f) Prior to disclosing any record about an individual to any person other than an agency, unless the disclosure is pursuant to the Freedom of Information Act, the System Manager shall make reasonable efforts to assure that each record is accurate, complete, timely, and relevant for DOE's purposes.

§ 1008.19 Criminal penalties—improper disclosure.

Subsection (i)(1) of the Act provides that a Federal employee who willfully discloses information subject to the Privacy Act in violation of the Act or rules promulgated under it shall be guilty of a misdemeanor and fined up to $5,000.

Subpart D—Maintenance and Establishment of Systems of Records

§ 1008.20 Content of systems of records.

(a) The DOE will maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose DOE is required to accomplish by statute or by Executive Order of the President, unless an exemption ot this requirement has been claimed by DOE, as provided in § 1008.12 of this part.

(b) The DOE will maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless it is pertinent to and within the scope of an authorized law enforcement activity.

(c) The DOE will maintain all records that are used by it to make any determination about any individual with such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness to the individual in such determination.

§ 1008.21 Collection of information by DOE about an individual for a system of records.

(a) The DOE will collect information, to the greatest extent practicable, directly from the subject individual when the use of the information may result in adverse determinations about an individual's rights, benefits and privileges under Federal programs, unless an exemption from the Act to this requirement has been claimed by DOE as provided in § 1008.12

(b) Unless an exemption from the Act has been claimed by DOE under subsection (j)(2), as provided in § 1008.12, DOE shall inform each individual whom it asks to supply information, on the form or other means by which it uses to collect the information, or on a separate form that can be retained by the individual, of the following:

(1) The authority (whether granted by statute or by Executive Order of the President) that authorizes the solicitation of the information and whether

the provision of such information is mandatory or voluntary;

(2) The principal purpose or purposes for which the information is intended to be used;

(3) The routine uses that may be made of the information, as published in the FEDERAL REGISTER pursuant to the requirements of the Act; and

(4) The effect on the individual, if any, of not providing all or any part of the requested information.

§ 1008.22 Use and collection of social security numbers.

(a) The System Manager of each system of records which utilizes social security numbers as a method of identification without statutory authorization or authorization by regulation adopted prior to January 1, 1975, shall revise the system to avoid future collection and use of the social security numbers.

(b) Heads of Headquarters Divisions and Offices and heads of the other DOE locations shall insure that employees authorized to collect information from individuals are advised that individuals may not be required to furnish social security numbers without statutory authorization, and that individuals who are requested to provide social security numbers voluntarily must be advised that furnishing the number is not required and that no penalty or denial of benefits will flow from the refusal to provide it.

§ 1008.23 Public notice of systems of records.

(a) The DOE shall publish in the FEDERAL REGISTER at least annually a notice of the existence and character of each of its systems of records, which notice shall include:

(1) The name and location of the system;

(2) The categories of individuals on whom records are maintained in the system;

(3) The categories of records maintained in the system;

(4) Each routine use of the records contained in the system, including the categories of users and the purpose of such use, subject to paragraph (d) of this section;

(5) The policies and practices of the DOE regarding storage, retrievability, access controls, retention, and disposal of the records;

(6) The title and business address of the DOE official who is responsible for the system of records;

(7) The DOE procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(8) The DOE procedures whereby an individual can be notified at his request about how he can gain access to any record pertaining to him contained in the system or records, and how he can contest its content; and

(9) The categories of source of records in the systems.

(b) Notwithstanding the requirements of paragraph (a) of this section, the notice of systems of records shall not necessarily include the information in paragraphs (a) (7) through (9) of this section if DOE has claimed a general or specific exemption from the requirements of the Act, as provided in § 1008.12.

(c) Copies of the notices as printed in the FEDERAL REGISTER shall be available at the DOE locations listed at § 1008.2(c). Requests by mail for copies of such notices should be sent to Privacy Act Officer, Headquarters, U.S. Department of Energy, Washington, DC. 20585. The first copy will be furnished free of charge. For each additional copy, the costs of printing and handling may be charged.

(d) DOE shall publish in the FEDERAL REGISTER notice of any new routine use or intended routine use of a record in the system of records, at least 30 calendar days prior to the implementation of any new routine use of a record in a system of records, or at least 30 calendar days prior to publication of the annual notice of such routine uses, as provided in paragraph (a) of this section, an opportunity for interested persons to submit written comments consisting of data, views, or arguments regarding such use to DOE, shall be provided.

§ 1008.24 Criminal penalties—failure to publish a system notice.

Subsection (i)(2) of the Act provides that an agency officer or employee who

willfully maintains a system of records without publishing a system notice as required by subsection (e)(4) of the Act shall be guilty of a misdemeanor and fined up to $5,000.

PART 1009—GENERAL POLICY FOR PRICING AND CHARGING FOR MATERIALS AND SERVICES SOLD BY DOE

Sec.
1009.1 Purpose and scope.
1009.2 Definitions.
1009.3 Policy.
1009.4 Exclusions.
1009.5 Supersessions.
1009.6 Dissemination of prices and charges.

AUTHORITY: Sec. 644 of the Dept. of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7254); Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*) ''User Fee Statute'', 31 U.S.C. 483a, 42 U.S.C. 2111, 2112 and 2201.

SOURCE: 45 FR 70430, Oct. 24, 1980, unless otherwise noted.

§ 1009.1 Purpose and scope.

(a) This part establishes Department of Energy policy for establishing prices and charges for Department materials and services sold to organizations and persons outside the Federal Government.

(b) This part applies to all elements of the Department except the Federal Energy Regulatory Commission.

§ 1009.2 Definitions.

For the purposes of this regulation:

(a) *Allocable cost* means a cost allocable to a particular cost objective (i.e., a specific function, project, process, or organization) if the costs incurred are chargeable or assignable to such cost objectives in accordance with the relative benefits received or other equitable relationships. Subject to the foregoing, a cost is allocable if:

(1) It is incurred solely for materials or services sold;

(2) It benefits both the customer and the Department in proportions that can be approximated through use of reasonable methods, or

(3) It is necessary to the overall operation of the Department and is deemed to be assignable in part to materials or services sold.

(b) *Byproduct material* means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material.

(c) *Charges* means an accumulation of job related costs for materials and services sold by the Department.

(d) *Commerical price* means the price that a willing buyer is currently paying or would pay a willing seller for materials and services in the market.

(e) *Direct cost* is any cost which can be identified specifically with a particular final cost objective.

(f) *Full cost* includes all direct costs and all allocable costs of producing the material or providing the service consistent with generally accepted accounting principles. Direct costs and allocable costs may include, but are not limited to, the following cost elements:

(1) Direct labor.

(2) Personnel fringe benefits.

(3) Direct materials.

(4) Other direct costs.

(5) Processing materials and chemicals.

(6) Power and other utilities.

(7) Maintenance.

(8) Indirect cost, i.e., common costs which cannot be directly assigned to specific cost objectives and are therefore allocated to cost objectives in a systematic cost allocation process.

(9) Depreciation which includes depreciation costs that are directly associated with facilities and equipment utilized, and allocated depreciation costs for support and general facilities and equipment.

(10) Added factor includes general and administrative costs and other support costs that are incurred for the benefit of the Department, an organizational unit or a material or service as a whole.

(g) *Prices* means the monetary amounts generally established and published for recurring sales of the same materials and services.

(h) *Source material* means uranium or thorium.

(i) *Special nuclear material* means plutonium, uranium enriched in the isotope 233 or in the isotope 235, or any materials artificially enriched by any

of the foregoing. Special Nuclear Material does not include source material.

§ 1009.3 Policy.

(a) The Department's price or charge for materials and services sold to persons and organizations outside the Federal Government shall be the Government's full cost for those materials and services, unless otherwise provided in this part.

(b) Exceptions from the Department pricing and charging policy may be authorized in accordance with the following provisions:

(1) Prices and charges for byproduct material sold pursuant to 42 U.S.C. 2111 and 2112 *et seq.* shall be either the full cost recovery price or the commercial price, whichever is higher, except that lower prices and charges may be established by the Department if it is determined that such lower prices and charges (i) will provide reasonable compensation to the Government for such material, (ii) will not discourage the use of or the development of sources of supply independent of the DOE of such material, and (iii) will encourage research and development. In individual cases, if (ii) and (iii) cannot be equally accommodated, greater weight will be given to encouragement of research and development.

(2) Prices and charges for materials and services sold pursuant to 42 U.S.C. 2201 shall be either the full cost recovery price or the commercial price, whichever is higher, except that lower prices and charges may be established by the Department if it is determined that such lower prices and charges will provide reasonable compensation to the Government and will not discourage the development of sources of supply independent of the DOE of such material.

§ 1009.4 Exclusions.

This part shall not apply when the amount to be priced or charged is otherwise provided for by statute, Executive Order, or regulations. This part does not apply to:

(a) Fees, penalties and fines established by the Economic Regulatory Administration of DOE.

(b) Power marketing and related activities of the Alaska Power Administration, the Bonneville Power Administration, the Southeastern Power Administration, the Southwestern Power Administration, and the Western Power Administration.

(c) Crude oil, natural gas and other petroleum products and services by or from the Naval Petroleum and Oil Shale Reserves.

(d) Uranium enriching services, source material, and special nuclear material.

(e) Requests for information under the Freedom of Information Act and the Privacy Act.

(f) Energy data and information provided by the Energy Information Administration.

(g) Crude oil and related materials and services from the Strategic Petroleum Reserve.

(h) The disposal of excess and surplus property.

(i) Access permits for uranium enrichment technology issued in accordance with 10 CFR part 725.

(j) Materials and services provided pursuant to a cooperative agreement, research assistance contract or grant, or made available to a DOE contractor in connection with a contract, the primary purpose of which is to procure materials or services for DOE.

§ 1009.5 Supersessions.

Prices which appear in FEDERAL REGISTER Notices previously published by the Department, or its predecessor agencies, for materials and services covered by this rule are hereby superseded.

§ 1009.6 Dissemination of prices and charges.

Current prices and charges for specific materials and services are available from the DOE laboratory or office providing the material or service, or from the responsible program office. If this office cannot be determined, inquiries regarding the appropriate contact office should be addressed to the Office, of Finance and Accounting, Product Accounting and Pricing Branch, Mail Station 4A–139, 1000 Independence Avenue, SW., Washington, DC 20585.

PART 1010—CONDUCT OF EMPLOYEES AND FORMER EMPLOYEES

Sec.

Subpart A—Conduct of Employees

1010.101 General.
1010.102 Cross-references to employee ethical conduct standards, financial disclosure regulations, and other conduct rules.
1010.103 Reporting wrongdoing.
1010.104 Cooperation with the Inspector General.

Subpart B—Procedures for Exemption of Scientific and Technological Information Communications From Post-Employment Restrictions

1010.201 Purpose and scope.
1010.202 Definitions.
1010.203 Procedures for review and approval of requests.

AUTHORITY: 5 U.S.C. 301, 303, 7301; 5 U.S.C. App. (Ethics in Government Act); 5 U.S.C. App. (Inspector General Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105; 18 U.S.C. 207, 208.

SOURCE: 61 FR, 35088, July 5, 1996, unless otherwise noted.

Subpart A—Conduct of Employees

§ 1010.101 General.

This subpart applies to employees of the Department of Energy (DOE), excluding employees of the Federal Energy Regulatory Commission.

[61 FR 35088, July 5, 1996, as amended at 75 FR 75376, Dec. 3, 2010]

§ 1010.102 Cross-references to employee ethical conduct standards, financial disclosure regulations, and other conduct rules.

Employees of DOE are subject to the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR part 2635, the DOE regulation at 5 CFR part 3301 which supplements the executive branch-wide standards, the executive branch-wide financial disclosure regulations at 5 CFR part 2634, the executive branch-wide financial interests regulations at 5 CFR part 2640, and the executive branch-wide employee responsibilities and conduct regulation at 5 CFR part 735.

[61 FR 35088, July 5, 1996, as amended at 63 FR 30111, June 3, 1998]

§ 1010.103 Reporting wrongdoing.

(a) Employees shall, in fulfilling the obligation of 5 CFR 2635.101(b)(11), report fraud, waste, abuse, and corruption in DOE programs, including on the part of DOE employees, contractors, subcontractors, grantees, or other recipients of DOE financial assistance, to the Office of Inspector General or other appropriate Federal authority.

(b) All alleged violations of the ethical restrictions described in section 1010.102 that are reported in accordance with (a) of this section to an appropriate authority within the Department shall in turn be referred by that authority to the designated agency ethics official or his delegatee, or the Inspector General.

§ 1010.104 Cooperation with the Inspector General.

Employees shall respond to questions truthfully under oath when required, whether orally or in writing, and must provide documents and other materials concerning matters of official interest. An employee is not required to respond to such official inquiries if answers or testimony may subject the employee to criminal prosecution.

Subpart B—Procedures for Exemption of Scientific and Technological Information Communications From Post-Employment Restrictions

SOURCE: 75 FR 75376, Dec. 3, 2010, unless otherwise noted.

§ 1010.201 Purpose and scope.

(a) This subpart sets forth criteria for the types of communications on scientific or technological matters permitted under 18 U.S.C. 207(j)(5) by defining the term ''scientific or technological information.'' This subpart also establishes the procedures for receiving and approving requests from former employees of the executive branch to make such communications to DOE.

(b) This subpart applies to any former employee of the executive branch subject to the post-employment conflict of interest restrictions in 18 U.S.C. 207(a), (c), and (d), who wishes to communicate with DOE under the exemption in 18 U.S.C. 207(j)(5) for the purpose of furnishing scientific or technological information to DOE offices or officials.

(c) This subpart does not apply to a former DOE employee's testimony as an expert in an adversarial proceeding in which the United States is a party or has a direct and substantial interest.

§ 1010.202 Definitions.

For purposes of this subpart:

(a) *Agency designee* means an individual serving in a position in DOE requiring appointment by the President of the United States with the advice and consent of the Senate.

(b) *Authorized communication* means any transmission of scientific or technological information to any DOE office or official that is approved by DOE under § 1010.203 of this subpart.

(c) *DOE* means the U.S. Department of Energy.

(d) *Scientific or technological information* means: Information of a scientific or technological character, such as technical or engineering information relating to the natural sciences. The exception does not extend to information associated with a nontechnical discipline such as law, economics, or political science.

(e) *Incidental references or remarks.* Provided the former employee's communication primarily conveys information of a scientific or technological character, the entirety of the communication will be deemed made solely for the purpose of furnishing such information notwithstanding an incidental reference or remark:

(1) Unrelated to the matter to which the post-employment restriction applies;

(2) Concerning feasibility, risk, cost, speed of implementation, or other considerations when necessary to appreciate the practical significance of the basic scientific or technological information provided; or

(3) Intended to facilitate the furnishing of scientific or technological information, such as those references or remarks necessary to determine the kind and form of information required or the adequacy of information already supplied.

§ 1010.203 Procedures for review and approval of requests.

(a) Any former employee of the executive branch subject to the constraints of the post-employment restrictions of 18 U.S.C. 207(a), (c), and (d) who wishes to communicate scientific or technological information to DOE must contact the DOE office with which the former employee wishes to communicate and request authorization to make such communication. This request must be in writing and address, in detail, information regarding each of the factors set forth in paragraphs (c)(1) through (c)(6) and (c)(8) of this section.

(b) In consultation with the Designated Agency Ethics Official (DAEO), the agency designee in the office with cognizance over the matter must advise the former employee in writing whether the proposed communication is an authorized communication. This authority cannot be delegated, except to another individual serving in a position in DOE requiring appointment by the President of the United States with the advice and consent of the Senate.

(c) In deciding whether a proposed communication is an authorized communication, the agency designee receiving the request and the DAEO must consider the following factors:

(1) Whether the former employee has relevant scientific or technical qualifications;

(2) Whether the former employee has qualifications that are otherwise unavailable to both the former employee's current employer and DOE;

(3) The nature of the scientific or technological information to be conveyed;

(4) The former employee's position prior to termination;

(5) The extent of the former employee's involvement in the matter at issue during his or her employment, including:

(i) The former employee's involvement in the same particular matter involving specific parties;

(ii) The time elapsed since the former employee's participation in such matter; and

(iii) The offices within the Federal department or agency involved in the matter both during the former employee's period of employment in the executive branch and at the time the request is being made;

(6) The existence of pending or anticipated matters before the Federal government from which the former employee or his or her current employer may financially benefit, including contract modifications, grant applications, and proposals; and

(7) Whether DOE's interests would be served by allowing the proposed communication; and

(8) Any other relevant information.

PART 1013—PROGRAM FRAUD CIVIL REMEDIES AND PROCEDURES

Sec.

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1013.46 Compromise or settlement.
1013.47 Limitations.

AUTHORITY: 31 U.S.C. 3801–3812; 28 U.S.C. 2461 note.

SOURCE: 53 FR 44385, Nov. 3, 1988, unless otherwise noted.

§ 1013.1 Basis and purpose.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Pub. L. 99–509, sections 6101–6104, 100 Stat. 1874 (October 21, 1986), codified at 31 U.S.C. 3801–3812. 31 U.S.C. 3809 of the statute requires each authority head to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This part (1) establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to authorities or to their agents, and (2) specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§ 1013.2 Definitions.

ALJ means an Admininstrative Law Judge in the authority appointed pursuant to 5 U.S.C. 3105 or detailed to the authority pursuant to 5 U.S.C. 3344.

Authority means the Department of Energy.

Authority head means the Secretary or the Under Secretary of the Department of Energy.

Benefit means, in the context of ''statement,'' anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

Claim means any request, demand, or submission—

(a) Made to the authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

(b) Made to a recipient of property, services, or money from the authority or to a party to a contract with the authority—

(1) For property or services if the United States—

(i) Provided such property or services;

(ii) Provided any portion of the funds for the purchase of such property or services; or

(iii) Will reimburse such recipient or party for the purchase of such property or services; or

(2) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(i) Provided any portion of the money requested or demanded; or

(ii) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(c) Made to the authority which has the effect of decreasing an obligation to pay or account for property, services, or money.

Complaint means the administrative complaint served by the reviewing official on the defendant under §1013.7 of this part.

Defendant means any person alleged in a complaint under §1013.7 of this part to be liable for a civil penalty or assessment under §1013.3 of this part.

Department means the Department of Energy.

Government means the United States Government.

Individual means a natural person.

Initial decision means the written decision of the ALJ required by §1013.10 or §1013.37 of this part, and includes a revised initial decision issued following a remand or a motion for reconsideration.

Investigating official means the Inspector General of the Department of Energy or an officer or employee of the Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

Knows or has reason to know, means that a person, with respect to a claim or statement—

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

Makes, wherever it appears, shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, *making* or *made,* shall likewise include the corresponding forms of such terms.

Person means any individual, partnership, corporation, association, or private organization, and includes the plural of that term.

Representative means an attorney, who is a member in good standing of the bar of any State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico, and designated by a party in writing.

Reviewing official means the General Counsel of the Department or his designee who is—

(a) Not subject to supervision by, or required to report to, the investigating official;

(b) Not employed in the organizational unit of the authority in which the investigating official is employed; and

(c) Serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(a) With respect to a claim or to obtain the approval or payment of a

claim (including relating to eligibility to make a claim); or

(b) With respect to (including relating to eligibility for)—

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant, loan, or benefit from, the authority, or any State, political subdivision of a State, or other party, if the United States Government provides any poztion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

§ 1013.3 Basis for civil penalties and assessments.

(a) *Claims*. (1) Except as provided in paragraph (c) of this section, any person who makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written statement that—

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $9,000 for each such claim.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to the authority, recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority, recipient, or party.

(4) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.

(b) *Statements*. (1) Except as provided in paragraph (c) of this section, any person who makes a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement, and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $9,000 for each such statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to the authority when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority.

(c) *Application for certain benefits*. (1) In the case of any claim or statement made by any individual relating to any of the benefits listed in paragraph (c)(2) of this section received by such individual, such individual may be held liable for penalties and assessments under this section only if such claim or statement is made by such individual in making application for such benefits with respect to such individual's eligibility to receive such benefits.

(2) For purposes of paragraph (c) of this section, the term ''benefits'' means benefits under part A of the Energy Conservation in Existing Buildings Act of 1976, which are intended for the personal use of the individual who receives the benefits or for a member of the individual's family.

(d) No proof of specific intent to defraud is required to establish liability under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty under this section.

(f) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

[53 FR 44385, Nov. 3, 1988, as amended at 62 FR 46184, Sept. 2, 1997; 74 FR 66033, Dec. 14, 2009; 79 FR 20, Jan. 2, 2014]

§ 1013.4 Investigation.

(a) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued and shall identify the records or documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving such subpoena shall be required to tender to the investigating official or the person designated to receive the documents a certification that the documents sought have been produced, or that such documents are not available and the reasons therefor, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to preclude or limit such official's discretion to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

§ 1013.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 1013.4(b) of this part, the reviewing official determines that there is adequate evidence to believe that a person is liable under § 1013.3 of this part, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 1013.7 of this part.

(b) Such notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 1013.3 of this part;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

§ 1013.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 1013.7 of this part only if—

(1) The Department of Justice approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1), and

(2) In the case of allegations of liability under § 1013.3(a) of this part with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of § 1013.3(a) of this part does not exceed $150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (*e.g.*, grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 1013.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in § 1013.8 of this part.

(b) The complaint shall state—

(1) The allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in § 1013.10 of this part.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§ 1013.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service is complete upon receipt.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by—

(1) Affidavit of the individual serving the complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgment of receipt by the defendant or his or her representative.

§ 1013.9 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the defendant—

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the

time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (b) of this section. The reviewing offical shall file promptly with the ALJ the complaint, the general answer denying liability, and the request for an extension of time as provided in § 1013.11 of this part. For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

§ 1013.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in § 1013.9(a) of this part, the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on defendant in the manner prescribed in § 1013.8 of this part, a notice that an initial decision shall be issued under this section.

(c) The ALJ shall assume the facts alleged in the complaint to be true, and, if such facts establish liability under § 1013.3 of this part, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the ALJ shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying a defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 1013.38 of this part.

(h) The defendant may appeal to the authority head the decision denying a motion to reopen by filing a notice of appeal with the authority head within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.

(i) If the defendant files a timely notice of appeal with the authority head, the ALJ shall forward the record of the proceeding to the authority head.

(j) The authority head shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the ALJ.

(k) If the authority head decides that extraordinary circumstances excused the defendant's failure to file a timely answer, the authority head shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the authority head decides that the defendant's failure to file a timely answer is not excused, the authority head shall reinstate the initial decision of the ALJ, which shall become final and binding upon the parties 30 days after the authority head issues such decision.

§ 1013.11 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ.

§ 1013.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by § 1013.8 of this part. At the same time, the ALJ shall send a copy

of such notice to the representative for the Government.

(b) Such notice shall include—

(1) The tentative time, date, and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Government and of the defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 1013.13 Parties to the hearing.

(a) The parties to the hearing shall be the defendant and the authority.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 1013.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the authority who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case—

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision by the authority head, except as a witness or a representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ shall not be responsible to, or subject to the supervision or direction of, the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in the authority, including in the offices of either the investigating official or the reviewing official.

§ 1013.15 *Ex parte* contacts.

No party or person (except employees of the ALJ's office) shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 1013.16 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections shall be deemed waived.

(d) Such affidavit shall state specific facts that support the party's belief that personal basis or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of such a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f)(1) If the ALJ determines that a reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case shall be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the authority head may determine the matter only as part of his or her review or the initial decision upon appeal, if any.

§ 1013.17 Rights of parties.

Except as otherwise limited by this part, all parties may—

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which shall be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law.

§ 1013.18 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ has the authority to—

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts; decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(12) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(13) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to find Federal statutes or regulations invalid.

§ 1013.19 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact or as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses);

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time, date, and place for the hearing; and

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 1013.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 1013.4(b) are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 1013.5 of the part is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 1013.9 of this part.

§ 1013.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purpose of this section and §§ 1013.22 and 1013.23 of this part, the term ''documents'' includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) *Motions for discovery*. (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in § 1013.24 of this part.

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought—

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 1013.24 of this part.

(e) *Depositions*. (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time, date, and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 1013.8 of this part.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

§ 1013.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 1013.33(b) of this part. At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, shall provide each party with a copy of the

specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 1013.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefor not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena shall specify the time, date, and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in § 1013.8 of this part. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 1013.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 1013.25 Witness fees.

The party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the authority, a check for witness fees and mileage need not accompany the subpoena.

§ 1013.26 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the ALJ shall include an original and two copies.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (*e.g.*, motion to quash subpoena).

(3) Every pleading and paper shall be signed by, and shall contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than those required to be served as prescribed in § 1013.8 of this part shall be made by delivering a copy or by placing a copy of the document in the United States mail, postage prepaid, and addressed to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) *Proof of service.* A certificate by the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§ 1013.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturday, Sundays, and legal holidays observed by the Federal government shall be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional five days will be added to the time permitted for any response.

§ 1013.28 Motions.

(a) Any application to the ALJ for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§ 1013.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative, for—

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may—

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 1013.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under § 1013.3 of this part, and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The authority shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 1013.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the authority head, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the authority head in determining the amount of penalties and assessments to impose with respect to the misconduct (*i.e.*, the false, fictitious, or fraudulent claims or statement) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the defendant attempted to conceal the misconduct;

(10) The degree to which the defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the

defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in similar transactions;

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly; and

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section shall be construed to limit the ALJ or the authority head from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 1013.32 Location of hearing.

(a) The hearing may be held—

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the defendant and the ALJ.

(b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the ALJ.

§ 1013.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 1013.22(a) of this part.

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity *pro se* or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 1013.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, *e.g.*, to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 1013.24 of this part.

§ 1013.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the authority head.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 1013.24 of this part.

§ 1013.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing such briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 1013.37 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions thereof, violate § 1013.3 of this part;

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 1013.31 of this part.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the authority head. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the authority head, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued by the ALJ.

§ 1013.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the authority head in accordance with § 1013.39.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the authority head in accordance with § 1013.39 of this part.

§ 1013.39 Appeal to authority head.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the authority head by filing a notice of appeal with the authority head in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues an initial decision. However, if any party files a motion for reconsideration under § 1013.38 of this part, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) The authority head may extend the initial 30-day period for an additional 30 days if the defendant files with the authority head a request for an extension within the initial 30-day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the authority head and the time for filing motions for reconsideration under § 1013.38 of this part has expired, the ALJ shall forward the record of the proceeding to the authority head.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the authority head.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the authority head shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in any initial decision.

(k) The authority head shall promptly serve each party to the appeal with a copy of the decision of the authority head and a statement describing the right of any person determined to be liable for a penalty or an assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the authority head serves the defendant with a copy of the authority head's decision, a determination that a defendant is liable under § 1013.3 of this part is final and is not subject to judicial review.

§ 1013.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the authority head a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the authority head shall stay the process immediately. The authority head may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 1013.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the authority head.

(b) No administrative stay is available following a final decision of the authority head.

§ 1013.42 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the authority head imposing penalties or assessments under this part and specifies the procedures for such review.

§ 1013.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorizes actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 1013.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under § 1013.42 or § 1013.43 of this part, or any amount agreed upon in a compromise or settlement under § 1013.46 of this part, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the defendant.

§ 1013.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 1013.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(c) The authority head has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under § 1013.42 of this part or during the pendency of any action to collect penalties and assessments under § 1013.43 of this part.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 1013.42 of this part or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the authority head, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the authority head, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§ 1013.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 1013.8 of this part within 6 years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of notice under § 1013.10(b) of this part shall be deemed a notice of a hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

PART 1014—ADMINISTRATIVE CLAIMS UNDER FEDERAL TORT CLAIMS ACT

Sec.
1014.1 Scope of regulations.
1014.2 Administrative claim; when presented; appropriate office.
1014.3 Administrative claim; who may file.
1014.4 Administrative claims; evidence and information to be submitted.
1014.5 Authority to adjust, determine, compromise, and settle.
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1014.8 Investigation and examination.
1014.9 Final denial of claim.
1014.10 Action on approved claims.
1014.11 Penalties.

AUTHORITY: Sec. 1(a), 80 Stat. 306, (28 U.S.C. 2672); 28 CFR part 14; sec. 644, Pub. L. 95–91, 91 Stat. 599, (42 U.S.C. 7254).

SOURCE: 45 FR 7768, Feb. 4, 1980, unless otherwise noted.

§ 1014.1 Scope of regulations.

(a) These regulations shall apply only to claims asserted under the Federal Tort Claims Act, as amended, accruing on or after January 18, 1967, for money damages against the United States for injury to, or loss of, property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Department of Energy (DOE) while acting within the scope of office or employment.

(b) The terms *DOE*, *Department*, and *Department of Energy* as used in this part mean the agency established by the Department of Energy Organization Act (Pub. L. 95–91), 42 U.S.C. 7101, *et seq.*, including the Federal Energy Regulatory Commission, but do not include any contractor of the Department.

(c) The regulations in this part supplement the Attorney General's regulations in part 14 of chapter 1 of title 28 CFR as amended. Those regulations, including subsequent amendments thereto, and the regulations in this part apply to the consideration by DOE of administrative claims under the Federal Tort Claims Act.

§ 1014.2 Administrative claim; when presented; appropriate office.

(a) For purposes of these regulations, a claim shall be deemed to have been presented when DOE receives, at a place designated in paragraph (b) of this section, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a definite amount for injury to or loss of property, personal injury, or death, that is alleged to have occurred by reason of the incident. A claim that should have been presented to DOE but which was mistakenly addressed to or filed with another Federal agency, shall be deemed to be presented to DOE on the date the claim is received by DOE. A claim mistakenly addressed to or filed with DOE shall be transferred to the appropriate Federal agency, if ascertainable, or returned to the claimant.

(b) Claims should be mailed in envelopes marked ''Attention Office of General Counsel.'' Claims shall be mailed or delivered to the DOE installation or office employing the person or persons whose acts or omissions are alleged to have caused the loss, damage, or injury, unless the claimant does not know that address. If the proper address is unknown, claims may be mailed or delivered to: The General Counsel, U.S. Department of Energy, Washington, DC 20585. Forms may be obtained from the same places.

(c) A claim may be amended by the claimant at any time before final DOE action or before the exercise of the claimant's option under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or a duly authorized agent or legal representative. If an amendment to a pending claim is filed in time, the DOE shall have 6 months to decide the claim as amended. The claimant's option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of an amendment.

§ 1014.3 Administrative claim; who may file.

(a) A claim for injury to or loss of property may be presented by the owner of the property interest that is the subject of the claim or the owner's duly authorized agent or legal representative.

(b) A claim for personal injury may be presented by the injured person or

the claimant's duly authorized agent or legal representative.

(c) A claim based on death may be presented by the executor or administrator of the decedent's estate or by any other person legally entitled to assert such a claim under the applicable State law.

(d) A claim for a loss that was wholly compensated by an insurer with the rights of a subrogee may be presented by the insurer. A claim for loss that was partially compensated by an insurer with the rights of a subrogee may be presented by the insurer or the insured individually, as their respective interests appear, or jointly. Whenever an insurer presents a claim asserting the rights of a subrogee, it shall present with its claim appropriate evidence that it has the rights of a subrogee.

(e) A claim presented by an agent or legal representative shall be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of authority to present a claim on behalf of the claimant.

§ 1014.4 Administrative claims; evidence and information to be submitted.

(a) *Death*. In support of a claim based on death, the claimant may be required to submit the following evidence or information:

(1) An authenticated death certificate or other competent evidence showing the cause of death, the date of death, and the age of the decedent.

(2) Decedent's employment or occupation at time of death, including monthly or yearly salary or earnings (if any), and the duration of last employment or occupation.

(3) Full names, addresses, birth dates, kinship, and marital status of the decedent's survivors, including identification of those survivors who were dependent for support upon the decedent at the time of death.

(4) The degree of support afforded by the decedent to each survivor dependent upon decedent for support at the time of death.

(5) Decedent's general physical and mental condition before death.

(6) Itemized bills for medical and burial expenses incurred by reason of the incident causing death, or itemized receipts of payment for such expenses.

(7) If damages for pain and suffering prior to death are claimed, a physican's detailed statement specifying the injuries suffered, the duration of pain and suffering, any drugs administered for pain, and the decedent's physical condition between injury and death.

(8) Any other evidence or information that may have a bearing on either the responsibility of the United States for the death or the amount of damages claimed.

(b) *Personal injury*. In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information:

(1) A written report by the attending physician or dentist setting forth the nature and extent of the injury, the nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, the period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to a physical or mental examination by a physician employed by the DOE or another Federal agency. A copy of the physician's report shall be made available to the claimant upon the claimant's written request, provided that the claimant has, upon request, made or agrees to make available to the DOE any physician's reports previously or thereafter made of the physical or mental condition which is the subject matter of the claim.

(2) Itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts of payment for such expenses.

(3) If the prognosis reveals that future treatment will be needed, a statement of the expected expenses of such treatment.

(4) If a claim is made for loss of time from employment, a written statement from the claimant's employer showing actual time lost from employment, whether the claimant is a full-time or part-time employee, and the wages or salary actually lost.

(5) If a claim is made for loss of income and the claimant is self-employed, documentary evidence showing the amounts of earnings actually lost.

(6) Any other evidence or information that may bear on either the responsibility of the United States for the personal injury or the damages claimed.

(c) *Property damage.* In support of a claim for injury to or loss of property, real or personal, the claimant may be required to submit the following evidence or information:

(1) Proof of ownership of the property interest that is the subject of the claim.

(2) A detailed statement of the amount claimed with respect to each item of property.

(3) An itemized receipt of payment for necessary repairs or itemized written estimates of the cost of such repairs.

(4) A statement listing date of purchase, purchase price, and salvage value, where repair is not economical.

(5) Any other evidence or information that may bear on either the responsibility of the United States for the injury to or loss of property or the damages claimed.

§ 1014.5 Authority to adjust, determine, compromise, and settle.

The General Counsel, the Deputy General Counsel, the Deputy General Counsel for Legal Services, the Assistant General Counsel for Legal Counsel, and any employees of the Department designated by the General Counsel to receive and act on tort claims at Headquarters and field locations are authorized to act on claims.

§ 1014.6 Limitation on authority.

(a) An award, compromise, or settlement of a claim in excess of $25,000 shall be made only with the prior written approval of the Attorney General or his or her designee. For the purposes of this paragraph, a principal claim and any derivative or subrogated claim shall be treated as a single claim.

(b) An administrative claim may be adjusted, determined, compromised, or settled only after the Department of Justice has been consulted if, in the opinion of the General Counsel or designee:

(1) A new precedent may be involved;

(2) A question of policy may be involved;

(3) The United States may be entitled to indemnity or contribution from a third party and the DOE is unable to adjust the third party claim; or

(4) The compromise of a particular claim, as a practical matter, may control the disposition of a related claim in which the amount to be paid may exceed $25,000.

(c) An administrative claim may be adjusted, determined, compromised, or settled only after consultation with the Department of Justice when the DOE is aware that the United States or an employee, agent, or cost-type contractor of the United States is involved in litagation based on a claim arising out of the same incident or transaction.

(d) The authority of DOE subordinate claims officials to make awards, compromises, and settlements of over $10,000 is subject to the approval of the General Counsel, the Deputy General Counsel, or the Deputy General Counsel for Legal Services.

§ 1014.7 Referral to Department of Justice.

(a) When Department of Justice approval or consultation is required under § 1014.6, the referral or request shall be transmitted to the Department of Justice by the General Counsel or designee.

(b) When a designee of the General Counsel is processing a claim requiring consultation with, or approval of, either the DOE General Counsel or the Department of Justice, the referral or request shall be sent to the General Counsel in writing and shall contain:

(1) A short and concise statement of the facts and of the reasons for the referral or request,

(2) Copies of relevant portions of the claim file, and

(3) A statement of recommendations or views.

§ 1014.8 Investigation and examination.

The DOE may investigate, or may request any other Federal agency to investigate, a claim and may conduct, or

request another Federal agency to conduct, a physical examination of a claimant and provide a report of the physical examination.

§ 1014.9 Final denial of claim.

(a) Final denial of an administrative claim shall be in writing and sent to the claimant, or the claimant's attorney or legal representative by certified or registered mail. The notification of final denial may include a statement of the reasons for the denial and shall include a statement that, if the claimant is dissatisfied with the Department's action, the claimant may file suit in an appropriate U.S. District Court not more than 6 months after the notification is mailed.

(b) Before the commencement of suit and before the 6-month period provided in 28 U.S.C. 2401(b) expires, a claimant, or the claimant's duly authorized agent, or legal representative, may file a written request with the DOE General Counsel for reconsideration of a final denial of a claim. Upon the timely filing of a request for reconsideration the DOE shall have 6 months from the date of filing to decide the claim, and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the request for reconsideration is filed. Final DOE action on a request for reconsideration shall be made in accordance with the provisions of paragraph (a) of this section.

§ 1014.10 Action on approved claims.

(a) Payment of any approved claim shall not be made unless the claimant executes (1) a Standard Form 1145, (2) a claims settlement agreement, or (3) a Standard Form 95, as appropriate consistent with applicable rules of the Department of Justice, Department of the Treasury, and the General Accounting Office. When a claimant is represented by an attorney, the voucher for payment shall designate both the claimant and the attorney as payees, and the check shall be delivered to the attorney, whose address shall appear on the voucher.

(b) If the claimant or the claimant's agent or legal representative accepts any award, compromise, or settlement made pursuant to the provisions of section 2672 or 2677 of title 28, United States Code, that acceptance shall be final and conclusive on the claimant, the claimant's agent or legal representative, and any other person on whose behalf or for whose benefit the claim has been presented. The acceptance shall constitute a complete release of any claim against the United States and against any employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

§ 1014.11 Penalties.

A person who files a false claim or makes a false or fraudulent statement in a claim against the United States may be liable to a fine of not more than $10,000 or to imprisonment for not more than 5 years, or both (18 U.S.C. 1001), and, in addtion, to a forfeiture of $2,000 and a penalty of double the loss or damage sustained by the United States (31 U.S.C 231).

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AUTHORITY: 31 U.S.C. 3701, 3711, 3716, 3717, 3718, and 3720B; 42 U.S.C. 2201 and 7101, *et seq.;* 50 U.S.C. 2401 *et seq.*

SOURCE: 68 FR 48533, Aug. 14, 2003, unless otherwise noted.

Subpart A—General

§ 1015.100 Scope.

This subpart describes the scope of the standards set forth in this part. This subpart corresponds to 31 CFR part 900 in the Department of the Treasury (Treasury) Federal Claims Collection Standards.

§ 1015.101 Prescription of standards.

(a) The Secretary of the Treasury and the Attorney General of the United States issued regulations in 31 CFR parts 900–904, under the authority contained in 31 U.S.C. 3711(d)(2). Those regulations prescribe standards for Federal agency use in the administrative collection, offset, compromise, and the suspension or termination of collection activity for civil claims for money, funds, or property, as defined by 31 U.S.C. 3701(b), unless specific Federal agency statutes or regulations apply to such activities or, as provided for by Title 11 of the United States Code, when the claims involve bankruptcy. The regulations in 31 CFR parts 900–904 also prescribe standards for referring debts to the Department of Justice (DOJ) for litigation. Additional guidance is contained in the Office of Management and Budget's (OMB) Circular A–129 (Revised), ''Policies for Federal Credit Programs and Non-Tax Receivables,'' the Treasury's ''Managing Federal Receivables,'' and other publications concerning debt collection and debt management. These publications are available from the Department of Energy (DOE) Office of Financial Policy, 1000 Independence Ave., SW., Washington, DC 20585.

(b) Additional rules governing centralized administrative offset and the transfer of delinquent debt to Treasury or Treasury-designated debt collection centers for collection (cross-servicing) under the Debt Collection Improvement Act of 1996 (DCIA), Public Law 104–134, 110 Stat. 1321, 1358 (April 26, 1996), are set forth in separate regulations issued by Treasury. Rules governing the use of certain debt collection tools created under the DCIA, such as administrative wage garnishment, also are set forth in separate regulations issued by Treasury. See generally, 31 CFR part 285.

(c) DOE is not limited to the remedies contained in this part and may use any other authorized remedies, including alternative dispute resolution and arbitration, to collect civil claims, to the extent that such remedies are not inconsistent with the Federal

Claims Collection Act, as amended, Public Law 89–508, 80 Stat. 308 (July 19, 1966), the Debt Collection Act of 1982, Public Law 97–365, 96 Stat. 1749 (October 25, 1982), the DCIA or other relevant law. The regulations in this part do not impair DOE's common law rights to collect debts.

(d) Standards and policies regarding the classification of debt for accounting purposes (for example, write-off of uncollectible debt) are contained in OMB's Circular A–129 (Revised), ''Policies for Federal Credit Programs and Non-Tax Receivables.''

§ 1015.102 Definitions and construction.

(a) For the purposes of the standards in this part, the terms ''claim'' and ''debt'' are synonymous and interchangeable. They refer to an amount of money, funds, or property that has been determined by an agency official to be due the United States from any person, organization, or entity, except another Federal agency. For the purposes of administrative offset under 31 U.S.C. 3716, the terms ''claim'' and ''debt'' include an amount of money, funds, or property owed by a person to a State (including past-due support being enforced by a State), the District of Columbia, American Samoa, Guam, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, or the Commonwealth of Puerto Rico.

(b) A debt is ''delinquent'' if it has not been paid by the date specified in DOE's initial written demand for payment or applicable agreement or instrument (including a post-delinquency payment agreement), unless other satisfactory payment arrangements have been made.

(c) In this part, words in the plural form shall include the singular and vice versa, and words signifying the masculine gender shall include the feminine and vice versa. The terms ''includes'' and ''including'' do not exclude matters not listed but do include matters that are in the same general class.

(d) Recoupment is a special method for adjusting debts arising under the same transaction or occurrence. For example, obligations arising under the same contract generally are subject to recoupment.

(e) The term ''Department of Energy'' or ''DOE'' includes the National Nuclear Security Administration.

§ 1015.103 Antitrust, fraud, tax, interagency, transportation account audit, acquisition contract, and financial assistance instrument claims excluded.

(a) The standards in this part relating to compromise, suspension, and termination of collection activity do not apply to any debt based in whole or in part on conduct in violation of the antitrust laws or to any debt involving fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any party having an interest in the claim. Only the DOJ has the authority to compromise, suspend, or terminate collection activity on such claims. The standards in this part relating to the administrative collection of claims do apply, but only to the extent authorized by the DOJ in a particular case. Upon identification of a claim based in whole or in part on conduct in violation of the antitrust laws or any claim involving fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any party having an interest in the claim, DOE will promptly refer the case to the DOJ for action. At its discretion, the DOJ may return the claim to DOE for further handling in accordance with the standards in this part.

(b) Part 1015 does not apply to tax debts.

(c) Part 1015 does not apply to claims between Federal agencies. Federal agencies should attempt to resolve interagency claims by negotiation in accordance with Executive Order 12146 (3 CFR, 1980 Comp., pp. 409–412).

(d) Part 1015 does not apply to claims arising from the audit of transportation accounts pursuant to 31 U.S.C. 3726 which shall be determined, collected, compromised, terminated, or settled in accordance with regulations published under the authority of 31 U.S.C. 3726 (*see* 41 CFR parts 101–141, administered by the Director, Office of Transportation Audits, General Services Administration) and are otherwise excepted from these regulations.

(e)(1) Part 1015 does not apply to claims arising out of acquisition contracts, subcontracts, and purchase orders which are subject to the Federal Acquisition Regulations System, including the Federal Acquisition Regulation, 48 CFR subpart 32.6, and the Department of Energy Acquisition Regulation, 48 CFR subpart 932.6, and which shall be determined or settled in accordance with those regulations; and

(2) Part 1015 does not apply to claims arising out of financial assistance instruments (*e.g.*, grants, cooperative agreements, and contracts under cooperative agreements) and loans and loan guarantees, which shall be determined or settled in accordance with 10 CFR 600.26 and 10 CFR 600.112(f).

§ 1015.104 Compromise, waiver, or disposition under other statutes not precluded.

Nothing in this part precludes DOE from disposing of any claim under statutes and implementing regulations other than subchapter II of chapter 37 of Title 31 of the United States Code (Claims of the United States Government) and the standards in this part. In such cases, the specifically applicable laws and regulations will generally take precedence over this part.

§ 1015.105 Form of payment.

Claims may be paid in the form of money or, when a contractual basis exists, the Government may demand the return of specific property or the performance of specific services.

§ 1015.106 Subdivision of claims not authorized.

Debts may not be subdivided to avoid the monetary ceiling established by 31 U.S.C. 3711(a)(2). A debtor's liability arising from a particular transaction or contract shall be considered a single debt in determining whether the debt is one of less than $100,000 (excluding interest, penalties, and administrative costs) or such higher amount as the Attorney General shall from time to time prescribe for purposes of compromise or suspension or termination of collection activity.

§ 1015.107 Required administrative proceedings.

DOE is not required to omit, foreclose, or duplicate administrative proceedings required by contract or other laws or regulations.

§ 1015.108 No private rights created.

The standards in this part do not create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person, nor shall the failure of DOE, Treasury, the DOJ or other agency to comply with any of the provisions of this part be available to any debtor as a defense.

Subpart B—Standards for the Administrative Collection of Claims

§ 1015.200 Scope.

The subpart sets forth the standards for administrative collection of claims under this part. This subpart corresponds to 31 CFR part 901 of the Treasury Federal Claims Collection Standards.

§ 1015.201 Aggressive agency collection activity.

(a) Heads of DOE Headquarters Elements and Field Elements or their designees must promptly notify the appropriate DOE finance office of claims arising from their operations. A claim will be recorded and controlled by the responsible finance office upon receipt of documentation from a competent authority establishing the amount due.

(b) In accordance with 31 CFR Chapter IX parts 900–904 and this part, DOE will aggressively collect all debts arising out of activities. Collection activities shall be undertaken promptly with follow-up action taken as necessary.

(c) Debts referred or transferred to Treasury, or Treasury-designated debt collection centers under the authority of 31 U.S.C. 3711(g), shall be serviced, collected, or compromised, or the collection action will be suspended or terminated, in accordance with the statutory requirements and authorities applicable to the collection of such debts.

(d) DOE will cooperate with other agencies in its debt collection activities.

(e) DOE will refer debts to Treasury as soon as due process requirements are complete, and should refer such debts no later than 180 days after the debt has become delinquent. On behalf of DOE, Treasury will take appropriate action to collect or compromise the referred debt, or to suspend or terminate collection action thereon, in accordance with the statutory and regulatory requirements and authorities applicable to the debt and action. Appropriate action to collect a debt may include referral to another debt collection center, a private collection contractor, or the DOJ for litigation. (See 31 CFR 285.12, Transfer of Debts to Treasury for Collection.) This requirement does not apply to any debt that:

(1) Is in litigation or foreclosure;

(2) Will be disposed of under an approved asset sale program;

(3) Has been referred to a private collection contractor for a period of time acceptable to Treasury; or

(4) Will be collected under internal offset procedures within three years after the debt first became delinquent.

(f) Treasury is authorized to charge a fee for services rendered regarding referred or transferred debts. DOE will add the fee to the debt as an administrative cost (see § 1015.212(c)).

§ 1015.202 Demand for payment.

(a) Written demand as described in paragraph (b) of this section will be made promptly upon a debtor of the United States in terms that inform the debtor of the consequences of failing to cooperate with DOE to resolve the debt. Generally, one demand letter issued 30 days after the initial notice, bill, or written demand should suffice. When necessary to protect the Government's interest (for example, to prevent the running of a statute of limitations), written demand may be preceded by other appropriate actions under this Part, including immediate referral for litigation.

(b) Demand letters will inform the debtor of:

(1) The basis for the indebtedness and the rights, if any, the debtor may have to seek review within DOE;

(2) The applicable standards for imposing any interest, penalties, or administrative costs;

(3) The date by which payment should be made to avoid late charges (*i.e.*, interest, penalties, and administrative costs) and enforced collection, which generally should not be more than 30 days from the date that the demand letter is mailed or hand-delivered;

(4) The name, address, and phone number of a contact person or office within DOE;

(5) DOE's intent to refer unpaid debts to Treasury for collection;

(6) DOE's intent to authorize Treasury to add fees for services rendered as an administrative fee;

(7) DOE's intent to authorize Treasury to utilize collection tools such as credit bureau reporting, private collection agencies, administrative wage garnishment, Federal salary offset, tax refund offset, administrative offset, litigation, and other tools, as appropriate, to collect the debt;

(8) DOE's willingness to discuss alternative methods of payment;

(9) The debtor's entitlement to consideration of a waiver, depending on applicable statutory authority; and

(10) DOE's intent to suspend or revoke licenses, permits, or privileges for any inexcusable or willful failure of a debtor to pay such a debt in accordance with DOE regulations or governing procedures.

(c) DOE will seek to ensure that demand letters are mailed or hand-delivered on the same day that they are dated.

(d) DOE will seek to respond promptly to communications from debtors, within 30 days whenever feasible, and will advise debtors who dispute debts to furnish available evidence to support their contentions.

(e) Prior to the initiation of the demand process or at any time during or after completion of the demand process, if DOE determines to pursue, or is required to pursue, offset, the procedures applicable to offset should be followed (see § 1015.203 of this subpart). The availability of funds or money for debt satisfaction by offset and DOE's determination to pursue collection by

offset shall release DOE from the necessity of further compliance with paragraphs (a), (b), and (c) of this section.

(f) Prior to referring a debt for litigation, DOE should advise each person determined to be liable for the debt that, unless the debt can be collected administratively, litigation may be initiated. This notification should comply with Executive Order 12988 (3 CFR, 1996 Comp, pp. 157–163) and should be given as part of a demand letter under paragraph (b) of this section.

(g) When DOE learns that a bankruptcy petition has been filed with respect to a debtor, before proceeding with further collection action, DOE should immediately seek legal advice from appropriate legal counsel concerning the impact of the Bankruptcy Code on any pending or contemplated collection activities. Unless counsel determines that the automatic stay imposed at the time of filing pursuant to 11 U.S.C. 362 has been lifted or is no longer in effect, in most cases collection activity against the debtor should stop immediately.

(1) After seeking legal advice, a proof of claim should be filed in most cases with the bankruptcy court or the Trustee. DOE will refer to the provisions of 11 U.S.C. 106 relating to the consequences on sovereign immunity of filing a proof of claim.

(2) If DOE is a secured creditor, it may seek relief from the automatic stay regarding its security, subject to the provisions and requirements of 11 U.S.C. 362.

(3) Offset is stayed in most cases by the automatic stay. However, DOE will seek legal advice from counsel to determine whether its payments to the debtor and payments of other agencies available for offset may be frozen until relief from the automatic stay can be obtained from the bankruptcy court. DOE also will seek legal advice from counsel to determine whether recoupment is available.

§ 1015.203 Collection by administrative offset.

(a) *Scope*. (1) The term ''administrative offset'' has the meaning provided in 31 U.S.C. 3701(a)(1).

(2) This section does not apply to:

(i) Debts arising under the Social Security Act (42 U.S.C. 301, *et. seq.*) except as provided in 42 U.S.C. 404;

(ii) Payments made under the Social Security Act (42 U.S.C. 301, *et. seq.*) except as provided for in 31 U.S.C. 3716(c) (see 31 CFR 285.4, Federal Benefit Offset);

(iii) Debts arising under, or payments made under, the Internal Revenue Code (see 31 CFR 285.2, Tax Refund Offset) or the tariff laws of the United States;

(iv) Offsets against Federal salaries to the extent these standards are inconsistent with regulations published to implement such offsets under 5 U.S.C. 5514 and 31 U.S.C. 3716 (see 5 CFR part 550, subpart K, and 31 CFR 285.7, Federal Salary Offset);

(v) Offsets under 31 U.S.C. 3728 against a judgment obtained by a debtor against the United States;

(vi) Offsets or recoupments under common law, state law, or Federal statutes specifically prohibiting offsets or recoupments of particular types of debts; or

(vii) Offsets in the course of judicial proceedings, including bankruptcy.

(3) Unless otherwise provided for by contract or law, debts or payments that are not subject to administrative offset under 31 U.S.C. 3716 may be collected by administrative offset under the common law or other applicable statutory authority.

(4) Unless otherwise provided by law, administrative offset of payments under the authority of 31 U.S.C. 3716 to collect a debt may not be conducted more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the Government's right to collect the debt were not known and could not reasonably have been known by the official or officials of the Government who were charged with the responsibility to discover and collect such debts. This limitation does not apply to debts reduced to a judgment.

(5) In bankruptcy cases, DOE will seek legal advice from appropriate legal counsel concerning the impact of the Bankruptcy Code, particularly 11 U.S.C. 106, 362, and 553, on pending or contemplated collections by offset.

(b) *Mandatory centralized administrative offset*. (1) As described in

§ 1015.201(e), under the DCIA, DOE is required to refer all debts over 180 days delinquent to Treasury for purposes of debt collection (*i.e.*, cross-servicing). Administrative offset is one type of collection tool used by Treasury to collect debts referred under 31 CFR 285.12. Thus, by transferring debts to Treasury, DOE will satisfy the requirement to notify Treasury of debts for the purposes of administrative offset and duplicate referrals are not required. A debt, which is not transferred to Treasury for purposes of debt collection, however, may be subject to the DCIA requirement of notification to Treasury for purposes of administrative offset.

(2) The names and taxpayer identifying numbers (TINs) of debtors who owe debts referred to Treasury as described in paragraph (b)(1) of this section shall be compared to the names and TINs on payments to be made by Federal disbursing officials. Federal disbursing officials include disbursing officials of Treasury, the Department of Defense, the United States Postal Service, other Government corporations, and disbursing officials of the United States designated by the Secretary of the Treasury. When the name and TIN of a debtor match the name and TIN of a payee and all other requirements for offset have been met, the payment will be offset to satisfy the debt.

(3) Treasury will notify the debtor/payee in writing that an offset has occurred to satisfy, in part or in full, a past due, legally enforceable delinquent debt. The notice shall include a description of the type and amount of the payment from which the offset was taken, the amount of offset that was taken, the identity of DOE as the creditor agency requesting the offset, and a contact point within DOE who will respond to questions regarding the offset.

(4) As required in 31 CFR 901.3(b)(4), DOE will refer a delinquent debt to Treasury for administrative offset, only after the debtor:

(i) Has been sent written notice of the type and amount of the debt, the intention of DOE to use administrative offset to collect the debt, and an explanation of the debtor's rights under 31 U.S.C. 3716; and

(ii) Has been given:

(A) The opportunity to inspect and copy DOE records related to the debt;

(B) The opportunity for a review within DOE of the determination of indebtedness; and

(C) The opportunity to make a written agreement to repay the debt.

(iii) DOE may omit the procedures set forth in paragraph (a)(4) of this section when:

(A) The offset is in the nature of a recoupment;

(B) The debt arises under a contract as set forth in *Cecile Industries, Inc.* v. *Cheney*, 995 F.2d 1052 (Fed. Cir. 1993) (notice and other procedural protections set forth in 31 U.S.C. 3716(a) do not supplant or restrict established procedures for contractual offsets accommodated by the Contracts Disputes Act); or

(C) In the case of non-centralized administrative offsets conducted under paragraph (c) of this section, DOE first learns of the existence of the amount owed by the debtor when there is insufficient time before payment would be made to the debtor/payee to allow for prior notice and an opportunity for review. When prior notice and an opportunity for review are omitted, DOE shall give the debtor such notice and an opportunity for review as soon as practicable and shall promptly refund any money ultimately found not to have been owed to the Government.

(iv) When DOE previously has given a debtor any of the required notice and review opportunities with respect to a particular debt (see § 1015.202), DOE need not duplicate such notice and review opportunities before administrative offset may be initiated.

(5) When DOE refers delinquent debts to Treasury, DOE must certify, in a form acceptable to Treasury, that:

(i) The debt(s) is (are) past due and legally enforceable; and

(ii) DOE has complied with all due process requirements under 31 U.S.C. 3716(a) and DOE regulations.

(6) Payments that are prohibited by law from being offset are exempt from centralized administrative offset. Treasury may exempt classes of DOE payments from centralized offset upon the written request of the Secretary of DOE.

(7) In accordance with 31 U.S.C. 3716(f), Treasury may waive the provisions of the Computer Matching and Privacy Protection Act of 1988 concerning matching agreements and post-match notification and verification (5 U.S.C. 552a(o) and (p)) for centralized administrative offset upon receipt of a certification from DOE that the due process requirements enumerated in 31 U.S.C. 3716(a) have been met. The certification of a debt in accordance with paragraph (b)(5) of this section will satisfy this requirement. If such a waiver is granted, only the Data Integrity Board of Treasury is required to oversee any matching activities, in accordance with 31 U.S.C. 3716(g). This waiver authority does not apply to offsets conducted under paragraphs (c) and (d) of this section.

(c) *Non-centralized administrative offset.* (1) Generally, non-centralized administrative offsets are ad hoc case-by-case offsets that DOE conducts, at DOE's discretion, internally or in cooperation with the agency certifying or authorizing payments to the debtor. Unless otherwise prohibited by law, when centralized administrative offset is not available or appropriate, past due, legally enforceable non-tax delinquent debts may be collected through non-centralized administrative offset. In these cases, DOE may make a request directly to a payment-authorizing agency to offset a payment due a debtor to collect a delinquent debt. For example, it may be appropriate for DOE to request that the Office of Personnel Management (OPM) offset a Federal employee's lump sum payment upon leaving Government service to satisfy an unpaid advance.

(2) DOE shall comply with offset requests by creditor agencies to collect debts owed to the United States, unless the offset would not be in the best interest of the United States with respect to the program of DOE, or would otherwise be contrary to law. Appropriate use will be made of the cooperative efforts of other agencies in effecting collection by administrative offset.

(3) When collecting multiple debts by non-centralized administrative offset, DOE generally will apply the recovered amounts to those debts in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, particularly the applicable statute of limitations.

(d) *Requests to OPM to offset a debtor's anticipated or future benefit payments under the Civil Service Retirement and Disability Fund.* Upon providing OPM written certification that a debtor has been afforded the procedures provided in paragraph (b)(4) of this section, DOE may request OPM to offset a debtor's anticipated or future benefit payments under the Civil Service Retirement and Disability Fund (Fund) in accordance with regulations codified at 5 CFR 831.1801–831.1808. Upon receipt of such a request, OPM will identify and ''flag'' a debtor's account in anticipation of the time when the debtor requests, or becomes eligible to receive, payments from the Fund. This will satisfy any requirement that offset be initiated prior to the expiration of the time limitations referenced in paragraph (a)(4) of this section.

(e) *Review requirements.* (1) For purposes of this section, whenever DOE is required to afford a debtor a review within the agency, DOE shall provide the debtor with a reasonable opportunity for an oral hearing when the debtor requests reconsideration of the debt and DOE determines that the question of the indebtedness cannot be resolved by review of the documentary evidence, for example, when the validity of the debt turns on an issue of credibility or veracity.

(2) Unless otherwise required by law, an oral hearing under this section is not required to be a formal evidentiary hearing, although DOE will carefully document all significant matters discussed at the hearing.

(3) This section does not require an oral hearing with respect to debt collection systems in which a determination of indebtedness rarely involves issues of credibility or veracity and DOE has determined that review of the written record is ordinarily an adequate means to correct prior mistakes.

(4) In those cases when an oral hearing is not required by this section, DOE will accord the debtor a ''paper hearing,'' that is, a determination of the request for reconsideration based upon a review of the written record.

§ 1015.204 Reporting debts.

(a) DOE may disclose delinquent debts to consumer reporting agencies in accordance with 31 U.S.C. 3711(e), the DCIA, the revised Federal Claims Collection Standards (31 CFR parts 900–904) published November 22, 2000, and other applicable authorities. DOE will ensure that all of the rights and protections afforded to the debtor under 31 U.S.C. 3711(e) have been fulfilled. Additional guidance is contained in Treasury's ''Guide to the Federal Credit Bureau Program,'' revised October 2001.

(b) As described in § 1015.201(e), under the DCIA (31 U.S.C. 3711(g)), DOE is required to transfer all debts over 180 days delinquent to Treasury for purposes of debt collection (*i.e.*, cross-servicing). As part of its regular debt collection procedures, Treasury will report debts it is collecting to the appropriate designated credit reporting agencies on behalf of DOE. A debt not transferred to Treasury for purposes of debt collection, however, may be subject to the DCIA requirement to report all non-tax delinquent consumer debts to credit reporting agencies.

§ 1015.205 Credit reports.

(a) In order to aid DOE in making appropriate determinations as to the collection and compromise of claims; the collection of interest, penalties, and administrative costs; and the likelihood of collecting the claim, DOE may institute a credit investigation of the debtor at any time following receipt of knowledge of the claim.

(b) As described in § 1015.201(e), under the DCIA (31 U.S.C. 3711(g)), DOE is required to transfer all debts over 180 days delinquent to Treasury for purposes of debt collection (*i.e.*, cross-servicing). As part of its regular debt collection procedures, Treasury may also institute a credit investigation of the debtor on behalf of DOE.

§ 1015.206 Contracting with private collection contractors and with entities that locate and recover unclaimed assets.

(a) DOE may contract with private collection contractors in accordance with 31 U.S.C. 3718(d), the DCIA, the revised Federal Claims Collection Standards (31 CFR parts 900–904) published November 22, 2000, and other applicable authorities.

(b) As described in § 1015.201(e), under the DCIA, DOE is required to transfer all debts over 180 days delinquent to Treasury for purposes of debt collection (*i.e.*, cross-servicing) under 31 U.S.C. 3711(g). As part of its regular debt collection procedures, Treasury may refer delinquent debts to private collection contractors on behalf of DOE.

(c) DOE may enter into contracts for locating and recovering assets of the United States, such as unclaimed assets. DOE must establish procedures acceptable to Treasury before entering into contracts to recover assets of the United States held by a state government or a financial institution.

(d) DOE may enter into contracts for debtor asset and income search reports. In accordance with 31 U.S.C. 3718(d), such contracts may provide that the fee a contractor charges DOE for such services may be payable from the amounts recovered, unless otherwise prohibited by statute.

§ 1015.207 Suspension or revocation of eligibility for loans and loan guaranties, licenses, permits, or privileges.

(a) Unless waived by the Secretary of DOE or his designee, DOE may not extend financial assistance in the form of a loan, loan guarantee, or loan insurance to any person who DOE knows to be delinquent on a non-tax debt owed to a Federal agency. This prohibition does not apply to disaster loans. The authority to waive the application of this section may be delegated to the Chief Financial Officer and redelegated only to the Deputy Chief Financial Officer of DOE. DOE may extend credit after the delinquency has been resolved. See 31 CFR 285.13 (Barring Delinquent Debtors From Obtaining Federal Loans or Loan Insurance or Guarantees).

(b) In non-bankruptcy cases, DOE offices seeking the collection of statutory penalties, forfeitures, or other types of claims should consider the suspension or revocation of licenses, permits, or other privileges for any inexcusable or willful failure of a debtor to pay such a debt in accordance with

DOE's regulations or governing procedures. The debtor should be advised in DOE's written demand for payment of DOE's ability to suspend or revoke licenses, permits, or privileges. Any DOE office making, guaranteeing, insuring, acquiring, or participating in loans should consider suspending or disqualifying any lender, contractor, or broker from doing further business with DOE or engaging in programs sponsored by DOE if such lender, contractor, or broker fails to pay its debts to the Government within a reasonable time or if such lender, contractor, or broker has been suspended, debarred, or disqualified from participation in a program or activity by another Federal agency. The failure of any surety to honor its obligations in accordance with 31 U.S.C. 9305 should be reported to Treasury. Treasury will forward to all interested agencies notification that a surety's certificate of authority to do business with the Government has been revoked by Treasury.

(c) The suspension or revocation of licenses, permits, or privileges also should extend to Federal programs or activities that are administered by the states on behalf of the Federal Government, to the extent that they affect the Federal Government's ability to collect money or funds owed by debtors. Therefore, states that manage Federal activities, pursuant to approval from DOE, should ensure that appropriate steps are taken to safeguard against issuing licenses, permits, or privileges to debtors who fail to pay their debts to the Federal Government.

(d) In bankruptcy cases, before advising the debtor of DOE's intention to suspend or revoke licenses, permits, or privileges, DOE will seek legal advice from counsel concerning the impact of the Bankruptcy Code, particularly 11 U.S.C. 362 and 525, which may restrict such action.

§ 1015.208 Administrative wage garnishment.

(a) DOE may use administrative wage garnishment to collect money from a debtor's disposable pay to satisfy delinquent debt in accordance with section 31001(o) of the DCIA, codified at 31 U.S.C. 3720D. Treasury has issued regulations implementing the administrative wage garnishment provisions contained in the DCIA, at 31 CFR 285.11. DOE has adopted these regulations in their entirety.

(b) As described in § 1015.201(e) of this part, under the DCIA (31 U.S.C. 3711(g)), DOE is required to transfer all debts over 180 days delinquent to Treasury for purposes of debt collection (*i.e.*, cross-servicing). As part of its regular debt collection procedures, Treasury may use administrative wage garnishment on behalf of DOE.

§ 1015.209 Tax refund offset.

(a) DOE may authorize the Internal Revenue Service (IRS) to offset a tax refund to satisfy delinquent debt in accordance with 31 U.S.C. 3720A, Reduction of Tax Refund by Amount of Debt. Treasury has issued regulations implementing the tax refund offset as part of Treasury's mandatory centralized offset at 31 CFR 285.2, Offset of Tax Refund to Collect Past-Due, Legally Enforceable Non-tax Debt. DOE has adopted 31 U.S.C. 3720A and 31 CFR 285.2 in their entirety. The due process requirements of 31 U.S.C. 3720A are contained in §§ 1015.203(b)(4), and 1015.203(e) of this part.

(b) As described in § 1015.201(e) of this part, under the DCIA (31 U.S.C. 3711(g)), DOE is required to transfer all debts over 180 days delinquent to Treasury for purposes of debt collection (*i.e.*, cross-servicing). As part of its regular debt collection procedures, Treasury may use tax refund offset on behalf of DOE.

§ 1015.210 Liquidation of collateral.

(a) DOE may liquidate security or collateral through the exercise of a power of sale in the security instrument or a nonjudicial foreclosure, and apply the proceeds to the applicable debt(s), if the debtor fails to pay the debt(s) within a reasonable time after demand and if such action is in the best interest of the United States. Collection from other sources, including liquidation of security or collateral, is not a prerequisite to requiring payment by a surety, insurer, or guarantor unless such action is expressly required by statute or contract.

(b) When DOE learns that a bankruptcy petition has been filed with respect to a debtor, DOE will seek legal advice from counsel concerning the impact of the Bankruptcy Code, including, but not limited to, 11 U.S.C. 362, to determine the applicability of the automatic stay and the procedures for obtaining relief from such stay prior to proceeding under paragraph (a) of this section.

§ 1015.211 Collection in installments.

(a) Whenever feasible, DOE shall collect the total amount of a debt in one lump sum. If a debtor is financially unable to pay a debt in one lump sum, DOE may accept payment in regular installments. DOE will obtain a current financial statement showing the debtor's assets, liabilities, income, and expenses from debtors who represent that they are unable to pay in one lump sum, and independently verify such representations whenever possible. DOE may also obtain credit reports or other financial information to assess installment requests. DOE may use its own financial information form or a DOJ form, such as the Financial Statement of Debtor (OBD–500) (see § 1015.302(g) of this part). When DOE agrees to accept payments in regular installments, it will obtain a legally enforceable, written agreement from the debtor that specifies all of the terms of the arrangement and that contains a provision accelerating the debt in the event of default.

(b) The size and frequency of installment payments should bear a reasonable relation to the size of the debt and the debtor's ability to pay. If possible, the installment payments should be sufficient in size and frequency to liquidate the debt in three years or less.

(c) Security for deferred payments should be obtained in appropriate cases. DOE may accept installment payments notwithstanding the refusal of the debtor to execute a written agreement or to give security, at DOE's option.

§ 1015.212 Interest, penalties and administrative costs.

(a) Except as provided in paragraphs (g), (h), and (i) of this section, DOE shall charge interest, penalties and administrative costs on debts owed to the United States pursuant to 31 U.S.C. 3717. DOE shall mail or hand-deliver a written notice to the debtor, at the debtor's most recent address available to DOE, explaining DOE's requirements concerning these charges except where these requirements are included in a contractual or repayment agreement. These charges shall continue to accrue until the debt is paid in full or otherwise resolved through compromise, termination, or waiver of the charges.

(b) DOE shall charge interest on debts owed the United States as follows:

(1) Interest shall accrue from the date of delinquency, or as otherwise provided by law.

(2) Unless otherwise established in a contract, repayment agreement, or by statute, the rate of interest charged shall be the rate established annually by Treasury in accordance with 31 U.S.C. 3717. Pursuant to 31 U.S.C 3717, DOE may charge a higher rate of interest if it reasonably determines that a higher rate is necessary to protect the rights of the United States. DOE will document the reason(s) for its determination that the higher rate is necessary.

(3) The rate of interest, as initially charged, shall remain fixed for the duration of the indebtedness. When a debtor defaults on a repayment agreement and seeks to enter into a new agreement, DOE may require payment of interest at a new rate that reflects the current value of funds to the Treasury at the time the new agreement is executed. Interest shall not be compounded, that is, interest shall not be charged on interest, penalties, or administrative costs required by this section. If, however, a debtor defaults on a previous repayment agreement, charges that accrued but were not collected under the defaulted agreement shall be added to the principal under the new repayment agreement.

(c) DOE shall assess administrative costs incurred for processing and handling delinquent debts. The calculation of administrative costs should be based on actual costs incurred or upon estimated costs as determined by the assessing office.

(d) Unless otherwise established in a contract, repayment agreement, or by statute, DOE shall charge a penalty, pursuant to 31 U.S.C. 3717(e)(2), not to exceed six percent a year on the amount due on a debt that is delinquent for more than 90 days. This charge shall accrue from the date of delinquency.

(e) DOE may increase an ''administrative debt'' by the cost of living adjustment in lieu of charging interest and penalties under this section. ''Administrative debt'' includes, but is not limited to, a debt based on fines, penalties, and overpayments, but does not include a debt based on the extension of Government credit, such as those arising from loans and loan guaranties. The cost of living adjustment is the percentage by which the Consumer Price Index for the month of June of the calendar year preceding the adjustment exceeds the Consumer Price Index for the month of June of the calendar year in which the debt was determined or last adjusted. Increases to administrative debts shall be computed annually. DOE will use this alternative only when there is a legitimate reason to do so, such as when calculating interest and penalties on a debt would be extremely difficult because of the age of the debt.

(f) When a debt is paid in partial or installment payments, amounts received by DOE shall be applied first to outstanding penalties, second to administrative costs, third to interest, and last to principal.

(g) DOE shall waive the collection of interest and administrative costs imposed pursuant to this section on the portion of the debt that is paid within 30 days after the date on which interest began to accrue. DOE may extend this 30-day period on a case-by-case basis. In addition, DOE may waive interest, penalties, and administrative costs charged under this section, in whole or in part, without regard to the amount of the debt, either under the criteria set forth in these standards for the compromise of debts, or if DOE determines that collection of these charges is against equity and good conscience or is not in the best interest of the United States.

(h) When a debtor requests a waiver or review of the debt, DOE will continue to accrue interest, penalties, and administrative costs during the period collection activity is suspended. Upon completion of DOE's review, interest, penalties, and administrative costs related to the portion of the debt found to be without merit will be waived.

(i) DOE is authorized to impose interest and related charges on debts not subject to 31 U.S.C. 3717, in accordance with the common law.

§ 1015.213 Analysis of costs.

DOE will prepare periodic comparisons of costs incurred and amounts collected. Data on costs and corresponding recovery rates for debts of different types and in various dollar ranges will be used to compare the cost effectiveness of alternative collection techniques, establish guidelines with respect to points at which costs of further collection efforts are likely to exceed recoveries, assist in evaluating offers in compromise, and establish minimum debt amounts below which collection efforts need not be taken.

§ 1015.214 Use and disclosure of mailing addresses.

(a) When attempting to locate a debtor in order to collect or compromise a debt under §§ 1015.100–105 of this part or other authority, DOE may send a request to Treasury to obtain a debtor's mailing address from the records of the IRS.

(b) DOE may use mailing addresses obtained under paragraph (a) of this section to enforce collection of a delinquent debt and may disclose such mailing addresses to other agencies and to collection agencies for collection purposes.

§ 1015.215 Federal salary offset.

(a) DOE may authorize Treasury to offset a Federal salary to satisfy delinquent debt in accordance with 5 U.S.C. 5514, Installment Deduction for Indebtedness to the United States; 5 CFR 550.1101 through 550.1108, Collection by Offset from Indebted Government Employees; 31 CFR parts 900–904, the revised Federal Claims Collection Standards; and 31 CFR 285.7, Salary Offset. DOE shall ensure that all of the rights

and protections afforded to the debtor under 5 U.S.C. 5514 and 31 CFR 901.3 have been fulfilled. Claims due from Federal employees will be collected in accordance with DOE Order 2200.2B, Collection from Current and Former Employees for Indebtedness to the United States.

(b) As described in § 1015.201(e), under the DCIA (31 U.S.C. 3711(g)), DOE is required to refer all debts over 180 days delinquent to Treasury for purposes of debt collection (*i.e.*, cross-servicing). As part of its regular debt collection procedures, Treasury may use Federal salary offset on behalf of DOE.

§ 1015.216 Exemptions.

(a) The preceding sections of this part, to the extent they reflect remedies or procedures prescribed by the Debt Collection Act of 1982 and the DCIA, such as administrative offset, use of credit bureaus, contracting for collection agencies, and interest and related charges, do not apply to debts arising under, or payments made under, the Internal Revenue Code of 1986, as amended (26 U.S.C. 1, *et seq.*); the Social Security Act (42 U.S.C. 301, *et seq.*) except to the extent provided under 42 U.S.C. 404 and 31 U.S.C. 3716(c); or the tariff laws of the United States. These remedies and procedures, however, may be authorized with respect to debts that are exempt from the Debt Collection Act of 1982 and the DCIA, to the extent that they are authorized under some other statute or the common law.

(b) This section should not be construed as prohibiting the use of these authorities or requirements when collecting debts owed by persons employed by agencies administering the laws cited in paragraph (a) of this section unless the debt arose under those laws.

Subpart C—Standards for the Compromise of Claims

§ 1015.300 Scope.

This subpart sets forth the standards for the compromise of claims under this part. This subpart corresponds to 31 CFR part 902 of the Treasury Federal Claims Collection Standards.

§ 1015.301 Scope and application.

(a) The standards set forth in this subpart apply to the compromise of debts pursuant to 31 U.S.C. 3711. DOE's Chief Financial Officer or designee or Heads of Field Elements or designees in field locations may exercise such compromise authority for debts arising out of activities of, or referred or transferred for collection services to, DOE when the amount of the debt then due, exclusive of interest, penalties, and administrative costs, does not exceed $100,000 or any higher amount authorized by the Attorney General.

(b) Unless otherwise provided by law, when the principal balance of a debt, exclusive of interest, penalties, and administrative costs, exceeds $100,000 or any higher amount authorized by the Attorney General, the authority to accept the compromise rests with the DOJ. DOE will evaluate the compromise offer, using the factors set forth in this part. If an offer to compromise any debt in excess of $100,000 is acceptable to DOE, DOE shall refer the debt to the Civil Division or other appropriate litigating division in the DOJ using a Claims Collection Litigation Report (CCLR). DOE may obtain the CCLR from the DOJ's National Central Intake Facility. The referral shall include appropriate financial information and a recommendation for the acceptance of the compromise offer. DOJ approval is not required if DOE rejects a compromise offer.

§ 1015.302 Bases for compromise.

(a) DOE may compromise a debt if the Government cannot collect the full amount because:

(1) The debtor is unable to pay the full amount in a reasonable time, as verified through credit reports or other financial information;

(2) The Government is unable to collect the debt in full within a reasonable time by enforced collection proceedings;

(3) The cost of collecting the debt does not justify the enforced collection of the full amount; or

(4) There is significant doubt concerning the Government's ability to prove its case in court.

(b) In determining the debtor's inability to pay, DOE should consider relevant factors such as the following:

(1) Age and health of the debtor;

(2) Present and potential income;

(3) Inheritance prospects;

(4) The possibility that assets have been concealed or improperly transferred by the debtor; and

(5) The availability of assets or income that may be realized by enforced collection proceedings.

(c) DOE will verify the debtor's claim of inability to pay by using a credit report and other financial information as provided in paragraph (g) of this section. DOE will consider the applicable exemptions available to the debtor under state and Federal law in determining the Government's ability to enforce collection. DOE may also consider uncertainty as to the price that collateral or other property will bring at a forced sale in determining the Government's ability to enforce collection. A compromise effected under this section should be for an amount that bears a reasonable relation to the amount that can be recovered by enforced collection procedures, with regard to the exemptions available to the debtor and the time that collection will take.

(d) If there is significant doubt concerning the Government's ability to prove its case in court for the full amount claimed, either because of the legal issues involved or because of a bona fide dispute as to the facts, then the amount accepted in compromise of such cases should fairly reflect the probabilities of successful prosecution to judgment, with due regard given to the availability of witnesses and other evidentiary support for the Government's claim. In determining the litigative risks involved, DOE will consider the probable amount of court costs and attorney fees pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412, that may be imposed against the Government if it is unsuccessful in litigation.

(e) DOE may compromise a debt if the cost of collecting the debt does not justify the enforced collection of the full amount. The amount accepted in compromise in such cases may reflect an appropriate discount for the administrative and litigative costs of collection, with consideration given to the time it will take to effect collection. Collection costs may be a substantial factor in the settlement of small debts. In determining whether the cost of collecting justifies enforced collection of the full amount, DOE should consider whether continued collection of the debt, regardless of cost, is necessary to further an enforcement principle, such as the Government's willingness to pursue aggressively defaulting and uncooperative debtors.

(f) DOE generally will not accept compromises payable in installments. This is not an advantageous form of compromise in terms of time and administrative expense. If, however, payment of a compromise in installments is necessary, DOE will obtain a legally enforceable, written agreement providing that, in the event of default, the full original principal balance of the debt prior to compromise, less sums paid thereon, is reinstated. Whenever possible, DOE also will obtain security for repayment in the manner set forth in subpart B of this part.

(g) To assess the merits of a compromise offer based in whole or in part on the debtor's inability to pay the full amount of a debt within a reasonable time, DOE will, if feasible, obtain a current financial statement from the debtor, executed under penalty of perjury, showing the debtor's assets, liabilities, income, and expenses. DOE also may obtain credit reports or other financial information to assess compromise offers. DOE may use its own financial information form or may request suitable forms from the DOJ or the local United States Attorney's Office.

§ 1015.303 Enforcement policy.

Pursuant to this part, DOE may compromise statutory penalties, forfeitures, or claims established as an aid to enforcement and to compel compliance, if DOE's enforcement policy in terms of deterrence and securing compliance, present and future, will be adequately served by DOE's acceptance of the sum to be agreed upon.

§ 1015.304 Joint and several liability.

(a) When two or more debtors are jointly and severally liable, DOE will pursue collection activity against all debtors, as appropriate. DOE will not attempt to allocate the burden of payment between the debtors, but will proceed to liquidate the indebtedness as quickly as possible.

(b) DOE will seek to ensure that a compromise agreement with one debtor does not release DOE's claim against the remaining debtors. The amount of a compromise with one debtor shall not be considered a precedent or binding in determining the amount that will be required from other debtors jointly and severally liable on the claim.

§ 1015.305 Further review of compromise offers.

If DOE is uncertain whether to accept a firm, written, substantive compromise offer on a debt that is within DOE's delegated compromise authority, it may refer the offer to the Civil Division or other appropriate litigating division in the DOJ, using a CCLR accompanied by supporting data and particulars concerning the debt. The DOJ may act upon such an offer or return it to DOE with instructions or advice.

§ 1015.306 Consideration of tax consequences to the Government.

In negotiating a compromise, DOE will consider the tax consequences to the Government. In particular, DOE will consider requiring a waiver of tax-loss-carry-forward and tax-loss-carry-back rights of the debtor. For information on discharge of indebtedness reporting requirements see § 1015.405 of this part.

§ 1015.307 Mutual releases of the debtor and the Government.

In all appropriate instances, a compromise that is accepted by DOE will be implemented by means of a mutual release, in which the debtor is released from further non-tax liability on the compromised debt in consideration of payment in full of the compromise amount and the Government and its officials, past and present, are released and discharged from any and all claims and causes of action arising from the same transaction that the debtor may have. In the event a mutual release is not executed when a debt is compromised, unless prohibited by law, the debtor is still deemed to have waived any and all claims and causes of action against the Government and its officials related to the transaction giving rise to the compromised debt.

Subpart D—Standards for Suspending or Terminating Collection Activity

§ 1015.400 Scope.

The subpart sets forth the standards for terminating collection activity. This subpart corresponds to 31 CFR part 903 of the Treasury Federal Claims Collection Standards.

§ 1015.401 Scope and application.

(a) The standards set forth in this subpart apply to the suspension or termination of collection activity pursuant to 31 U.S.C. 3711 on debts that do not exceed $100,000, or such other amount as the Attorney General may direct, exclusive of interest, penalties, and administrative costs, after deducting the amount of partial payments or collections, if any. Prior to referring a debt to the DOJ for litigation, DOE may suspend or terminate collection under this part with respect to debts arising out of activities of, or referred to, DOE.

(b) If, after deducting the amount of any partial payments or collections, the principal amount of a debt exceeds $100,000, or such other amount as the Attorney General may direct, exclusive of interest, penalties, and administrative costs, the authority to suspend or terminate rests solely with the DOJ. If DOE believes that suspension or termination of any debt in excess of $100,000 may be appropriate, DOE shall refer the debt to the Civil Division or other appropriate litigating division in the DOJ, using the CCLR. The referral should specify the reasons for DOE's recommendation. If, prior to referral to the DOJ, DOE determines that a debt is plainly erroneous or clearly without legal merit, DOE may terminate collection activity regardless of the amount involved without obtaining DOJ concurrence.

§ 1015.402 Suspension of collection activity.

(a) DOE may suspend collection activity on a debt when:

(1) DOE cannot locate the debtor;

(2) The debtor's financial condition is expected to improve; or

(3) The debtor has requested a waiver or review of the debt.

(b) Based on the current financial condition of the debtor, DOE may suspend collection activity on a debt when the debtor's future prospects justify retention of the debt for periodic review and collection activity and:

(1) The applicable statute of limitations has not expired; or

(2) Future collection can be effected by administrative offset, notwithstanding the expiration of the applicable statute of limitations for litigation of claims, with due regard to the 10-year limitation for administrative offset prescribed by 31 U.S.C. 3716(e)(1); or

(3) The debtor agrees to pay interest on the amount of the debt on which collection will be suspended, and such suspension is likely to enhance the debtor's ability to pay the full amount of the principal of the debt with interest at a later date.

(c)(1) DOE shall suspend collection activity during the time required for consideration of the debtor's request for waiver or administrative review of the debt if the statute under which the request is sought prohibits DOE from collecting the debt during that time. As indicated in § 1015.212(h), DOE will continue to accrue interest, penalties, and administrative costs during the period collection activity is suspended.

(2) If the statute under which the request is sought does not prohibit collection activity pending consideration of the request, DOE may use discretion, on a case-by-case basis, to suspend collection. Further, DOE ordinarily will suspend collection action upon a request for waiver or review if DOE is prohibited by statute or regulation from issuing a refund of amounts collected prior to DOE's consideration of the debtor's request. However, DOE will not suspend collection when DOE determines that the request for waiver or review is frivolous or was made primarily to delay collection.

(d) When DOE learns that a bankruptcy petition has been filed with respect to a debtor, in most cases the collection activity on a debt must be suspended, pursuant to the provisions of 11 U.S.C. 362, 1201, and 1301, unless DOE can clearly establish that the automatic stay has been lifted or is no longer in effect. DOE will seek legal advice immediately from counsel and, if legally permitted, take the necessary legal steps to ensure that no funds or money is paid by DOE to the debtor until relief from the automatic stay is obtained.

§ 1015.403 Termination of collection activity.

(a) DOE may terminate collection activity when:

(1) DOE is unable to collect any substantial amount through its own efforts or through the efforts of others;

(2) DOE is unable to locate the debtor;

(3) Costs of collection are anticipated to exceed the amount recoverable;

(4) The debt is legally without merit, or enforcement of the debt is barred by any applicable statute of limitations;

(5) The debt cannot be substantiated; or

(6) The debt against the debtor has been discharged in bankruptcy.

(b) Before terminating collection activity, DOE will have pursued all appropriate means of collection and determined, based upon the results of the collection activity, that the debt is uncollectible. Termination of collection activity ceases active collection of the debt. The termination of collection activity does not preclude DOE from retaining a record of the account for purposes of:

(1) Selling the debt, if Treasury determines that such sale is in the best interests of the United States;

(2) Pursuing collection at a subsequent date in the event there is a change in the debtor's status or a new collection tool becomes available;

(3) Offsetting against future income or assets not available at the time of termination of collection activity; or

(4) Screening future applicants for prior indebtedness.

(c) Generally, DOE shall terminate collection activity on a debt that has

been discharged in bankruptcy, regardless of the amount. DOE may continue collection activity, however, subject to the provisions of the Bankruptcy Code, for any payments provided under a plan of reorganization. Offset and recoupment rights may survive the discharge of the debtor in bankruptcy and, under some circumstances, claims also may survive the discharge. For example, if DOE is a known creditor of a debtor, its claims may survive a discharge if DOE did not receive formal notice of the proceedings. DOE will seek legal advice from counsel if it believes it has claims or offsets that may survive the discharge of a debtor.

§ 1015.404 Exception to termination.

When a significant enforcement policy is involved, or recovery of a judgment is a prerequisite to the imposition of administrative sanctions, DOE may refer debts for litigation even though termination of collection activity may otherwise be appropriate.

§ 1015.405 Discharge of indebtedness; reporting requirements.

(a) Before discharging a delinquent debt (also referred to as a close out of the debt), DOE shall take all appropriate steps to collect the debt in accordance with 31 U.S.C. 3711(g), including, as applicable, administrative offset, tax refund offset, Federal salary offset, referral to Treasury, Treasury-designated debt collection centers or private collection contractors, credit bureau reporting, wage garnishment, litigation, and foreclosure. Discharge of indebtedness is distinct from termination or suspension of collection activity under § 1015.400 of this part and is governed by the Internal Revenue Code. When collection action on a debt is suspended or terminated, the debt remains delinquent and further collection action may be pursued at a later date in accordance with the standards set forth in this subpart. When DOE discharges a debt in full or in part, further collection action is prohibited. Therefore, DOE will make the determination that collection action is no longer warranted before discharging a debt. Before discharging a debt, DOE must terminate debt collection action.

(b) 31 U.S.C. 3711(i) requires DOE to sell a delinquent non-tax debt upon termination of collection action if Treasury determines such a sale is in the best interests of the United States. Since the discharge of a debt precludes any further collection action (including the sale of a delinquent debt), DOE may not discharge a debt until the requirements of 31 U.S.C. 3711(i) have been met.

(c) Upon discharge of an indebtedness, DOE must report the discharge to the IRS in accordance with the requirements of 26 U.S.C. 6050P and 26 CFR 1.6050P–1. DOE may request Treasury or Treasury-designated debt collection centers to file such a discharge report to the IRS on DOE's behalf.

(d) When discharging a debt, DOE must request that litigation counsel release any liens of record securing the debt.

Subpart E—Referrals to the Department of Justice

§ 1015.500 Scope.

This subpart sets forth the standards for referrals to the Department of Justice. This subpart corresponds to 31 CFR part 904 of the Treasury Federal Claims Collection Standards.

§ 1015.501 Referrals to the Department of Justice and the Department of the Treasury's Cross-Servicing Program.

(a) DOE may authorize Treasury to refer a delinquent debt to the DOJ for litigation in accordance with 31 U.S.C. 3711(g), the DCIA, the revised Federal Claims Collection Standards (31 CFR parts 900–904), and other applicable authorities. DOE shall ensure that all of the rights and protections afforded to the debtor under 31 U.S.C. 3711(e) have been fulfilled.

(b) As described in § 1015.201(e), under the DCIA (31 U.S.C. 3711(g)), DOE is required to transfer all debts over 180 days delinquent to Treasury for purposes of debt collection (*i.e.*, cross-servicing). As part of its regular debt collection procedures, Treasury will refer debts to the DOJ for litigation on behalf of DOE.

§ 1015.502 Prompt referral.

(a) If a debt is not referred to the DOJ through Treasury's cross-servicing program, DOE shall promptly refer to the DOJ for litigation debts on which aggressive collection activity has been taken in accordance with § 1015.200 of this part and that cannot be compromised, or on which collection activity cannot be suspended or terminated, in accordance with §§ 1015.300 and 1015.400 of this part. DOE may refer those debts arising out of activities of DOE. Debts for which the principal amount is over $1,000,000, or such other amount as the Attorney General may direct, exclusive of interest and penalties, shall be referred to the Civil Division or other division responsible for litigating such debts at the DOJ, Washington, DC. Debts for which the principal amount is $1,000,000, or less, or such other amount as the Attorney General may direct, exclusive of interest or penalties, shall be referred to the DOJ's Nationwide Central Intake Facility as required by the CCLR instructions. Claims will be referred as early as possible, consistent with aggressive agency collection activity and the observance of the standards contained in the Federal Claims Collection Standards (31 CFR parts 900–904), and, in any event, well within the period for initiating timely lawsuits against the debtors. DOE shall make every effort to refer delinquent debts to the DOJ for litigation within one year of the date such debts last became delinquent. In the case of guaranteed or insured loans, DOE will make every effort to refer these delinquent debts to the DOJ for litigation within one year from the date the loan was presented to DOE for payment or re-insurance.

(b) The DOJ has exclusive jurisdiction over the debts referred to it pursuant to this section. DOE shall refrain from having any contact with the debtor and shall direct all debtor inquiries concerning the claim to the DOJ. DOE shall notify the DOJ immediately of any payments credited by DOE to the debtor's account after referral of a debt or claim under this section. The DOJ shall notify DOE, in a timely manner, of any payments it receives from the debtor.

§ 1015.503 Claims Collection Litigation Report.

(a) Unless excepted by the DOJ, DOE shall complete the CCLR (see § 1015.301 of this part), accompanied by a signed Certificate of Indebtedness, to refer all administratively uncollectible claims to the DOJ for litigation. DOE shall complete all of the sections of the CCLR appropriate to each claim as required by the CCLR instructions and furnish such other information as may be required in specific cases.

(b) DOE shall indicate clearly on the CCLR the actions it wishes the DOJ to take with respect to the referred claim. The CCLR permits DOE to indicate specifically any of a number of litigative activities which the DOJ may pursue, including enforced collection, judgment lien only, renew judgment lien only, renew judgment lien and enforce collection, program enforcement, foreclosure only, and foreclosure and deficiency judgment.

(c) DOE also shall use the CCLR to refer claims to the DOJ to obtain the DOJ's approval of any proposals to compromise the claims or to suspend or terminate DOE collection activity.

§ 1015.504 Preservation of evidence.

DOE will take care to preserve all files and records that may be needed by the DOJ to prove its claims in court. DOE ordinarily will include certified copies of the documents that form the basis for the claim in the packages referring its claims to the DOJ for litigation. DOE shall provide originals of such documents immediately upon request by the DOJ.

§ 1015.505 Minimum amount of referrals to the Department of Justice.

(a) DOE shall not refer for litigation claims of less than $2,500, exclusive of interest, penalties, and administrative costs, or such other amount as the Attorney General shall from time to time prescribe. The DOJ promptly shall notify DOE if the Attorney General changes this minimum amount.

(b) DOE shall not refer claims of less than the minimum amount unless:

(1) Litigation to collect such smaller claims is important to ensure compliance with DOE's policies or programs;

(2) The claim is being referred solely for the purpose of securing a judgment against the debtor, which will be filed as a lien against the debtor's property pursuant to 28 U.S.C. 3201 and returned to DOE for enforcement; or

(3) The debtor has the clear ability to pay the claim and the Government effectively can enforce payment, with due regard for the exemptions available to the debtor under state and Federal law and the judicial remedies available to the Government.

(4) DOE will consult with the Financial Litigation Staff of the Executive Office for United States Attorneys in the DOJ prior to referring claims valued at less than the minimum amount.

PART 1016—SAFEGUARDING OF RESTRICTED DATA

GENERAL PROVISIONS

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AUTHORITY: Sec. 161i of the Atomic Energy Act of 1954, 68 Stat. 948 (42 U.S.C. 2201).

SOURCE: 48 FR 36432, Aug. 10, 1983, unless otherwise noted.

GENERAL PROVISIONS

§ 1016.1 Purpose.

The regulations in this part establish requirements for the safeguarding of Secret and Confidential Restricted Data received or developed under an access permit. This part does not apply to Top Secret information since no such information may be forwarded to an access permittee within the scope of this regulation.

§ 1016.2 Scope.

The regulations in this part apply to all persons who may require access to Retricted Data used, processed, stored, reproduced, transmitted, or handled in connection with an access permit.

§ 1016.3 Definitions.

(a) *Access authorization or security clearance.* An administrative determination by the DOE that an individual who is either a DOE employee, applicant for employment, consultant, assignee, other Federal department or agency employee (and other persons who may be designated by the Secretary of Energy), or a DOE contractor or subcontractor employee and an access permittee is eligible for access to Restricted Data. Access authorizations or security clearances granted by DOE are designated as ''Q,'' ''Q(X),'' ''L,'' ''L(X),'' ''Top Secret,'' or ''Secret.'' For the purpose of this chapter only ''Q,'' ''Q(X),'' ''L,'' and ''L(X)'' access authorizations or clearances will be defined.

(1) ''Q'' access authorizations or clearances are based upon full field investigations conducted by the Federal Bureau of Investigation, Office of Personnel Management, or another Government agency which conducts personnel security investigations. They permit an individual to have access, on a ''need to know'' basis, to Top Secret, Secret, and Confidential Restricted Data, Formerly Restricted Data, National Security Information, or special nuclear material in Category I or II quantities as required in the performance of duties.

(2) ''Q(X)'' access authorizations or clearances are based upon the same full field investigations as described in § 1016.3(a)(1), above. When ''Q'' access authorizations or clearances are granted to access permittees they are identified as ''Q(X)'' access authorizations or clearances and authorize access only to the type of Secret Restricted Data as specified in the permit and consistent with appendix A, 10 CFR part 725, ''Categories of Restricted Data Available.''

(3) ''L'' access authorizations or clearances are based upon National Agency Checks and Inquiries (NACI) for Federal employees, or National Agency Checks (NAC) for non-Federal employees, conducted by the Office of Personnel Management. They permit an individual to have access, on a ''need to know'' basis, to Confidential Restricted Data, Secret and Confidential Formerly Restricted Data, or Secret and Confidential National Security Information, required in the performance of duties, provided such information is not designated ''CRYPTO'' (classified cryptographic information), other classified communications security (''COMSEC'') information, or intelligence information.

(4) ''L(X)'' access authorizations or clearances are based upon the same National Agency Checks as described in paragraph (a)(3), of this section. When ''L'' access authorizations or clearances are granted to access permittees, they are identified as ''L(X)'' access authorizations or clearances and authorize access only to the type of Confidential Retricted Data as specified in the permit and consistent with appendix A, 10 CFR part 725, ''Categories of Restricted Data Available.''

(b) *Act*. The Atomic Energy Act of 1954 (68 Stat. 919) as amended.

(c) *Authorized classifier*. An individual authorized in writing by appropriate DOE authority to classify, declassify, or downgrade the classification of information, work, projects, documents, and materials.

(d) *Classified mail address*. A mail address established for each access permittee approved by the DOE to which all Restricted Data for the permittee is to be sent.

(e) *Classified matter*. Documents and material containing classified information.

(f) *Combination lock*. A built-in combination lock on a security container which is of tempered steel alloy hard plate, at least ¼″ in thickness and Rockwell hardness of C–63 to C–65, of sufficient size and so located as to sufficiently impede access to the locking mechanism by drilling of the lock or container.

(g) *DOE*. The United States Department of Energy or its duly authorized representatives.

(h) *Document*. Any piece of recorded information regardless of its physical form or characteristics.

(i) *Formerly Restricted Data*. Classified information jointly determined by the DOE and the Department of Defense to be related primarily to the military utilization of atomic weapons and removed by the DOE from the Restricted Data category pursuant to section 142(d) of the Atomic Energy Act of 1954, as amended.

(j) *Infraction*. An act or omission involving failure to comply with DOE safeguards and security orders or directives, and may include a violation of law.

(k) *Intrusion alarm*. A tamper-indicating electrical, electro-mechanical, electro-optical, electronic or similar device which will detect unauthorized intrusion by an individual into a building or security area, and alert protective personnel by means of actuated visible and audible signals.

(l) *Material*. A chemical substance without regard to form; fabricated or processed item; or assembly, machinery, or equipment.

(m) *Matter*. Documents or material.

(n) *National Security*. The national defense and foreign relations of the United States.

(o) *National Security Information*. Information that has been determined pursuant to Executive Order 12958, as amended ''Classified National Security Information'' and Executive Order 13292 ''Further Amendment to Executive Order 12958, as Amended, Classified National Security Information'' or any predecessor order to require protection against unauthorized disclosure and that is so designated.

(p) ''*Need to know*.'' A determination by persons having responsibility for classified information or matter, that a proposed recipient's access to such classified information or matter is necessary in the performance of official, contractual, or access permit duties of employment under cognizance of the DOE.

(q) *Permittee*. The holder of an Access Permit issued pursuant to the regulations set forth in 10 CFR part 725, ''Permits For Access to Restricted Data.''

(r) *Person*. Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than DOE, any State or any political subdivision of, or any political entity within a State, or other entity; and any legal successor, representative, agency, or agency of the foregoing.

(s) *Protective personnel*. Guards or watchmen or other persons designated responsibility for the protection of classified matter.

(t) *Restricted Data*. All data concerning design, manufacture, or utilization of atomic weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142 of the Act.

(u) *Security area*. A physically defined space containing classified matter and subject to physical protection and personnel access controls.

(v) *Security clearance*. See access authorization.

(w) *Security facility*. Any facility, including an access permittee, which has been approved by the DOE for using, processing, storing, reproducing, transmitting, or handling classified matter.

(x) *Security facility approval*. A determination by the DOE that a facility, including an access permittee, is eligible to use, process, store, reproduce, transmit, or handle classified matter.

(y) *Security Plan*. A written plan by the access permittee, and submitted to the DOE for approval, which outlines the permittee's proposed security procedures and controls for the protection of Restricted Data and which includes a floor plan of the area in which the matter is to be used, processed, stored, reproduced, transmitted, or handled.

(z) *Security survey*. An onsite examination by a DOE representative of all devices, equipment, and procedures employed at a security facility to safeguard classified matter.

[48 FR 36432, Aug. 10, 1983, as amended at 71 FR 68735, Nov. 28, 2006]

§ 1016.4 Communications.

Communications concerning rulemaking, i.e., petition to change part 1016, should be addressed to the Chief Health, Safety and Security Officer, HS–1/Forrestal Building, Office of Health, Safety and Security, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585. All other communications concerning the regulations in this part should be addressed to the cognizant DOE or National Nuclear Security Administration (NNSA) office.

[71 FR 68735, Nov. 28, 2006]

§ 1016.5 Submission of procedures by access permit holder.

No access permit holder shall have access to Restricted Data until he shall have submitted to the DOE a written statement of his procedures for the safeguarding of Restricted Data and for the security education of his employees, and DOE shall have determined and informed the permittee that his procedures for the safeguarding of Restricted Data are in compliance with the regulations in this part and that his procedures for the security education of his employees, who will have access to Restricted Data, are informed

about and understand the regulations in this part.

§ 1016.6 Specific waivers.

DOE may, upon application of any interested party, grant such waivers from the requirements of this part as it determines are authorized by law and will not constitute an undue risk to the common defense and security.

§ 1016.7 Interpretations.

Except as specifically authorized by the Secretary of Energy in writing, no interpretation of the meaning of the regulations in this part by any officer or employee of DOE other than a written interpretation by the General Counsel will be recognized to be binding upon DOE.

PHYSICAL SECURITY

§ 1016.8 Approval for processing access permittees for security facility approval.

(a) An access permittee who has a need to use, process, store, reproduce, transmit, or handle Restricted Data at any location in connection with its permit shall promptly request a DOE security facility approval.

(b) The request shall include the following information: The name and address of the permittee; the extent and scope of the classified activity and the highest classification of Restricted Data to be received; a written statement in the form of a security plan which outlines the permittee's proposed security procedures and controls for the protection of Restricted Data, including a floor plan of the areas(s) in which the classified matter is to be used, processed, stored, reproduced, transmitted, and handled.

(c) The DOE will promptly inform the permittee of the acceptability of the request for further processing and will notify the permittee of its decision in writing.

§ 1016.9 Processing security facility approval.

The following receipt of an acceptable request for security facility approval, the DOE will perform an initial security survey of the permittee's facility to determine that granting a security facility approval would be consistent with the national security. If DOE makes such a determination, security facility approval will be granted. If not, security facility approval will be withheld pending compliance with the security survey recommendations or until a waiver is granted pursuant to § 1016.6 of this part.

§ 1016.10 Grant, denial, or suspension of security facility approval.

Notification of the DOE's grant, denial, or suspension of security facility approval will be furnished the permittee in writing, or orally with written confirmation. This information may also be furnished to representatives of the DOE, DOE contractors, or other Federal agencies having a need to transmit Restricted Data to the permittee.

§ 1016.11 Cancellation of requests for security facility approval.

When a request for security facility approval is to be withdrawn or cancelled, the DOE Operations Office will be notified by the requester immediately by telephone and confirmed in writing so that processing of this approval may be terminated.

§ 1016.12 Termination of security facility approval.

Security facility approval will be terminated when:

(a) There is no longer a need to use, process, store, reproduce, transmit, or handle Restricted Data at the facility; or

(b) The DOE makes a determination that continued security facility approval is not in the interest of national security.

In such cases the permittee will be notified in writing of the determination, and the procedures outlined in § 1016.39 of this part will apply.

§ 1016.21 Protection of Restricted Data in storage.

(a) Persons who possess Restricted Data pursuant to an Access Permit shall store Secret and Confidential documents and material when not in use in accordance with one of the following methods:

(1) In a locked vault, safe, or safe-type steel file cabinet having a 3-position dial-type combination lock; or

(2) In a dual key, bank safety deposit box; or

(3) In a steel file cabinet secured by a steel lock bar and a 3-position dial-type changeable combination padlock; or

(4) In a locked steel file cabinet when located in a security area established under § 1016.23 or when the cabinet or the place in which the cabinet is located is under DOE-approved intrusion alarm protection.

(b) Changes of combination: Each permittee shall change the combination on locks of his safekeeping equipment whenever such equipment is placed in use, whenever an individual knowing the combination no longer requires access to the repository as a result of change in duties or position in the permittee's organization, or termination of employment with the permittee or whenever the combination has been subjected to compromise, and in any event at least once a year. Permittees shall classify records of combinations no lower than the highest classification of the documents and material authorized for storage in the safekeeping equipment concerned.

(c) The lock on safekeeping equipment of the type specified in paragraph (a)(4) of this section shall be replaced immediately whenever a key is lost.

§ 1016.22 Protection while in use.

While in use, documents and material containing Restricted Data shall be under the direct control of an appropriately cleared individual, and the Restricted Data shall be capable of being removed from sight immediately.

§ 1016.23 Establishment of security areas.

(a) When, because of their nature or size, it is impracticable to safeguard documents and material containing Restricted Data in accordance with the provisions of §§ 1016.21 and 1016.22, a security area to protect such documents and material shall be established.

(b) The following controls shall apply to security areas:

(1) Security areas shall be separated from adjacent areas by a physical barrier designed to prevent entrance into such areas, and access to the Restricted Data within the areas, by unauthorized individuals.

(2) During working hours, admittance shall be controlled by an appropriately cleared individual posted at each unlocked entrance.

(3) During nonworking hours, admittance shall be controlled by protective personnel on patrol, with protective personnel posted at unlocked entrances, or by such intrusion alarm system as DOE may approve.

(4) Each individual authorized to enter a security area shall be issued a distinctive badge or pass when the number of employees assigned to the area exceeds thirty.

§ 1016.24 Special handling of classified material.

When the Restricted Data contained in material is not ascertainable by observation or examination at the place where the material is located and when the material is not readily removable because of size, weight, radioactivity, or similar factors, DOE may authorize the permittee to provide such lesser protection than is otherwise required by §§ 1016.21 to 1016.23 inclusive, as DOE determines to be commensurate with the difficulty of removing the material.

§ 1016.25 Protective personnel.

Whenever protective personnel are required by § 1016.23, such protective personnel shall:

(a) Possess a ''Q'' or ''L'' security clearance or access authorization or ''Q(X)'' or ''L(X)'' access authorization if the Restricted Data being protected is classified Confidential, or a ''Q'' security clearance or access authorization or ''Q(X)'' access authorization if the Restricted Data being protected is classified Secret.

(b) Be armed with sidearms of not less than .38 caliber.

CONTROL OF INFORMATION

§ 1016.31 Access to Restricted Data.

(a) Except as DOE may authorize, no person subject to the regulations in this part shall permit any individual to have access to Secret or Confidential

Restricted Data in his possession unless the individual has an appropriate security clearance or access authorization granted by DOE, or has been certified by DOD or NASA through DOE, and;

(1) The individual is authorized by an Access Permit to receive Restricted Data in the categories involved and, in the case of Secret Restricted Data, the permittee determines that such access is required in the course of his duties, or

(2) The individual needs such access in connection with such duties as a DOE employee or DOE contractor employee, or as certified by DOD or NASA.

(b) Inquiries concerning the clearance status of individuals, the scope of Access Permits, or the nature of contracts should be addressed to the cognizant DOE or NNSA office.

[48 FR 36432, Aug. 10, 1983, as amended at 71 FR 68735, Nov. 28, 2006]

§ 1016.32 Classification and preparation of documents.

(a) *Classification*. Restricted Data generated or possessed by an Access Permit holder must be appropriately marked. CG-UF-3, ''Guide to the Unclassified Fields of Research,'' will be furnished each permittee. In the event a permittee originates classified information which falls within the definition of Restricted Data or information which he is not positive is not within that definition and CG-UF-3 does not provide positive classification guidance for such information, he shall designate the information as Confidential, Restricted Data and request classification guidance from the DOE through the Classification Officer at the cognizant DOE or NNSA office, who will refer the request to the Director, Office of Classification, HS–90/Germantown Building, Office of Health, Safety and Security, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–1290 if he does not have authority to provide the guidance.

(b) *Classification consistent with content*. Each document containing Restricted Data shall be classified Secret or Confidential according to its own content.

(c) *Document which custodian believes improperly classified or lacking appropriate classification markings*. If a person receives a document which, in his opinion, is not properly classified, or omits the appropriate classification markings, he shall communicate with the sender and suggest the classification which he believes appropriate. Pending final determination of proper classification, such documents shall be safeguarded with the highest classification in question.

(d) *Classification markings*. Unless otherwise authorized below, the assigned classification of a document shall be conspicuously marked or stamped at the top and bottom of each page and on the front cover, if any, and the document shall bear the following additional markings on the first page and on the front cover:

RESTRICTED DATA

This document contains Restricted Data as defined in the Atomic Energy Act of 1954. Its transmittal or the disclosure of its contents in any manner to an unauthorized person is prohibited.

(e) *Documentation*. (1) All Secret documents shall bear on the first page a properly completed documentation stamp such as the following: This document consists of __ pages. Copy No. __ of __ Series __.

(2) The series designation shall be a capital letter beginning with the letter ''A'' designating the original set of copies prepared. Each subsequent set of copies of the same documents shall be identified by the succeeding letter of the alphabet.

(f) *Letter of transmittal*. A letter of transmitting Restricted Data shall be marked with a classification at least as high as its highest classified enclosure. When the contents of the letter of transmittal warrant lower classification or requires no classification, a stamp or marking such as the following shall be used in the letter:

When separated from enclosures handle this document as ____.

(g) *Permanently fastened documents*. Classified books or pamphlets, the pages of which are permanently and securely fastened together, shall be conspicuously marked or stamped with the assigned classification in letters at

least one-fourth (¼) inch in height at the top and bottom on the outside front cover, on the title page, on the front page, and on the inside and outside of the back cover. The additional markings referred to in paragraph (d) of this section shall be placed on the first page and on the front cover.

(h) *Physically connected documents.* The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein. It shall bear only one overall classification, although pages, paragraphs, sections, or components thereof may bear different classifications. Each document separated from the file or group shall be handled in accordance with its individual classification.

(i) *Attachment of security markings.* Documents which do not lend themselves to marking or stamping shall have securely affixed or attached a tag, sticker, or similar device bearing the appropriate security markings.

[48 FR 36432, Aug. 10, 1983, as amended at 71 FR 68735, Nov. 28, 2006]

§ 1016.33 External transmission of documents and material.

(a) *Restrictions.* (1) Documents and material containing Restricted Data shall be transmitted only to persons who possess appropriate clearance or access authorization and are otherwise eligible for access under the requirements of § 1016.31.

(2) In addition, such documents and material shall be transmitted only to persons who possess facilities for their physicial security consistent with this part. Any person subject to the regulations in this part who transmits such documents or material shall be deemed to have fulfilled his obligations under this subparagraph by securing a written certification from the prospective recipient that such recipient possesses facilities for its physical security consistent with this part.

(3) Documents and material containing Restricted Data shall not be exported from the United States without prior authorization of DOE.

(b) *Preparation of documents.* Documents containing Restricted Data shall be prepared for transmission outside an individual installation in accordance with the following:

(1) They shall be enclosed in two sealed, opaque envelopes or wrappers.

(2) The inner envelope or wrapper shall be addressed in the ordinary manner and sealed with tape, the appropriate classification shall be placed on both sides of the envelope, and the additional marking referred to in § 1016.32(d) shall be placed on the side bearing the address.

(3) The outer envelope or wrapper shall be addressed in the ordinary manner. No classification, additional marking, or other notation shall be affixed which indicates that the document enclosed therein contains classified information or Restricted Data.

(4) A receipt which identifies the document, the date of transfer, the recipient, and the person transferring the document shall accompany the document and shall be signed by the recipient and returned to the sender whenever the custody of a Secret document is transferred.

(c) *Preparation of material.* Material, other than documents, containing Restricted Data shall be prepared for shipment outside an individual installation in accordance with the following:

(1) The material shall be so packaged that the classified characteristics will not be revealed.

(2) A receipt which identifies the material, the date of shipment, the recipient, and the person transferring the material shall accompany the material, and the recipient shall sign such receipt whenever the custody of Secret material is transferred.

(d) *Methods of transportation.* (1) Secret matter shall be transported only by one of the following methods:

(i) By messenger-courier system specifically created for that purpose.

(ii) Registered mail.

(iii) By protective services provided by United States air or surface commercial carriers under such conditions as may be preserved by the DOE.

(iv) Individuals possessing appropriate DOE security clearance or access authorization who have been given written authority by their employers.

(2) Confidential matter may be transported by one of the methods set forth

in paragraph (d)(1) of this section or by U.S. first class, express, or certified mail.

(e) *Telecommunication of classified information.* There shall be no telecommunication of Restricted Data unless the secure telecommunication system has been approved by the DOE.

(f) *Telephone conversations.* Classified information shall not be discussed over the telephone.

§ 1016.34 Accountability for Secret Restricted Data.

Each permittee possessing documents containing Secret Restricted Data shall establish a document accountability procedure and shall maintain records to show the disposition of all such documents which have been in his custody at any time.

§ 1016.35 Authority to reproduce Restricted Data.

Secret Restricted Data will not be reproduced without the written permission of the originator, his successor, or high authority. Confidential Restricted Data may be reproduced to the minimum extent necessary consistent with efficient operation without the necessity for permission.

§ 1016.36 Changes in classification.

Documents containing Restricted Data shall not be downgraded or declassified except as authorized by DOE. Requests for downgrading or declassification shall be submitted to the cognizant DOE or NNSA office or Office of Classification, HS–90/Germantown Building, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–1290. If the appropriate authority approves a change of classification or declassification, the previous classification marking shall be canceled and the following statement, properly completed, shall be placed on the first page of the document:

Classification canceled (or changed to)

_____
(Insert appropriate classification)
by _____
(Person authorizing change in classification)
by _____
(Signature of person making change and date thereof)

Any persons making a change in classification or receiving notice of such a change shall forward notice of the change in classification to holders of all copies as shown in their records.

[48 FR 36432, Aug. 10, 1983, as amended at 71 FR 68735, Nov. 28, 2006]

§ 1016.37 Destruction of documents or material containing Restricted Data.

Documents containing Restricted Data may be destroyed by burning, pulping, or another method that assures complete destruction of the information which they contain. If the document contains Secret Restricted Data, a permanent record of the subject, title, report number of the document, its date of preparation, its series designation and copy number, and the date of destruction shall be signed by the person destroying the document and shall be maintained in the office of the last custodian. Restricted Data contained in material, other than documents, may be destroyed only by a method that assures complete obliteration, removal, or destruction of the Restricted Data.

§ 1016.38 Suspension or revocation of access authorization.

In any case where the access authorization of an individual subject to the regulations in this part is suspended or revoked in accordance with the procedures set forth in 10 CFR part 710, such individual shall, upon due notice from DOE of such suspension or revocation and demand by DOE, deliver to DOE any and all Restricted Data in his possession for safekeeping and such further disposition as DOE determines to be just and proper.

§ 1016.39 Termination, suspension, or revocation of security facility approval.

(a) If the need to use, process, store, reproduce, transmit, or handle classified matter no longer exists, the security facility approval will be terminated. The permittee may deliver all Restricted Data to the DOE or to a person authorized to receive them; or the

permittee may destroy all such Restricted Data. In either case, the facility must submit a certification of nonpossession of Restricted Data to the DOE.

(b) In any instance where security facility approval has been suspended or revoked based on a determination of the DOE that further possession of classified matter by the permittee would endanger the common defense and national security, the permittee shall, upon notice from the DOE, immediately deliver all Restricted Data to the DOE along with a certificate of nonpossession of Restricted Data.

§ 1016.40 Termination of employment or change of duties.

Each permittee shall furnish promptly to DOE written notification of the termination of employment of each individual who possesses an access authorization under his Permit or whose duties are changed so that access to Restricted Data is no longer needed. Upon such notification, DOE may:

(a) Terminate the individual's access authorization, or

(b) Transfer the individual's access authorization to the new employer of the individual to allow continued access to Restricted Data where authorized, pursuant to DOE regulations.

§ 1016.41 Continued applicability of the regulations in this part.

The expiration, suspension, revocation, or other termination of a security clearance or access authorization or security facility approval shall not relieve any person from compliance with the regulations in this part.

§ 1016.42 Reports.

Each permittee shall immediately report to the DOE office administering the permit any alleged or suspected violation of the Atomic Energy Act of 1954, as amended, Espionage Act, or other Federal statutes related to Restricted Data. Additionally, the permittee shall report any infractions, losses, compromises, or possible compromise of Restricted Data.

§ 1016.43 Inspections.

The DOE shall make such inspections and surveys of the premises, activities, records, and procedures of any person subject to the regulations in this part as DOE deems necessary to effectuate the purposes of the Act, Executive Order 12958, as amended, and DOE orders and procedures.

[48 FR 36432, Aug. 10, 1983, as amended at 71 FR 68735, Nov. 28, 2006]

§ 1016.44 Violations.

An injunction or other court order may be obtained prohibiting any violation of any provision of the Act or any regulation or order issued thereunder. Any person who willfully violates, attempts to violate, or conspires to violate any provision of the Act or any regulation or order issued thereunder, including the provisions of this part, may be guilty of a crime and upon conviction may be punished by fine or imprisonment, or both, as provided by law.

PART 1017—IDENTIFICATION AND PROTECTION OF UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION

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AUTHORITY: 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.;* 42 U.S.C. 2168; 28 U.S.C. 2461.

SOURCE: 73 FR 32641, June 10, 2008, unless otherwise noted.

Subpart A—General Overview

§ 1017.1 Purpose and scope.

(a) This part implements section 148 of the Atomic Energy Act (42 U.S.C. 2168) which prohibits the unauthorized dissemination of certain unclassified Government information. This information identified by the term ''Unclassified Controlled Nuclear Information'' (UCNI) consists of certain design and security information concerning nuclear facilities, nuclear materials, and nuclear weapons.

(b) This part:

(1) Provides for the review of information prior to its designation as UCNI;

(2) Describes how information is determined to be UCNI;

(3) Establishes minimum physical protection standards for documents and material containing UCNI;

(4) Specifies who may have access to UCNI; and,

(5) Establishes a procedure for the imposition of penalties on persons who violate section 148 of the Atomic Energy Act or any regulation or order of the Secretary issued under section 148 of the Atomic Energy Act, including this part.

(c) This part does not apply to information controlled under 10 U.S.C. 128 by the Department of Defense.

§ 1017.2 Applicability.

This part applies to any person who is or was authorized access to UCNI, requires authorized access to UCNI, or attempts to gain or gains unauthorized access to UCNI.

§ 1017.3 Policy.

The Department of Energy (DOE) strives to make information publicly available to the fullest extent possible. Therefore, this part must be interpreted and implemented to apply the minimum restrictions needed to protect the health and safety of the public or the common defense and security consistent with the requirement in section 148 of the Atomic Energy Act to prohibit the unauthorized dissemination of UCNI.

§ 1017.4 Definitions.

As used in this part:

Atomic Energy Act means the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*).

Atomic energy defense programs means Government activities, equipment, and facilities that are capable of:

(1) Developing, producing, testing, sampling, maintaining, repairing, modifying, assembling or disassembling, using, transporting, or retiring nuclear weapons or components of nuclear weapons; or

(2) Producing, using, or transporting nuclear material that could be used in nuclear weapons or military-related utilization facilities.

Authorized Individual means a person who has routine access to UCNI under § 1017.20.

Component means any operational, experimental, or research-related part, subsection, design, or material used in the manufacture or utilization of a nuclear weapon, nuclear explosive device, or nuclear weapon test assembly.

Denying Official means a DOE official designated under 10 CFR 1004.2(b) who is authorized to deny a request for unclassified information that is exempt from release when requested under the Freedom of Information Act (FOIA).

Director means the DOE Official, or his or her designee, to whom the Secretary has assigned responsibility for enforcement of this part.

Document means the physical medium on or in which information is recorded, regardless of its physical form or characteristics.

DOE means the United States Department of Energy, including the National Nuclear Security Administration (NNSA).

Essential technology-related information means technical information whose unauthorized dissemination could significantly increase the likelihood of the illegal production of a nuclear weapon.

Exploitable security-related information means information whose unauthorized dissemination could significantly increase the likelihood of the theft, diversion, or sabotage of nuclear material, equipment, or facilities.

Government means the Executive Branch of the United States Government.

Government information means any fact or concept, regardless of its physical form or characteristics, that is owned by, produced by or for, or otherwise controlled by the United States Government, including such facts or concepts that are provided by the Government to any person, including persons who are not employees of the Government.

Guidance means detailed written instructions that describe decisions made by the Secretary or his/her designee issued under Subpart B of these regulations concerning what specific information is UCNI.

Illegal production means the production or manufacture of a nuclear weapon in violation of either domestic (e.g., the Atomic Energy Act) or international (e.g., the Treaty on the Non-Proliferation of Nuclear Weapons) law.

In transit means the physical movement of a nuclear weapon, a component of a nuclear weapon containing nuclear material, or nuclear material from one part to another part of a facility or from one facility to another facility. An item is considered ''in transit'' until it has been relinquished to the custody of the authorized recipient and is in storage at its ultimate destination. An item in temporary storage pending shipment to its ultimate destination is ''in transit.''

Limited access means access to specific UCNI granted by the cognizant DOE Program Secretarial Officer or a Deputy or Associate Administrator of the NNSA to an individual not eligible for routine access (see § 1017.21).

Material means a product (*e.g.*, a part or a machine) or substance (e.g., a compound or an alloy), regardless of its physical form or characteristics.

Need to know means a determination made by an Authorized Individual that a person requires access to specific UCNI to perform official duties or other Government-authorized activities.

Nuclear material means special nuclear material, byproduct material, or source material as defined by sections 11.aa., 11.e., and 11.z., respectively, of the Atomic Energy Act (42 U.S.C. 2014 aa., e., and z), or any other material used in the production, testing, utilization, or assembly of nuclear weapons or components of nuclear weapons that the Secretary determines to be nuclear material under § 1017.9(a).

Nuclear weapon means atomic weapon as defined in section 11.d. of the Atomic Energy Act (42 U.S.C. 2014 d).

Person means any person as defined in section 11.s. of the Atomic Energy Act (42 U.S.C. 2014 s) or any affiliate or parent corporation thereof.

Production facility means:

(1) Any equipment or device capable of producing special nuclear material in such quantity as to be of significance to the common defense and security or in such manner as to affect the health and safety of the public; or

(2) Any important component part especially designed for such equipment or device.

(3) For the purposes of this part, equipment and devices described in paragraphs (1) and (2) of this definition include only:

(i) Government uranium isotope enrichment equipment or devices and any

other uranium isotope enrichment equipment or devices that use related technology provided by the Government; or

(ii) Government plutonium production reactors, isotope enrichment equipment or devices, and separation and purification equipment or devices and other such equipment or devices that use related technology provided by the Government.

Reviewing Official means an individual authorized under § 1017.14(a) to make a determination, based on guidance, that a document or material contains UCNI.

Routine access means access to UCNI granted by an Authorized Individual to an individual eligible to receive UCNI under § 1017.20 in order to perform official duties or other Government-authorized activities.

Secretary means the Secretary of Energy.

Special nuclear material means:

(1) Plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which DOE or the Nuclear Regulatory Commission, pursuant to the provisions of section 51 of the Atomic Energy Act (42 U.S.C. 2071), determines to be special nuclear material, but does not include source material; or

(2) Any material artificially enriched by any of the foregoing, but does not include source material.

Unauthorized dissemination means the intentional or negligent transfer of UCNI to any person other than an Authorized Individual or a person granted limited access to UCNI under § 1017.21.

Unclassified Controlled Nuclear Information or UCNI means certain unclassified Government information concerning nuclear facilities, materials, weapons, and components whose dissemination is controlled under section 148 of the Atomic Energy Act and this part.

Utilization facility means:

(1) Any equipment or device, or any important component part especially designed for such equipment or device, except for a nuclear weapon, that is capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security or in such manner as to affect the health and safety of the public. For the purposes of this part, such equipment or devices include only Government equipment or devices that use special nuclear material in the research, development, production, or testing of nuclear weapons, nuclear weapon components, or nuclear material capable of being used in nuclear weapons; or

(2) Any equipment or device, or any important component part especially designed for such equipment or device, except for a nuclear weapon, that is peculiarly adapted for making use of nuclear energy in such quantity as to be of significance to the common defense and security or in such manner as to affect the health and safety of the public. For the purposes of this part, such equipment or devices include only:

(i) Naval propulsion reactors;

(ii) Military reactors and power sources that use special nuclear material;

(iii) Tritium production reactors; and,

(iv) Government research reactors.

§ 1017.5 Requesting a deviation.

(a) Any person may request a deviation, or condition that diverges from the norm and that is categorized as:

(1) A variance (i.e., an approved condition that technically varies from a requirement in these regulations);

(2) A waiver (i.e., an approved nonstandard condition that deviates from a requirement in these regulations and which, if uncompensated, would create a potential or real vulnerability); or

(3) An exception (i.e., an approved deviation from a requirement in these regulations for which DOE accepts the risk of a safeguards and security vulnerability) according to the degree of risk involved.

(b) In writing, the person must:

(1) Identify the specific requirement for which the deviation is being requested;

(2) Explain why the deviation is needed; and,

(3) If appropriate, describe the alternate or equivalent means for meeting the requirement.

(c) DOE employees must submit such requests according to internal directives. DOE contractors must submit

such requests according to directives incorporated into their contracts. Other individuals must submit such requests to the Office of Classification, Office of Health, Safety and Security, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585–1290. The Office of Classification's decision must be made within 30 days.

Subpart B—Initially Determining What Information Is Unclassified Controlled Nuclear Information

§ 1017.6 Authority.

The Secretary, or his or her designee, determines whether information is UCNI. These determinations are incorporated into guidance that each Reviewing Official and Denying Official consults in his or her review of a document or material to decide whether the document or material contains UCNI.

§ 1017.7 Criteria.

To be identified as UCNI, the information must meet each of the following criteria:

(a) The information must be Government information as defined in § 1017.4;

(b) The information must concern atomic energy defense programs as defined in § 1017.4;

(c) The information must fall within the scope of at least one of the three subject areas eligible to be UCNI in § 1017.8;

(d) The information must meet the adverse effect test described in § 1017.10; and

(e) The information must not be exempt from being UCNI under § 1017.11.

§ 1017.8 Subject areas eligible to be Unclassified Controlled Nuclear Information.

To be eligible for identification as UCNI, information must concern at least one of the following categories:

(a) The design of production or utilization facilities as defined in this part;

(b) Security measures (including security plans, procedures, and equipment) for the physical protection of production or utilization facilities or nuclear material, regardless of its physical state or form, contained in these facilities or in transit; or

(c) The design, manufacture, or utilization of nuclear weapons or components that were once classified as Restricted Data, as defined in section 11y. of the Atomic Energy Act.

§ 1017.9 Nuclear material determinations.

(a) The Secretary may determine that a material other than special nuclear material, byproduct material, or source material as defined by the Atomic Energy Act is included within the scope of the term ''nuclear material'' if it meets the following criteria:

(1) The material is used in the production, testing, utilization, or assembly of nuclear weapons or components of nuclear weapons; and

(2) Unauthorized acquisition of the material could reasonably be expected to result in a significant adverse effect on the health and safety of the public or the common defense and security because the specific material:

(i) Could be used as a hazardous radioactive environmental contaminant; or

(ii) Could be of significant assistance in the illegal production of a nuclear weapon.

(b) Designation of a material as a nuclear material under paragraph (a) of this section does not make all information about the material UCNI. Specific information about the material must still meet each of the criteria in § 1017.7 prior to its being identified and controlled as UCNI.

§ 1017.10 Adverse effect test.

In order for information to be identified as UCNI, it must be determined that the unauthorized dissemination of the information under review could reasonably be expected to result in a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of:

(a) Illegal production of a nuclear weapon; or

(b) Theft, diversion, or sabotage of nuclear material, equipment, or facilities.

§ 1017.11 Information exempt from being Unclassified Controlled Nuclear Information.

Information exempt from this part includes:

(a) Information protected from disclosure under section 147 of the Atomic Energy Act (42 U.S.C. 2167) that is identified as Safeguards Information and controlled by the United States Nuclear Regulatory Commission;

(b) Basic scientific information (i.e., information resulting from research directed toward increasing fundamental scientific knowledge or understanding rather than any practical application of that knowledge);

(c) Radiation exposure data and all other personal health information; and,

(d) Information concerning the transportation of low level radioactive waste.

§ 1017.12 Prohibitions on identifying Unclassified Controlled Nuclear Information.

Information, documents, and material must not be identified as being or containing UCNI in order to:

(a) Conceal violations of law, inefficiency, or administrative error;

(b) Prevent embarrassment to a person or organization;

(c) Restrain competition; or,

(d) Prevent or delay the release of any information that does not properly qualify as UCNI.

§ 1017.13 Report concerning determinations.

The Office of Classification or successor office shall issue a report by the end of each quarter that identifies any new information that has been determined for the first time to be UCNI during the previous quarter, explains how each such determination meets the criteria in § 1017.7, and explains why each such determination protects from disclosure only the minimum amount of information necessary to protect the health and safety of the public or the common defense and security. A copy of the report may be obtained by writing to the Office of Classification, Office of Health, Safety and Security, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585–1290.

Subpart C—Review of a Document or Material for Unclassified Controlled Nuclear Information

§ 1017.14 Designated officials.

(a) *Reviewing Official*(1) *Authority*. A Reviewing Official with cognizance over the information contained in a document or material is authorized to determine whether the document or material contains UCNI based on applicable guidance. A Reviewing Official marks or authorizes the marking of the document or material as specified in § 1017.16.

(2) *Request for designation*. Procedures for requesting that a DOE Federal or contractor employee be designated as a Reviewing Official are contained in Departmental directives issued by the Secretary. DOE may also designate other Government agency employees, contractors, or other individuals granted routine access under § 1017.20 as Reviewing Officials.

(3) *Designation*. Prior to being designated as a Reviewing Official, each employee must receive training approved by DOE that covers the requirements in these regulations and be tested on his or her proficiency in using applicable UCNI guidance. Upon successful completion of the training and test, he or she is designated as a Reviewing Official only while serving in his or her current position for a maximum of 3 years. The employee does not automatically retain the authority when he or she leaves his or her current position. The employee cannot delegate this authority to anyone else, and the authority may not be assumed by another employee acting in the employee's position. At the end of 3 years, if the position still requires the authority, the employee must be retested and redesignated by DOE as a Reviewing Official.

(b) *Individuals approved to use DOE or joint DOE classification guidance*—(1) *Authority*. Other Government agency employees who are approved by DOE or another Government agency to use classification guidance developed by DOE or jointly by DOE and another Government agency may also be approved to review documents for UCNI and to make UCNI determinations.

This authority is limited to the UCNI subject areas contained in the specific classification guidance that the individual has been approved to use.

(2) *Designation*. Individuals must be designated this authority in writing by the appropriate DOE or other Government agency official with cognizance over the specific DOE or joint DOE classification guidance.

(c) *Denying Official*(1) *Authority*. A DOE Denying Official for unclassified information with cognizance over the information contained in a document is authorized to deny a request made under statute (e.g., the FOIA, the Privacy Act) or the mandatory review provisions of Executive Order 12958, as amended, ''Classified National Security Information,'' and its successor orders, for all or any portion of the document that contains UCNI. The Denying Official bases his or her denial on applicable guidance, ensuring that the Reviewing Official who determined that the document contains UCNI correctly interpreted and applied the guidance.

(2) *Designation*. Information on the designation of DOE Denying Officials is contained in 10 CFR Part 1004, *Freedom of Information* (see definition of the term ''Authorizing or Denying Official'' in § 1004.2).

§ 1017.15 Review process.

(a) *Reviewing documents for UCNI*. Anyone who originates or possesses a document that he or she thinks may contain UCNI must send the document to a Reviewing Official for a determination before it is finalized, sent outside of his or her organization, or filed. If the originator or possessor must send the document outside of his or her organization for the review, he or she must mark the front of the document with ''Protect as UCNI Pending Review'' and must transmit the document in accordance with the requirements in § 1017.27. The Reviewing Official must first determine whether the document is widely disseminated in the public domain, which means that the document under review is publicly available from a Government technical information service or depository library, for example, or that it can be found in a public library or an open literature source, or it can be accessed on the Internet using readily available search methods.

(1) If the document is determined to be widely disseminated in the public domain, it cannot be controlled as UCNI. The Reviewing Official returns the document to the person who sent it to the Reviewing Official and informs him or her why the document cannot be controlled as UCNI. This does not preclude control of the same information as UCNI if it is contained in another document that is not widely disseminated.

(2) If the document is not determined to be widely disseminated in the public domain, the Reviewing Official evaluates the information in the document using guidance to determine whether the document contains UCNI. If the Reviewing Official determines that the document does contain UCNI, the Reviewing Official marks or authorizes the marking of the document as specified in § 1017.16. If the Reviewing Official determines that the document does not contain UCNI, the Reviewing Official returns the document to the person who sent it and informs him or her that the document does not contain UCNI. For documentation purposes, the Reviewing Official may mark or authorize the marking of the document as specified in § 1017.17(b).

(3) If no applicable guidance exists, but the Reviewing Official thinks the information should be identified as UCNI, then the Reviewing Official must send the document to the appropriate official identified in applicable DOE directives issued by the Secretary or his or her designee. The Reviewing Official should also include a written recommendation as to why the information should be identified as UCNI.

(b) *Review exemption for documents in files*. Any document that was permanently filed prior to May 22, 1985, is not required to be reviewed for UCNI while in the files or when retrieved from the files for reference, inventory, or similar purposes as long as the document will be returned to the files and is not accessible by individuals who are not Authorized Individuals for the UCNI contained in the document. However, when a document that is likely to contain UCNI is removed from the files for dissemination within or outside of the

immediate organization, it must be reviewed by a Reviewing Official with cognizance over the information.

(c) *Reviewing material for UCNI.* Anyone who produces or possesses material that he or she thinks may contain or reveal UCNI must consult with a Reviewing Official for a determination. If the Reviewing Official determines that the material does contain or reveal UCNI, the Reviewing Official marks or authorizes the marking of the material as specified in § 1017.16(b).

§ 1017.16 Unclassified Controlled Nuclear Information markings on documents or material.

(a) *Marking documents.* If a Reviewing Official determines that a document contains UCNI, the Reviewing Official must mark or authorize the marking of the document as described in this section.

(1) *Front marking.* The following marking must appear on the front of the document:

Unclassified Controlled Nuclear Information Not for Public Dissemination

Unauthorized dissemination subject to civil and criminal sanctions under section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

Reviewing Official:

(Name/Organization)

Date:

Guidance Used:

(2) *Page marking.* The marking ''Unclassified Controlled Nuclear Information'' must be placed on the bottom of the front of the document and on the bottom of each interior page of the document that contains text or if more convenient, on the bottom of only those interior pages that contain UCNI. The page marking must also be placed on the back of the last page. If space limitations do not allow for use of the full page marking, the acronym ''UCNI'' may be used as the page marking.

(3) *Classified documents.* UCNI front and page markings are not applied to a classified document that also contains UCNI. If a classified document is portion marked, the acronym ''UCNI'' is used to indicate those unclassified portions that contain UCNI.

(4) Obsolete ''May Contain UCNI'' marking. The ''May Contain UCNI'' marking is no longer used. Any document marked with the ''May Contain UCNI'' marking is considered to contain UCNI and must be protected accordingly until a Reviewing Official or Denying Official determines otherwise. The obsolete ''May Contain UCNI'' marking reads as follows:

Not for Public Dissemination May contain Unclassified Controlled Nuclear Information subject to section 148 of the Atomic Energy Act of 1954 (42 U.S.C. 2168). Approval by the Department of Energy prior to release is required.

(b) *Marking material.* If possible, material containing or revealing UCNI must be marked as described in § 1017.16(a)(1). If space limitations do not allow for use of the full marking in § 1017.16(a)(1), the acronym ''UCNI'' may be used.

§ 1017.17 Determining that a document or material no longer contains or does not contain Unclassified Controlled Nuclear Information.

(a) *Document or material no longer contains UCNI.* A Reviewing Official with cognizance over the information in a document or material marked as containing UCNI may determine that the document or material no longer contains UCNI. A Denying Official may also determine that such a document or material no longer contains UCNI. The official making this determination must base it on applicable guidance and must ensure that any UCNI markings are crossed out (for documents) or removed (for material). The official marks or authorizes the marking of the document (or the material, if space allows) as follows:

Does Not Contain Unclassified Controlled Nuclear Information

Reviewing/Denying Official:

(Name and organization)

Date:

(b) *Document or material does not contain UCNI.* A Reviewing Official with cognizance over the information in a document or material may confirm that an unmarked document or material does not contain UCNI based on applicable guidance. No UCNI markings

are required in this case; however, for documentation purposes, the Reviewing Official may mark or may authorize the marking of the document or material with the same marking used in § 1017.17(a).

§ 1017.18 Joint documents or material.

If a document or material marked as containing UCNI is under consideration for decontrol and falls under the cognizance of another DOE organization or other Government agency, the Reviewing Official or Denying Official must coordinate the decontrol review with that DOE organization or other Government agency. Any disagreement concerning the control or decontrol of any document or material that contains UCNI that was originated by or for DOE or another Government agency is resolved by the Secretary or his or her designee.

Subpart D—Access to Unclassified Controlled Nuclear Information

§ 1017.19 Access limitations.

A person may only have access to UCNI if he or she has been granted routine access by an Authorized Individual (see § 1017.20) or limited access by the DOE Program Secretarial Officer or NNSA Deputy or Associate Administrator with cognizance over the UCNI (see § 1017.21). The Secretary, or his or her designee, may impose additional administrative controls concerning the granting of routine or limited access to UCNI to a person who is not a U.S. citizen.

§ 1017.20 Routine access.

(a) *Authorized Individual.* The Reviewing Official who determines that a document or material contains UCNI is the initial Authorized Individual for that document or material. An Authorized Individual, for UCNI in his or her possession or control, may determine that another person is an Authorized Individual who may be granted access to the UCNI, subject to limitations in paragraph (b) of this section, and who may further disseminate the UCNI under the provisions of this section.

(b) *Requirements for routine access.* To be eligible for routine access to UCNI, the person must have a need to know the UCNI in order to perform official duties or other Government-authorized activities and must be:

(1) A U.S. citizen who is:

(i) An employee of any branch of the Federal Government, including the U.S. Armed Forces;

(ii) An employee or representative of a State, local, or Indian tribal government;

(iii) A member of an emergency response organization;

(iv) An employee of a Government contractor or a consultant, including those contractors or consultants who need access to bid on a Government contract;

(v) A member of Congress or a staff member of a congressional committee or of an individual member of Congress;

(vi) A Governor of a State, his or her designated representative, or a State government official;

(vii) A member of a DOE advisory committee; or,

(viii) A member of an entity that has entered into a formal agreement with the Government, such as a Cooperative Research and Development Agreement or similar arrangement; or,

(2) A person who is not a U.S. citizen but who is:

(i) A Federal Government employee or a member of the U.S. Armed Forces;

(ii) An employee of a Federal Government contractor or subcontractor;

(iii) A Federal Government consultant;

(iv) A member of a DOE advisory committee;

(v) A member of an entity that has entered into a formal agreement with the Government, such as a Cooperative Research and Development Agreement or similar arrangement;

(vi) An employee or representative of a State, local, or Indian tribal government; or,

(vii) A member of an emergency response organization when responding to an emergency; or,

(3) A person who is not a U.S. citizen but who needs to know the UCNI in conjunction with an activity approved by the DOE Program Secretarial Officer or NNSA Deputy or Associate Administrator with cognizance over the UCNI.

§ 1017.21 Limited access.

(a) A person who is not eligible for routine access to specific UCNI under § 1017.20 may request limited access to such UCNI by sending a written request to the DOE Program Secretarial Officer or NNSA Deputy or Associate Administrator with cognizance over the information. The written request must include the following:

(1) The name, current residence or business address, birthplace, birth date, and country of citizenship of the person submitting the request;

(2) A description of the specific UCNI for which limited access is being requested;

(3) A description of the purpose for which the UCNI is needed; and,

(4) Certification by the requester that he or she:

(i) Understands and will follow these regulations; and

(ii) Understands that he or she is subject to the civil and criminal penalties under Subpart F of this part.

(b) The decision whether to grant the request for limited access is based on the following criteria:

(1) The sensitivity of the UCNI for which limited access is being requested;

(2) The approving official's evaluation of the likelihood that the requester will disseminate the UCNI to unauthorized individuals; and,

(3) The approving official's evaluation of the likelihood that the requester will use the UCNI for illegal purposes.

(c) Within 30 days of receipt of the request for limited access, the appropriate DOE Program Secretarial Officer or NNSA Deputy or Associate Administrator must notify the requester if limited access is granted or denied, or if the determination cannot be made within 30 days, of the date when the determination will be made.

(d) A person granted limited access to specific UCNI is not an Authorized Individual and may not further disseminate the UCNI to anyone.

Subpart E—Physical Protection Requirements

§ 1017.22 Notification of protection requirements.

(a) An Authorized Individual who grants routine access to specific UCNI under § 1017.20 to a person who is not an employee or contractor of the DOE must notify the person receiving the UCNI of protection requirements described in this subpart and any limitations on further dissemination.

(b) A DOE Program Secretarial Officer or NNSA Deputy or Associate Administrator who grants limited access to specific UCNI under § 1017.21 must notify the person receiving the UCNI of protection requirements described in this subpart and any limitations on further dissemination.

§ 1017.23 Protection in use.

An Authorized Individual or a person granted limited access to UCNI under § 1017.21 must maintain physical control over any document or material marked as containing UCNI that is in use to prevent unauthorized access to it.

§ 1017.24 Storage.

A document or material marked as containing UCNI must be stored to preclude unauthorized disclosure. When not in use, documents or material containing UCNI must be stored in locked receptacles (e.g., file cabinet, desk drawer), or if in secured areas or facilities, in a manner that would prevent inadvertent access by an unauthorized individual.

§ 1017.25 Reproduction.

A document marked as containing UCNI may be reproduced without the permission of the originator to the minimum extent necessary consistent with the need to carry out official duties, provided the reproduced document is marked and protected in the same manner as the original document.

§ 1017.26 Destruction.

A document marked as containing UCNI must be destroyed, at a minimum, by using a cross-cut shredder that produces particles no larger than

1/4-inch wide and 2 inches long. Other comparable destruction methods may be used. Material containing or revealing UCNI must be destroyed according to agency directives.

§ 1017.27 Transmission.

(a) *Physically transmitting UCNI documents or material.* (1) A document or material marked as containing UCNI may be transmitted by:

(i) U.S. First Class, Express, Certified, or Registered mail;

(ii) Any means approved for transmission of classified documents or material;

(iii) An Authorized Individual or person granted limited access under § 1017.21 as long as physical control of the package is maintained; or,

(iv) Internal mail services.

(2) The document or material must be packaged to conceal the presence of the UCNI from someone who is not authorized access. A single, opaque envelope or wrapping is sufficient for this purpose. The address of the recipient and the sender must be indicated on the outside of the envelope or wrapping along with the words ''TO BE OPENED BY ADDRESSEE ONLY.''

(b) *Transmitting UCNI documents over telecommunications circuits.* Encryption algorithms that comply with all applicable Federal laws, regulations, and standards for the protection of unclassified controlled information must be used when transmitting UCNI over a telecommunications circuit (including the telephone, facsimile, radio, e-mail, Internet).

§ 1017.28 Processing on Automated Information Systems (AIS).

UCNI may be processed or produced on any AIS that complies with the guidance in OMB Circular No. A–130, Revised, Transmittal No. 4, Appendix III, ''Security of Federal Automated Information Resources,'' or is certified for classified information.

Subpart F—Violations

§ 1017.29 Civil penalty.

(a) *Regulations.* Any person who violates a UCNI security requirement of any of the following is subject to a civil penalty under this part:

(1) 10 CFR Part 1017—Identification and Protection of Unclassified Controlled Nuclear Information; or

(2) Any other DOE regulation related to the safeguarding or security of UCNI if the regulation provides that violation of its provisions may result in a civil penalty pursuant to section 148 of the Act.

(b) *Compliance order.* If, without violating a requirement of any regulation issued under section 148, a person by an act or omission causes, or creates a risk of, the loss, compromise or unauthorized disclosure of UCNI, the Secretary may issue a compliance order to that person requiring the person to take corrective action and notifying the person that violation of the compliance order is subject to a notice of violation and assessment of a civil penalty. If a person wishes to contest the compliance order, the person must file a notice of appeal with the Secretary within 15 days of receipt of the compliance order.

(c) *Amount of penalty.* The Director may propose imposition of a civil penalty for violation of a requirement of a regulation under paragraph (a) of this section or a compliance order issued under paragraph (b) of this section, not to exceed $160,000 for each violation.

(d) *Settlements.* The Director may enter into a settlement, with or without conditions, of an enforcement proceeding at any time if the settlement is consistent with the objectives of DOE's UCNI protection requirements.

(e) *Enforcement conference.* The Director may convene an informal conference to discuss any situation that might be a violation of the Act, its significance and cause, any correction taken or not taken by the person, any mitigating or aggravating circumstances, and any other useful information. The Director may compel a person to attend the conference. This conference will not normally be open to the public and there shall be no transcript.

(f) *Investigations.* The Director may conduct investigations and inspections relating to the scope, nature and extent of compliance by a person with DOE security requirements specified in these regulations and take such action as the Director deems necessary and

appropriate to the conduct of the investigation or inspection, including signing, issuing and serving subpoenas.

(g) *Preliminary notice of violation.* (1) In order to begin a proceeding to impose a civil penalty under this part, the Director shall notify the person by a written preliminary notice of violation sent by certified mail, return receipt requested, of:

(i) The date, facts, and nature of each act or omission constituting the alleged violation;

(ii) The particular provision of the regulation or compliance order involved in each alleged violation;

(iii) The proposed remedy for each alleged violation, including the amount of any civil penalty proposed;

(iv) The right of the person to submit a written reply to the Director within 30 calendar days of receipt of such preliminary notice of violation; and,

(v) The fact that upon failure of the person to pay any civil penalty imposed, the penalty may be collected by civil action.

(2) A reply to a preliminary notice of violation must contain a statement of all relevant facts pertaining to an alleged violation. The reply must:

(i) State any facts, explanations, and arguments that support a denial of the alleged violation;

(ii) Demonstrate any extenuating circumstances or other reason why a proposed remedy should not be imposed or should be mitigated;

(iii) Discuss the relevant authorities that support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE;

(iv) Furnish full and complete answers to any questions set forth in the preliminary notice; and

(v) Include copies of all relevant documents.

(3) If a person fails to submit a written reply within 30 calendar days of receipt of a preliminary notice of violation:

(i) The person relinquishes any right to appeal any matter in the preliminary notice; and

(ii) The preliminary notice, including any remedies therein, constitutes a final order.

(4) The Director, at the request of a person notified of an alleged violation, may extend for a reasonable period the time for submitting a reply or a hearing request letter.

(h) *Final notice of violation.* (1) If a person submits a written reply within 30 calendar days of receipt of a preliminary notice of violation, the Director must make a final determination whether the person violated or is continuing to violate an UCNI security requirement.

(2) Based on a determination by the Director that a person has violated or is continuing to violate an UCNI security requirement, the Director may issue to the person a final notice of violation that concisely states the determined violation, the amount of any civil penalty imposed, and further actions necessary by or available to the person. The final notice of violation also must state that the person has the right to submit to the Director, within 30 calendar days of the receipt of the notice, a written request for a hearing under paragraph (i) of this section.

(3) The Director must send a final notice of violation by certified mail, return receipt requested, within 30 calendar days of the receipt of a reply.

(4) Subject to paragraphs (h)(7) and (h)(8) of this section, the effect of final notice shall be:

(i) If a final notice of violation does not contain a civil penalty, it shall be deemed a final order 15 days after the final notice is issued.

(ii) If a final notice of violation contains a civil penalty, the person must submit to the Director within 30 days after the issuance of the final notice:

(A) A waiver of further proceedings; or

(B) A request for an on-the-record hearing under paragraph (i) of this section.

(5) If a person waives further proceedings, the final notice of violation shall be deemed a final order enforceable against the person. The person must pay the civil penalty set forth in the notice of violation within 60 days of the filing of waiver unless the Director grants additional time.

(6) If a person files a request for an on-the-record hearing, then the hearing process commences.

(7) The Director may amend the final notice of violation at any time before the time periods specified in paragraphs (h)(4)(i) or (h)(4)(ii) of this section expire. An amendment shall add 15 days to the time period under paragraph (h)(4) of this section.

(8) The Director may withdraw the final notice of violation, or any part thereof, at any time before the time periods specified in paragraphs (h)(4)(i) or (h)(4)(ii) of this section expire.

(i) *Hearing*. (1) Any person who receives a final notice of violation under paragraph (h) of this section may request a hearing concerning the allegations contained in the notice. The person must mail or deliver any written request for a hearing to the Director within 30 calendar days of receipt of the final notice of violation.

(2) Upon receipt from a person of a written request for a hearing, the Director shall:

(i) Appoint a Hearing Counsel; and

(ii) Select an administrative law judge appointed under 5 U.S.C. 3105, to serve as Hearing Officer.

(j) *Hearing Counsel*. The Hearing Counsel:

(1) Represents DOE;

(2) Consults with the person or the person's counsel prior to the hearing;

(3) Examines and cross-examines witnesses during the hearing; and

(4) Enters into a settlement of the enforcement proceeding at any time if settlement is consistent with the objectives of the Act and DOE security requirements.

(k) *Hearing Officer*. The Hearing Officer:

(1) Is responsible for the administrative preparations for the hearing;

(2) Convenes the hearing as soon as is reasonable;

(3) Administers oaths and affirmations;

(4) Issues subpoenas, at the request of either party or on the Hearing Officer's motion;

(5) Rules on offers of proof and receives relevant evidence;

(6) Takes depositions or has depositions taken when the ends of justice would be served;

(7) Conducts the hearing in a manner which is fair and impartial;

(8) Holds conferences for the settlement or simplification of the issues by consent of the parties;

(9) Disposes of procedural requests or similar matters;

(10) Requires production of documents; and,

(11) Makes an initial decision under paragraph (n) of this section.

(l) *Rights of the person at the hearing*. The person may:

(1) Testify or present evidence through witnesses or by documents;

(2) Cross-examine witnesses and rebut records or other physical evidence, except as provided in paragraph (m)(4) of this section;

(3) Be present during the entire hearing, except as provided in paragraph (m)(4) of this section; and

(4) Be accompanied, represented, and advised by counsel of the person's choosing.

(m) *Conduct of the hearing*. (1) DOE shall make a transcript of the hearing.

(2) Except as provided in paragraph (m)(4) of this section, the Hearing Officer may receive any oral or documentary evidence, but shall exclude irrelevant, immaterial, or unduly repetitious evidence.

(3) Witnesses shall testify under oath and are subject to cross-examination, except as provided in paragraph (m)(4) of this section.

(4) The Hearing Officer must use procedures appropriate to safeguard and prevent unauthorized disclosure of classified information, UCNI, or any other information protected from public disclosure by law or regulation, with minimum impairment of rights and obligations under this part. The UCNI status shall not, however, preclude information from being introduced into evidence. The Hearing Officer may issue such orders as may be necessary to consider such evidence *in camera* including the preparation of a supplemental initial decision to address issues of law or fact that arise out of that portion of the evidence that is protected.

(5) DOE has the burden of going forward with and of proving by a preponderance of the evidence that the violation occurred as set forth in the final notice of violation and that the proposed civil penalty is appropriate. The

person to whom the final notice of violation has been addressed shall have the burden of presenting and of going forward with any defense to the allegations set forth in the final notice of violation. Each matter of controversy shall be determined by the Hearing Officer upon a preponderance of the evidence.

(n) *Initial decision*. (1) The Hearing Officer shall issue an initial decision as soon as practicable after the hearing. The initial decision shall contain findings of fact and conclusions regarding all material issues of law, as well as reasons therefor. If the Hearing Officer determines that a violation has occurred and that a civil penalty is appropriate, the initial decision shall set forth the amount of the civil penalty based on:

(i) The nature, circumstances, extent, and gravity of the violation or violations;

(ii) The violator's ability to pay;

(iii) The effect of the civil penalty on the person's ability to do business;

(iv) Any history of prior violations;

(v) The degree of culpability; and,

(vi) Such other matters as justice may require.

(2) The Hearing Officer shall serve all parties with the initial decision by certified mail, return receipt requested. The initial decision shall include notice that it constitutes a final order of DOE 30 days after the filing of the initial decision unless the Secretary files a Notice of Review. If the Secretary files a Notice of Review, he shall file a final order as soon as practicable after completing his review. The Secretary, at his discretion, may order additional proceedings, remand the matter, or modify the amount of the civil penalty assessed in the initial decision. DOE shall notify the person of the Secretary's action under this paragraph in writing by certified mail, return receipt requested. The person against whom the civil penalty is assessed by the final order shall pay the full amount of the civil penalty assessed in the final order within 30 days unless otherwise agreed by the Director.

(o) *Collection of penalty*. (1) The Secretary may request the Attorney General to institute a civil action to collect a penalty imposed under this section.

(2) The Attorney General has the exclusive power to uphold, compromise or mitigate, or remit any civil penalty imposed by the Secretary under this section and referred to the Attorney General for collection.

(p) *Direction to NNSA*. (1) Notwithstanding any other provision of this part, the NNSA Administrator, rather than the Director, signs, issues, serves, or takes the following actions that direct NNSA employees, contractors, subcontractors, or employees of such NNSA contractors or subcontractors:

(i) Subpoenas;

(ii) Orders to compel attendance;

(iii) Disclosures of information or documents obtained during an investigation or inspection;

(iv) Preliminary notices of violation; and,

(v) Final notice of violations.

(2) The Administrator shall act after consideration of the Director's recommendation. If the Administrator disagrees with the Director's recommendation, and the disagreement cannot be resolved by the two officials, the Director may refer the matter to the Deputy Secretary for resolution.

[73 FR 32641, June 10, 2008, as amended at 74 FR 66033, Dec. 14, 2009; 79 FR 20, Jan. 2, 2014]

§ 1017.30 Criminal penalty.

Any person who violates section 148 of the Atomic Energy Act or any regulation or order of the Secretary issued under section 148 of the Atomic Energy Act, including these regulations, may be subject to a criminal penalty under section 223 of the Atomic Energy Act (42 U.S.C. 2273). In such case, the Secretary shall refer the matter to the Attorney General for investigation and possible prosecution.

PART 1021—NATIONAL ENVIRONMENTAL POLICY ACT IMPLEMENTING PROCEDURES

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AUTHORITY: 42 U.S.C. 7101 *et seq.;* 42 U.S.C. 4321 *et seq.;* 50 U.S.C. 2401 *et seq.*

SOURCE: 57 FR 15144, Apr. 24, 1992, unless otherwise noted.

Subpart A—General

§ 1021.100 Purpose.

The purpose of this part is to establish procedures that the Department of Energy (DOE) shall use to comply with section 102(2) of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4332(2)) and the Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508). This part supplements, and is to be used in conjunction with, the CEQ Regulations.

§ 1021.101 Policy.

It is DOE's policy to follow the letter and spirit of NEPA; comply fully with the CEQ Regulations; and apply the NEPA review process early in the planning stages for DOE proposals.

§ 1021.102 Applicability.

(a) This part applies to all organizational elements of DOE except the Federal Energy Regulatory Commission.

(b) This part applies to any DOE action affecting the quality of the environment of the United States, its territories or possessions. DOE actions having environmental effects outside the United States, its territories or possessions are subject to the provisions of Executive Order 12114, ''Environmental Effects Abroad of Major Federal Actions'' (3 CFR, 1979 Comp., p. 356; 44 FR 1957, January 4, 1979), DOE guidelines implementing that Executive Order (46 FR 1007, January 5, 1981), and the Department of State's ''Unified Procedures Applicable to Major Federal Actions Relating to Nuclear Activities Subject to Executive Order 12114'' (44 FR 65560, November 13, 1979).

§ 1021.103 Adoption of CEQ NEPA regulations.

DOE adopts the regulations for implementing NEPA published by CEQ at 40 CFR parts 1500 through 1508.

§ 1021.104 Definitions.

(a) The definitions set forth in 40 CFR part 1508 are referenced and used in this part.

(b) In addition to the terms defined in 40 CFR part 1508, the following definitions apply to this part:

Action means a project, program, plan, or policy, as discussed at 40 CFR 1508.18, that is subject to DOE's control and responsibility. Not included within this definition are purely ministerial actions with regard to which DOE has no discretion. For example, ministerial actions to implement congressionally mandated funding for actions not proposed by DOE and as to which DOE has no discretion (i.e., statutorily mandated, congressionally initiated ''passthroughs'').

Advance NOI means a formal public notice of DOE's intent to prepare an EIS, which is published in advance of an NOI in order to facilitate public involvement in the NEPA process.

American Indian tribe means any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska native entity, which is recognized as eligible for the special programs or services provided by the United States because of their status as Indians.

Categorical exclusion means a category of actions, as defined at 40 CFR 1508.4 and listed in appendix A or B to subpart D of this part, for which neither an EA nor an EIS is normally required.

CEQ means the Council on Environmental Quality as defined at 40 CFR 1508.6.

CEQ Regulations means the regulations issued by CEQ (40 CFR parts 1500–1508) to implement the procedural provisions of NEPA.

CERCLA-excluded petroleum and natural gas products means petroleum, including crude oil or any fraction thereof, that is not otherwise specifically listed or designated as a hazardous substance under section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. 9601.101(14)) and natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel or of pipeline quality (or mixtures of natural gas and such synthetic gas).

Contaminant means a substance identified within the definition of contaminant in section 101(33) of CERCLA (42 U.S.C. 9601.101(33)).

Day means a calendar day.

DOE means the U.S. Department of Energy.

DOE proposal (or *proposal*) means a proposal, as discussed at 40 CFR 1508.23 (whether initiated by DOE, another Federal agency, or an applicant), for an action, if the proposal requires a DOE decision.

EA means an environmental assessment as defined at 40 CFR 1508.9.

EIS means an environmental impact statement as defined at 40 CFR 1508.11, or, unless this part specifically provides otherwise, a Supplemental EIS.

EPA means the U.S. Environmental Protection Agency.

FONSI means a Finding of No Significant Impact as defined at 40 CFR 1508.13.

Hazardous substance means a substance identified within the definition of hazardous substances in section 101(14) of CERCLA (42 U.S.C. 9601.101(14)). Radionuclides are hazardous substances through their listing under section 112 of the Clean Air Act (42 U.S.C. 7412) (40 CFR part 61, subpart H).

Host state means a state within whose boundaries DOE proposes an action at an existing facility or construction or operation of a new facility.

Host tribe means an American Indian tribe within whose tribal lands DOE proposes an action at an existing facility or construction or operation of a new facility. For purposes of this definition, *tribal lands* means the area of ''Indian country,'' as defined in 18 U.S.C. 1151, that is under the tribe's jurisdiction. That section defines Indian country as:

(i) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation;

(ii) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and

(iii) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Interim action means an action concerning a proposal that is the subject of an ongoing EIS and that DOE proposes to take before the ROD is issued, and that is permissible under 40 CFR 1506.1: Limitations on actions during the NEPA process.

Mitigation Action Plan means a document that describes the plan for implementing commitments made in a DOE EIS and its associated ROD, or, when appropriate, an EA or FONSI, to mitigate adverse environmental impacts associated with an action.

NEPA means the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

NEPA document means a DOE NOI, EIS, ROD, EA, FONSI, or any other document prepared pursuant to a requirement of NEPA or the CEQ Regulations.

NEPA review means the process used to comply with section 102(2) of NEPA.

NOI means a Notice of Intent to prepare an EIS as defined at 40 CFR 1508.22.

Notice of Availability means a formal notice, published in the FEDERAL REGISTER, that announces the issuance and public availability of a draft or final EIS. The EPA Notice of Availability is the official public notification of an EIS; a DOE Notice of Availability is an optional notice used to provide information to the public.

Pollutant means a substance identified within the definition of pollutant in section 101(33) of CERCLA (42 U.S.C. 9601.101(33)).

Program means a sequence of connected or related DOE actions or projects as discussed at 40 CFR 1508.18(b)(3) and 1508.25(a).

Programmatic NEPA document means a broad-scope EIS or EA that identifies and assesses the environmental impacts of a DOE program; it may also refer to an associated NEPA document, such as an NOI, ROD, or FONSI.

Project means a specific DOE undertaking including actions approved by permit or other regulatory decision as well as Federal and federally assisted activities, which may include design, construction, and operation of an individual facility; research, development, demonstration, and testing for a process or product; funding for a facility, process, or product; or similar activities, as discussed at 40 CFR 1508.18(b)(4).

ROD means a Record of Decision as described at 40 CFR 1505.2.

Scoping means the process described at 40 CFR 1501.7; ''public scoping process'' refers to that portion of the scoping process where the public is invited to participate, as described at 40 CFR 1501.7 (a)(1) and (b)(4).

Site-wide NEPA document means a broad-scope EIS or EA that is programmatic in nature and identifies and assesses the individual and cumulative impacts of ongoing and reasonably foreseeable future actions at a DOE site; it may also refer to an associated NEPA document, such as an NOI, ROD, or FONSI.

Supplement Analysis means a DOE document used to determine whether a supplemental EIS should be prepared pursuant to 40 CFR 1502.9(c), or to support a decision to prepare a new EIS.

Supplemental EIS means an EIS prepared to supplement a prior EIS as provided at 40 CFR 1502.9(c).

The Secretary means the Secretary of Energy.

[57 FR 15144, Apr. 24, 1992, as amended at 61 FR 36239, July 9, 1996]

§ 1021.105 Oversight of Agency NEPA activities.

The General Counsel, or his/her designee, is responsible for overall review of DOE NEPA compliance. Further information on DOE's NEPA process and the status of individual NEPA reviews may be obtained upon request from the Office of NEPA Policy and Compliance, GC–20, Office of the General Counsel, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585–0103.

[71 FR 68736, Nov. 28, 2006]

Subpart B—DOE Decisionmaking

§ 1021.200 DOE planning.

(a) DOE shall provide for adequate and timely NEPA review of DOE proposals, including those for programs, policies, projects, regulations, orders, or legislation, in accordance with 40

CFR 1501.2 and this section. In its planning for each proposal, DOE shall include adequate time and funding for proper NEPA review and for preparation of anticipated NEPA documents.

(b) DOE shall begin its NEPA review as soon as possible after the time that DOE proposes an action or is presented with a proposal.

(c) DOE shall determine the level of NEPA review required for a proposal in accordance with §1021.300 and subpart D of this part.

(d) During the development and consideration of a DOE proposal, DOE shall review any relevant planning and decisionmaking documents, whether prepared by DOE or another agency, to determine if the proposal or any of its alternatives are considered in a prior NEPA document. If so, DOE shall consider adopting the existing document, or any pertinent part thereof, in accordance with 40 CFR 1506.3.

§ 1021.210 DOE decisionmaking.

(a) For each DOE proposal, DOE shall coordinate its NEPA review with its decisionmaking. Sections 1021.211 through 1021.214 of this part specify how DOE will coordinate its NEPA review with decision points for certain types of proposals (40 CFR 1505.1(b)).

(b) DOE shall complete its NEPA review for each DOE proposal before making a decision on the proposal (e.g., normally in advance of, and for use in reaching, a decision to proceed with detailed design), except as provided in 40 CFR 1506.1 and §§1021.211 and 1021.216 of this part.

(c) During the decisionmaking process for each DOE proposal, DOE shall consider the relevant NEPA documents, public and agency comments (if any) on those documents, and DOE responses to those comments, as part of its consideration of the proposal (40 CFR 1505.1(d)) and shall include such documents, comments, and responses as part of the administrative record (40 CFR 1505.1(c)).

(d) If an EIS or EA is prepared for a DOE proposal, DOE shall consider the alternatives analyzed in that EIS or EA before rendering a decision on that proposal; the decision on the proposal shall be within the range of alternatives analyzed in the EA or EIS (40 CFR 1505.1(e)).

(e) When DOE uses a broad decision (such as one on a policy or program) as a basis for a subsequent narrower decision (such as one on a project or other site-specific proposal), DOE may use tiering (40 CFR 1502.20) and incorporation of material by reference (40 CFR 1502.21) in the NEPA review for the subsequent narrower proposal.

§ 1021.211 Interim actions: Limitations on actions during the NEPA process.

While DOE is preparing an EIS that is required under §1021.300(a) of this part, DOE shall take no action concerning the proposal that is the subject of the EIS before issuing an ROD, except as provided at 40 CFR 1506.1. Actions that are covered by, or are a part of, a DOE proposal for which an EIS is being prepared shall not be categorically excluded under subpart D of these regulations unless they qualify as interim actions under 40 CFR 1506.1.

§ 1021.212 Research, development, demonstration, and testing.

(a) This section applies to the adoption and application of programs that involve research, development, demonstration, and testing for new technologies (40 CFR 1502.4(c)(3)). Adoption of such programs might also lead to commercialization or other broad-scale implementation by DOE or another entity.

(b) For any proposed program described in paragraph (a) of this section, DOE shall begin its NEPA review (if otherwise required by this part) as soon as environmental effects can be meaningfully evaluated, and before DOE has reached the level of investment or commitment likely to determine subsequent development or restrict later alternatives, as discussed at 40 CFR 1502.4(c)(3).

(c) For subsequent phases of development and application, DOE shall prepare one or more additional NEPA documents (if otherwise required by this part).

§ 1021.213 Rulemaking.

(a) This section applies to regulations promulgated by DOE.

(b) DOE shall begin its NEPA review of a proposed rule (if otherwise required by this part) while drafting the proposed regulation, and as soon as environmental effects can be meaningfully evaluated.

(c) DOE shall include any relevant NEPA documents, public and agency comments (if any) on those documents, and DOE responses to those comments, as part of the administrative record (40 CFR 1505.1(c)).

(d) If an EIS is required, DOE will normally publish the draft EIS at the time it publishes the proposed rule (40 CFR 1502.5(d)). DOE will normally combine any public hearings required for a proposed rule with the public hearings required on the draft EIS under § 1021.313 of this part. The draft EIS need not accompany notices of inquiry or advance notices of proposed rulemaking that DOE may use to gather information during early stages of regulation development. When engaged in rulemaking for the purpose of protecting the public health and safety, DOE may issue the final rule simultaneously with publication of the EPA Notice of Availability of the final EIS in accordance with 40 CFR 1506.10(b).

(e) If an EA is required, DOE will normally complete the EA and issue any related FONSI prior to or simultaneously with issuance of the proposed rule; however, if the EA leads to preparation of an EIS, the provisions of paragraph (d) of this section shall apply.

§ 1021.214 Adjudicatory proceedings.

(a) This section applies to DOE proposed actions that involve DOE adjudicatory proceedings, excluding judicial or administrative civil or criminal enforcement actions.

(b) DOE shall complete its NEPA review (if otherwise required by this part) before rendering any final adjudicatory decision. If an EIS is required, the final EIS will normally be completed at the time of or before final staff recommendation, in accordance with 40 CFR 1502.5(c).

(c) DOE shall include any relevant NEPA documents, public and agency comments (if any) on those documents, and DOE responses to those comments, as part of the administrative record (40 CFR 1505.1(c)).

§ 1021.215 Applicant process.

(a) This section applies to actions that involve application to DOE for a permit, license, exemption or allocation, or other similar actions, unless the action is categorically excluded from preparation of an EA or EIS under subpart D of this part.

(b) The applicant shall:

(1) Consult with DOE as early as possible in the planning process to obtain guidance with respect to the appropriate level and scope of any studies or environmental information that DOE may require to be submitted as part of, or in support of, the application;

(2) Conduct studies that DOE deems necessary and appropriate to determine the environmental impacts of the proposed action;

(3) Consult with appropriate Federal, state, regional and local agencies, American Indian tribes and other potentially interested parties during the preliminary planning stages of the proposed action to identify environmental factors and permitting requirements;

(4) Notify DOE as early as possible of other Federal, state, regional, local or American Indian tribal actions required for project completion to allow DOE to coordinate the Federal environmental review, and fulfill the requirements of 40 CFR 1506.2 regarding elimination of duplication with state and local procedures, as appropriate;

(5) Notify DOE of private entities and organizations interested in the proposed undertaking, in order that DOE can consult, as appropriate, with these parties in accordance with 40 CFR 1501.2(d)(2); and

(6) Notify DOE if, before DOE completes the environmental review, the applicant plans to take an action that is within DOE's jurisdiction that may have an adverse environmental impact or limit the choice of alternatives. If DOE determines that the action would have an adverse environmental impact or would limit the choice of reasonable alternatives under 40 CFR 1506.1(a), DOE will promptly notify the applicant that DOE will take appropriate action

to ensure that the objectives and procedures of NEPA are achieved in accordance with 40 CFR 1506.1(b).

(c) For major categories of DOE actions involving a large number of applicants, DOE may prepare and make available generic guidance describing the recommended level and scope of environmental information that applicants should provide.

(d) DOE shall begin its NEPA review (if otherwise required by this part) as soon as possible after receiving an application described in paragraph (a) of this section, and shall independently evaluate and verify the accuracy of information received from an applicant in accordance with 40 CFR 1506.5(a). At DOE's option, an applicant may prepare an EA in accordance with 40 CFR 1506.5(b). If an EIS is prepared, the EIS shall be prepared by DOE or by a contractor that is selected by DOE and that may be funded by the applicant, in accordance with 40 CFR 1506.5(c). The contractor shall provide a disclosure statement in accordance with 40 CFR 1506.5(c). DOE shall complete any NEPA documents (or evaluation of any EA prepared by the applicant) before rendering a final decision on the application and shall consider the NEPA document in reaching its decision, as provided in § 1021.210 of this part.

[57 FR 15144, Apr. 24, 1992, as amended at 76 FR 63787, Oct. 13, 2011]

§ 1021.216 Procurement, financial assistance, and joint ventures.

(a) This section applies to DOE competitive and limited-source procurements, to awards of financial assistance by a competitive process, and to joint ventures entered into as a result of competitive solicitations, unless the action is categorically excluded from preparation of an EA or EIS under subpart D of this part. Paragraphs (b), (c), and (i) of this section apply as well to DOE sole-source procurements of sites, systems, or processes, to noncompetitive awards of financial assistance, and to sole-source joint ventures, unless the action is categorically excluded from preparation of an EA or EIS under subpart D of this part.

(b) When relevant in DOE's judgment, DOE shall require that offeror's submit environmental data and analyses as a discrete part of the offeror's proposal. DOE shall specify in its solicitation document the type of information and level of detail for environmental data and analyses so required. The data will be limited to those reasonably available to offerors.

(c) DOE shall independently evaluate and verify the accuracy of environmental data and analyses submitted by offerors.

(d) For offers in the competitive range, DOE shall prepare and consider an environmental critique before the selection.

(e) The environmental critique will be subject to the confidentiality requirements of the procurement process.

(f) The environmental critique will evaluate the environmental data and analyses submitted by offerors; it may also evaluate supplemental information developed by DOE as necessary for a reasoned decision.

(g) The environmental critique will focus on environmental issues that are pertinent to a decision on proposals and will include:

(1) A brief discussion of the purpose of the procurement and each offer, including any site, system, or process variations among the offers having environmental implications;

(2) A discussion of the salient characteristics of each offeror's proposed site, system, or process as well as alternative sites, systems, or processes;

(3) A brief comparative evaluation of the potential environmental impacts of the offers, which will address direct and indirect effects, short-term and long-term effects, proposed mitigation measures, adverse effects that cannot be avoided, areas where important environmental information is incomplete and unavailable, unresolved environmental issues and practicable mitigating measures not included in the offeror's proposal; and

(4) To the extent known for each offer, a list of Federal, Tribal, state, and local government permits, licenses, and approvals that must be obtained.

(h) DOE shall prepare a publicly available environmental synopsis, based on the environmental critique, to document the consideration given to environmental factors and to record

that the relevant environmental consequences of reasonable alternatives have been evaluated in the selection process. The synopsis will not contain business, confidential, trade secret or other information that DOE otherwise would not disclose pursuant to 18 U.S.C. 1905, the confidentiality requirements of the competitive procurement process, 5 U.S.C. 552(b) and 41 U.S.C. 423. To assure compliance with this requirement, the synopsis will not contain data or other information that may in any way reveal the identity of offerors. After a selection has been made, the environmental synopsis shall be filed with EPA, shall be made publicly available, and shall be incorporated in any NEPA document prepared under paragraph (i) of this section.

(i) If an EA or EIS is required, DOE shall prepare, consider and publish the EA or EIS in conformance with the CEQ Regulations and other provisions of this part before taking any action pursuant to the contract or award of financial assistance (except as provided at 40 CFR 1506.1 and § 1021.211 of this part). If the NEPA process is not completed before the award of the contract, financial assistance, or joint venture, then the contract, financial assistance, or joint venture shall be contingent on completion of the NEPA process (except as provided at 40 CFR 1506.1 and § 1021.211 of this part). DOE shall phase subsequent contract work to allow the NEPA review process to be completed in advance of a go/no-go decision.

Subpart C—Implementing Procedures

§ 1021.300 General requirements.

(a) DOE shall determine, under the procedures in the CEQ Regulations and this part, whether any DOE proposal:

(1) Requires preparation of an EIS;

(2) Requires preparation of an EA; or

(3) Is categorically excluded from preparation of either an EIS or an EA.

DOE shall prepare any pertinent documents as required by NEPA, the CEQ Regulations, or this part.

(b) Notwithstanding any other provision of these regulations, DOE may prepare a NEPA document for any DOE action at any time in order to further the purposes of NEPA. This may be done to analyze the consequences of ongoing activities, support DOE planning, assess the need for mitigation, fully disclose the potential environmental consequences of DOE actions, or for any other reason. Documents prepared under this paragraph shall be prepared in the same manner as DOE documents prepared under paragraph (a) of this section.

§ 1021.301 Agency review and public participation.

(a) DOE shall make its NEPA documents available to other Federal agencies, states, local governments, American Indian tribes, interested groups, and the general public, in accordance with 40 CFR 1506.6, except as provided in § 1021.340 of this part.

(b) Wherever feasible, DOE NEPA documents shall explain technical, scientific, or military terms or measurements using terms familiar to the general public, in accordance with 40 CFR 1502.8.

(c) DOE shall notify the host state and host tribe of a DOE determination to prepare an EA or EIS for a DOE proposal, and may notify any other state or American Indian tribe that, in DOE's judgment, may be affected by the proposal.

(d) DOE shall provide the host state and host tribe with an opportunity to review and comment on any DOE EA prior to DOE's approval of the EA. DOE may also provide any other state or American Indian tribe with the same opportunity if, in DOE's judgment, the state or tribe may be affected by the proposed action. At DOE's discretion, this review period shall be from 14 to 30 days. DOE shall consider all comments received from a state or tribe during the review period before approving or modifying the EA, as appropriate. If all states and tribes afforded this opportunity for preapproval review waive such opportunity, or provide a response before the end of the comment period, DOE may proceed to approve or take other appropriate action on the EA before the end of the review period.

(e) Paragraphs (c) and (d) of this section shall not apply to power marketing actions, such as rate-setting, in which a state or American Indian tribe

is a customer, or to any other circumstances where DOE determines that such advance information could create a conflict of interest.

§ 1021.310 Environmental impact statements.

DOE shall prepare and circulate EISs and related RODs in accordance with the requirements of the CEQ Regulations, as supplemented by this subpart. DOE shall include in draft and final EISs a disclosure statement executed by any contractor (or subcontractor) under contract with DOE to prepare the EIS document, in accordance with 40 CFR 1506.5(c).

[61 FR 36239, July 9, 1996]

§ 1021.311 Notice of intent and scoping.

(a) DOE shall publish an NOI in the FEDERAL REGISTER in accordance with 40 CFR 1501.7 and containing the elements specified in 40 CFR 1508.22 as soon as practicable after a decision is made to prepare an EIS. However, if there will be a lengthy period of time between its decision to prepare an EIS and the time of actual preparation, DOE may defer publication of the NOI until a reasonable time before preparing the EIS, provided that DOE allows a reasonable opportunity for interested parties to participate in the EIS process. Through the NOI, DOE shall invite comments and suggestions on the scope of the EIS. DOE shall disseminate the NOI in accordance with 40 CFR 1506.6.

(b) If there will be a lengthy delay between the time DOE has decided to prepare an EIS and the beginning of the public scoping process, DOE may publish an Advance NOI in the FEDERAL REGISTER to provide an early opportunity to inform interested parties of the pending EIS or to solicit early public comments. This Advance NOI does not serve as a substitute for the NOI provided for in paragraph (a) of this section.

(c) Publication of the NOI in the FEDERAL REGISTER shall begin the public scoping process. The public scoping process for a DOE EIS shall allow a minimum of 30 days for the receipt of public comments.

(d) DOE shall hold at least one public scoping meeting as part of the public scoping process for a DOE EIS. DOE shall announce the location, date, and time of public scoping meetings in the NOI or by other appropriate means, such as additional notices in the FEDERAL REGISTER, news releases to the local media, or letters to affected parties. Public scoping meetings shall not be held until at least 15 days after public notification. Should DOE change the location, date, or time of a public scoping meeting, or schedule additional public scoping meetings, DOE shall publicize these changes in the FEDERAL REGISTER or in other ways as appropriate.

(e) In determining the scope of the EIS, DOE shall consider all comments received during the announced comment period held as part of the public scoping process. DOE may also consider comments received after the close of the announced comment period.

(f) A public scoping process is optional for DOE supplemental EISs (40 CFR 1502.9(c)(4)). If DOE initiates a public scoping process for a supplemental EIS, the provisions of paragraphs (a) through (e) of this section shall apply.

[57 FR 15144, Apr. 24, 1992, as amended at 61 FR 36239, July 9, 1996; 76 FR 63787, Oct. 13, 2011]

§ 1021.312 [Reserved]

§ 1021.313 Public review of environmental impact statements.

(a) The public review and comment period on a DOE draft EIS shall be no less than 45 days (40 CFR 1506.10(c)). The public comment period begins when EPA publishes a Notice of Availability of the document in the FEDERAL REGISTER.

(b) DOE shall hold at least one public hearing on DOE draft EISs. Such public hearings shall be announced at least 15 days in advance. The announcement shall identify the subject of the draft EIS and include the location, date, and time of the public hearings.

(c) DOE shall prepare a final EIS following the public comment period and hearings on the draft EIS. The final EIS shall respond to oral and written

comments received during public review of the draft EIS, as provided at 40 CFR 1503.4. In addition to the requirements at 40 CFR 1502.9(b), a DOE final EIS may include any Statement of Findings required by 10 CFR part 1022, ''Compliance with Floodplain and Wetland Environmental Review Requirements,'' or a Statement of Findings may be issued separately.

(d) DOE shall use appropriate means to publicize the availability of draft and final EISs and the time and place for public hearings on a draft EIS. The methods chosen should focus on reaching persons who may be interested in or affected by the proposal and may include the methods listed in 40 CFR 1506.6(b)(3).

[57 FR 15144, Apr. 24, 1992, as amended at 68 FR 51432, Aug. 27, 2003]

§ 1021.314 Supplemental environmental impact statements.

(a) DOE shall prepare a supplemental EIS if there are substantial changes to the proposal or significant new circumstances or information relevant to environmental concerns, as discussed in 40 CFR 1502.9(c)(1).

(b) DOE may supplement a draft EIS or final EIS at any time, to further the purposes of NEPA, in accordance with 40 CFR 1502.9(c)(2).

(c) When it is unclear whether or not an EIS supplement is required, DOE shall prepare a Supplement Analysis.

(1) The Supplement Analysis shall discuss the circumstances that are pertinent to deciding whether to prepare a supplemental EIS, pursuant to 40 CFR 1502.9(c).

(2) The Supplement Analysis shall contain sufficient information for DOE to determine whether:

(i) An existing EIS should be supplemented;

(ii) A new EIS should be prepared; or

(iii) No further NEPA documentation is required.

(3) DOE shall make the determination and the related Supplement Analysis available to the public for information. Copies of the determination and Supplement Analysis shall be provided upon written request. DOE shall make copies available for inspection in the appropriate DOE public reading room(s) or other appropriate location(s) for a reasonable time.

(d) DOE shall prepare, circulate, and file a supplement to a draft or final EIS in the same manner as any other draft and final EISs, except that scoping is optional for a supplement. If DOE decides to take action on a proposal covered by a supplemental EIS, DOE shall prepare a ROD in accordance with the provisions of § 1021.315 of this part.

(e) When applicable, DOE will incorporate an EIS supplement, or the determination and supporting Supplement Analysis made under paragraph (c) of this section, into any related formal administrative record on the action that is the subject of the EIS supplement or determination (40 CFR 1502.9(c)(3)).

§ 1021.315 Records of decision.

(a) No decision may be made on a proposal covered by an EIS during a 30-day ''waiting period'' following completion of the final EIS, except as provided at 40 CFR 1506.1 and 1506.10(b) and § 1021.211 of this part. The 30-day period starts when the EPA Notice of Availability for the final EIS is published in the FEDERAL REGISTER.

(b) If DOE decides to take action on a proposal covered by an EIS, a ROD shall be prepared as provided at 40 CFR 1505.2 (except as provided at 40 CFR 1506.1 and § 1021.211 of this part).

(c) DOE RODs shall be published in the FEDERAL REGISTER and made available to the public as specified in 40 CFR 1506.6, except as provided in 40 CFR 1507.3(c) and § 1021.340 of this part.

(d) No action shall be taken until the decision has been made public. DOE may implement the decision before the ROD is published in the FEDERAL REGISTER if the ROD has been signed and the decision and the availability of the ROD have been made public by other means (e.g., press release, announcement in local media).

(e) DOE may revise a ROD at any time, so long as the revised decision is adequately supported by an existing EIS. A revised ROD is subject to the provisions of paragraphs (b), (c), and (d) of this section.

[57 FR 15144, Apr. 24, 1992, as amended at 61 FR 36239, July 9, 1996]

§ 1021.320 Environmental assessments.

DOE shall prepare and circulate EAs and related FONSIs in accordance with the requirements of the CEQ Regulations, as supplemented by this subpart.

§ 1021.321 Requirements for environmental assessments.

(a) *When to prepare an EA.* As required by 40 CFR 1501.4(b), DOE shall prepare an EA for a proposed DOE action that is described in the classes of actions listed in appendix C to subpart D of this part, and for a proposed DOE action that is not described in any of the classes of actions listed in appendices A, B, or D to subpart D, except that an EA is not required if DOE has decided to prepare an EIS. DOE may prepare an EA on any action at any time in order to assist agency planning and decisionmaking.

(b) *Purposes.* A DOE EA shall serve the purposes identified in 40 CFR 1508.9(a), which include providing sufficient evidence and analysis for determining whether to prepare an EIS or to issue a FONSI. If appropriate, a DOE EA shall also include any floodplain/wetlands assessment prepared under 10 CFR part 1022 and may include analyses needed for other environmental determinations.

(c) *Content.* A DOE EA shall comply with the requirements found at 40 CFR 1508.9. In addition to any other alternatives, DOE shall assess the no action alternative in an EA, even when the proposed action is specifically required by legislation or a court order.

§ 1021.322 Findings of no significant impact.

(a) DOE shall prepare a FONSI only if the related EA supports the finding that the proposed action will not have a significant effect on the human environment. If a required DOE EA does not support a FONSI, DOE shall prepare an EIS and issue a ROD before taking action on the proposal addressed by the EA, except as permitted under 40 CFR 1506.1 and § 1021.211 of this part.

(b) In addition to the requirements found at 40 CFR 1508.13, a DOE FONSI shall include the following:

(1) Any commitments to mitigations that are essential to render the impacts of the proposed action not significant, beyond those mitigations that are integral elements of the proposed action, and a reference to the Mitigation Action Plan prepared under § 1021.331 of this part;

(2) Any ''Statement of Findings'' required by 10 CFR part 1022, ''Compliance with Floodplain/Wetlands Environmental Review Requirements'';

(3) The date of issuance; and

(4) The signature of the DOE approving official.

(c) DOE shall make FONSIs available to the public as provided at 40 CFR 1501.4(e)(1) and 1506.6; DOE shall make copies available for inspection in the appropriate DOE public reading room(s) or other appropriate location(s) for a reasonable time.

(d) DOE shall issue a proposed FONSI for public review and comment before making a final determination on the FONSI if required by 40 CFR 1501.4(e)(2); DOE may issue a proposed FONSI for public review and comment in other situations as well.

(e) Upon issuance of the FONSI, DOE may proceed with the proposed action subject to any mitigation commitments expressed in the FONSI that are essential to render the impacts of the proposed action not significant.

(f) DOE may revise a FONSI at any time, so long as the revision is supported by an existing EA. A revised FONSI is subject to all provisions of this section.

[57 FR 15144, Apr. 24, 1992, as amended at 61 FR 36239, July 9, 1996; 76 FR 63787, Oct. 13, 2011]

§ 1021.330 Programmatic (including site-wide) NEPA documents.

(a) When required to support a DOE programmatic decision (40 CFR 1508.18(b)(3)), DOE shall prepare a programmatic EIS or EA (40 CFR 1502.4). DOE may also prepare a programmatic EIS or EA at any time to further the purposes of NEPA.

(b) A DOE programmatic NEPA document shall be prepared, issued, and circulated in accordance with the requirements for any other NEPA document, as established by the CEQ Regulations and this part.

(c) As a matter of policy when not otherwise required, DOE shall prepare

site-wide EISs for certain large, multiple-facility DOE sites; DOE may prepare EISs or EAs for other sites to assess the impacts of all or selected functions at those sites.

(d) DOE shall evaluate site wide NEPA documents prepared under §1021.330(c) at least every five years. DOE shall evaluate site-wide EISs by means of a Supplement Analysis, as provided in §1021.314. Based on the Supplement Analysis, DOE shall determine whether the existing EIS remains adequate or whether to prepare a new site-wide EIS or supplement the existing EIS, as appropriate. The determination and supporting analysis shall be made available in the appropriate DOE public reading room(s) or in other appropriate location(s) for a reasonable time.

(e) DOE shall evaluate site-wide EAs by means of an analysis similar to the Supplement Analysis to determine whether the existing site-wide EA remains adequate, whether to prepare a new site-wide EA, revise the FONSI, or prepare a site wide EIS, as appropriate. The determination and supporting analysis shall be made available in the appropriate DOE public reading room(s) or in other appropriate location(s) for a reasonable time.

§1021.331 Mitigation action plans.

(a) Following completion of each EIS and its associated ROD, DOE shall prepare a Mitigation Action Plan that addresses mitigation commitments expressed in the ROD. The Mitigation Action Plan shall explain how the corresponding mitigation measures, designed to mitigate adverse environmental impacts associated with the course of action directed by the ROD, will be planned and implemented. The Mitigation Action Plan shall be prepared before DOE takes any action directed by the ROD that is the subject of a mitigation commitment.

(b) In certain circumstances, as specified in §1021.322(b)(1), DOE shall also prepare a Mitigation Action Plan for commitments to mitigations that are essential to render the impacts of the proposed action not significant. The Mitigation Action Plan shall address all commitments to such necessary mitigations and explain how mitigation will be planned and implemented. The Mitigation Action Plan shall be prepared before the FONSI is issued and shall be referenced therein.

(c) Each Mitigation Action Plan shall be as complete as possible, commensurate with the information available regarding the course of action either directed by the ROD or the action to be covered by the FONSI, as appropriate. DOE may revise the Plan as more specific and detailed information becomes available.

(d) DOE shall make copies of the Mitigation Action Plans available for inspection in the appropriate DOE public reading room(s) or other appropriate location(s) for a reasonable time. Copies of the Mitigation Action Plans shall also be available upon written request.

[57 FR 15144, Apr. 24, 1992, as amended at 76 FR 63787, Oct. 13, 2011]

§1021.340 Classified, confidential, and otherwise exempt information.

(a) Notwithstanding other sections of this part, DOE shall not disclose classified, confidential, or other information that DOE otherwise would not disclose pursuant to the Freedom of Information Act (FOIA) (5 U.S.C. 552) and 10 CFR 1004.10(b) of DOE's regulations implementing the FOIA, except as provided by 40 CFR 1506.6(f).

(b) To the fullest extent possible, DOE shall segregate any information that is exempt from disclosure requirements into an appendix to allow public review of the remainder of a NEPA document.

(c) If exempt information cannot be segregated, or if segregation would leave essentially meaningless material, DOE shall withhold the entire NEPA document from the public; however, DOE shall prepare the NEPA document, in accordance with the CEQ Regulations and this part, and use it in DOE decisionmaking.

§1021.341 Coordination with other environmental review requirements.

(a) In accordance with 40 CFR 1500.4(k) and (o), 1502.25, and 1506.4, DOE shall integrate the NEPA process and coordinate NEPA compliance with other environmental review requirements to the fullest extent possible.

(b) To the extent possible, DOE shall determine the applicability of other environmental requirements early in the planning process, in consultation with other agencies when necessary or appropriate, to ensure compliance and to avoid delays, and shall incorporate any relevant requirements as early in the NEPA review process as possible.

§ 1021.342 Interagency cooperation.

For DOE programs that involve another Federal agency or agencies in related decisions subject to NEPA, DOE will comply with the requirements of 40 CFR 1501.5 and 1501.6. As part of this process, DOE shall cooperate with the other agencies in developing environmental information and in determining whether a proposal requires preparation of an EIS or EA, or can be categorically excluded from preparation of either. Further, where appropriate and acceptable to the other agencies, DOE shall develop or cooperate in the development of interagency agreements to facilitate coordination and to reduce delay and duplication.

§ 1021.343 Variances.

(a) *Emergency actions*. DOE may take an action without observing all provisions of this part or the CEQ Regulations, in accordance with 40 CFR 1506.11, in emergency situations that demand immediate action. DOE shall consult with CEQ as soon as possible regarding alternative arrangements for emergency actions having significant environmental impacts. DOE shall document, including publishing a notice in the FEDERAL REGISTER, emergency actions covered by this paragraph within 30 days after such action occurs; this documentation shall identify any adverse impacts from the actions taken, further mitigation necessary, and any NEPA documents that may be required.

(b) *Reduction of time periods*. On a case-by-case basis, DOE may reduce time periods established in this part that are not required by the CEQ Regulations. If DOE determines that such reduction is necessary, DOE shall publish a notice in the FEDERAL REGISTER specifying the revised time periods and the rationale for the reduction.

(c) *Other*. Any variance from the requirements of this part, other than as provided by paragraphs (a) and (b) of this section, must be soundly based on the interests of national security or the public health, safety, or welfare and must have the advance written approval of the Secretary; however, the Secretary is not authorized to waive or grant a variance from any requirement of the CEQ Regulations (except as provided for in those regulations). If the Secretary determines that a variance from the requirements of this part is within his/her authority to grant and is necessary, DOE shall publish a notice in the FEDERAL REGISTER specifying the variance granted and the reasons.

Subpart D—Typical Classes of Actions

SOURCE: 76 FR 63787, Oct. 13, 2011, unless otherwise noted.

§ 1021.400 Level of NEPA review.

(a) This subpart identifies DOE actions that normally:

(1) Do not require preparation of either an EIS or an EA (are categorically excluded from preparation of either document) (appendices A and B to this subpart D);

(2) Require preparation of an EA, but not necessarily an EIS (appendix C to this subpart D); or

(3) Require preparation of an EIS (appendix D to this subpart D).

(b) Any completed, valid NEPA review does not have to be repeated, and no completed NEPA documents need to be redone by reasons of these regulations, except as provided in § 1021.314.

(c) If a DOE proposal is encompassed within a class of actions listed in the appendices to this subpart D, DOE shall proceed with the level of NEPA review indicated for that class of actions, unless there are extraordinary circumstances related to the specific proposal that may affect the significance of the environmental effects of the proposal.

(d) If a DOE proposal is not encompassed within the classes of actions listed in the appendices to this subpart D, or if there are extraordinary circumstances related to the proposal that may affect the significance of the

environmental effects of the proposal, DOE shall either:

(1) Prepare an EA and, on the basis of that EA, determine whether to prepare an EIS or a FONSI; or

(2) Prepare an EIS and ROD.

§ 1021.410 Application of categorical exclusions (classes of actions that normally do not require EAs or EISs).

(a) The actions listed in appendices A and B to this subpart D are classes of actions that DOE has determined do not individually or cumulatively have a significant effect on the human environment (categorical exclusions).

(b) To find that a proposal is categorically excluded, DOE shall determine the following:

(1) The proposal fits within a class of actions that is listed in appendix A or B to this subpart D;

(2) There are no extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal. Extraordinary circumstances are unique situations presented by specific proposals, including, but not limited to, scientific controversy about the environmental effects of the proposal; uncertain effects or effects involving unique or unknown risks; and unresolved conflicts concerning alternative uses of available resources; and

(3) The proposal has not been segmented to meet the definition of a categorical exclusion. Segmentation can occur when a proposal is broken down into small parts in order to avoid the appearance of significance of the total action. The scope of a proposal must include the consideration of connected and cumulative actions, that is, the proposal is not connected to other actions with potentially significant impacts (40 CFR 1508.25(a)(1)), is not related to other actions with individually insignificant but cumulatively significant impacts (40 CFR 1508.27(b)(7)), and is not precluded by 40 CFR 1506.1 or § 1021.211 of this part concerning limitations on actions during EIS preparation.

(c) All categorical exclusions may be applied by any organizational element of DOE. The sectional divisions in appendix B to this subpart D are solely for purposes of organization of that appendix and are not intended to be limiting.

(d) A class of actions includes activities foreseeably necessary to proposals encompassed within the class of actions (such as award of implementing grants and contracts, site preparation, purchase and installation of equipment, and associated transportation activities).

(e) Categorical exclusion determinations for actions listed in appendix B shall be documented and made available to the public by posting online, generally within two weeks of the determination, unless additional time is needed in order to review and protect classified information, ''confidential business information,'' or other information that DOE would not disclose pursuant to the Freedom of Information Act (FOIA) (5 U.S.C. 552). Posted categorical exclusion determinations shall not disclose classified information, ''confidential business information,'' or other information that DOE would not disclose pursuant to FOIA. (See also 10 CFR 1021.340.)

(f) Proposed recurring activities to be undertaken during a specified time period, such as routine maintenance activities for a year, may be addressed in a single categorical exclusion determination after considering the potential aggregated impacts.

(g) The following clarifications are provided to assist in the appropriate application of categorical exclusions that employ the terms or phrases:

(1) ''Previously disturbed or developed'' refers to land that has been changed such that its functioning ecological processes have been and remain altered by human activity. The phrase encompasses areas that have been transformed from natural cover to non-native species or a managed state, including, but not limited to, utility and electric power transmission corridors and rights-of-way, and other areas where active utilities and currently used roads are readily available.

(2) DOE considers terms such as ''small'' and ''small-scale'' in the context of the particular proposal, including its proposed location. In assessing whether a proposed action is small, in addition to the actual magnitude of the

proposal, DOE considers factors such as industry norms, the relationship of the proposed action to similar types of development in the vicinity of the proposed action, and expected outputs of emissions or waste. When considering the physical size of a proposed facility, for example, DOE would review the surrounding land uses, the scale of the proposed facility relative to existing development, and the capacity of existing roads and other infrastructure to support the proposed action.

APPENDIX A TO SUBPART D OF PART 1021—CATEGORICAL EXCLUSIONS APPLICABLE TO GENERAL AGENCY ACTIONS

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A1 ROUTINE DOE BUSINESS ACTIONS

Routine actions necessary to support the normal conduct of DOE business limited to administrative, financial, and personnel actions.

A2 CLARIFYING OR ADMINISTRATIVE CONTRACT ACTIONS

Contract interpretations, amendments, and modifications that are clarifying or administrative in nature.

A3 CERTAIN ACTIONS BY OFFICE OF HEARINGS AND APPEALS

Adjustments, exceptions, exemptions, appeals and stays, modifications, or rescissions of orders issued by the Office of Hearings and Appeals.

A4 INTERPRETATIONS AND RULINGS FOR EXISTING REGULATIONS

Interpretations and rulings with respect to existing regulations, or modifications or rescissions of such interpretations and rulings.

A5 INTERPRETIVE RULEMAKINGS WITH NO CHANGE IN ENVIRONMENTAL EFFECT

Rulemakings interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended.

A6 PROCEDURAL RULEMAKINGS

Rulemakings that are strictly procedural, including, but not limited to, rulemaking (under 48 CFR chapter 9) establishing procedures for technical and pricing proposals and establishing contract clauses and contracting practices for the purchase of goods and services, and rulemaking (under 10 CFR part 600) establishing application and review procedures for, and administration, audit, and closeout of, grants and cooperative agreements.

A7 [RESERVED]

A8 AWARDS OF CERTAIN CONTRACTS

Awards of contracts for technical support services, management and operation of a government-owned facility, and personal services.

A9 INFORMATION GATHERING, ANALYSIS, AND DISSEMINATION

Information gathering (including, but not limited to, literature surveys, inventories, site visits, and audits), data analysis (including, but not limited to, computer modeling), document preparation (including, but not limited to, conceptual design, feasibility studies, and analytical energy supply and demand studies), and information dissemination (including, but not limited to, document publication and distribution, and classroom training and informational programs), but not including site characterization or environmental monitoring. (See also B3.1 of appendix B to this subpart.)

A10 REPORTS AND RECOMMENDATIONS ON NON-DOE LEGISLATION

Reports and recommendations on legislation or rulemaking that are not proposed by DOE.

A11 TECHNICAL ADVICE AND ASSISTANCE TO ORGANIZATIONS

Technical advice and planning assistance to international, national, state, and local organizations.

A12 EMERGENCY PREPAREDNESS PLANNING

Emergency preparedness planning activities, including, but not limited to, the designation of onsite evacuation routes.

A13 PROCEDURAL DOCUMENTS

Administrative, organizational, or procedural Policies, Orders, Notices, Manuals, and Guides.

A14 APPROVAL OF TECHNICAL EXCHANGE ARRANGEMENTS

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B4.4 Power marketing services and activities
B4.5 Temporary adjustments to river operations
B4.6 Additions and modifications to transmission facilities
B4.7 Fiber optic cable
B4.8 Electricity transmission agreements
B4.9 Multiple use of powerline rights-of-way
B4.10 Removal of electric transmission facilities
B4.11 Electric power substations and interconnection facilities
B4.12 Construction of powerlines
B4.13 Upgrading and rebuilding existing powerlines

B5. CATEGORICAL EXCLUSIONS APPLICABLE TO CONSERVATION, FOSSIL, AND RENEWABLE ENERGY ACTIVITIES

B5.1 Actions to conserve energy or water
B5.2 Modifications to pumps and piping
B5.3 Modification or abandonment of wells
B5.4 Repair or replacement of pipelines
B5.5 Short pipeline segments
B5.6 Oil spill cleanup
B5.7 Import or export natural gas, with operational changes
B5.8 Import or export natural gas, with new cogeneration powerplant
B5.9 Temporary exemptions for electric powerplants
B5.10 Certain permanent exemptions for existing electric powerplants
B5.11 Permanent exemptions allowing mixed natural gas and petroleum
B5.12 Workover of existing wells
B5.13 Experimental wells for injection of small quantities of carbon dioxide
B5.14 Combined heat and power or cogeneration systems
B5.15 Small-scale renewable energy research and development and pilot projects
B5.16 Solar photovoltaic systems
B5.17 Solar thermal systems
B5.18 Wind turbines
B5.19 Ground source heat pumps
B5.20 Biomass power plants
B5.21 Methane gas recovery and utilization systems
B5.22 Alternative fuel vehicle fueling stations
B5.23 Electric vehicle charging stations
B5.24 Drop-in hydroelectric systems
B5.25 Small-scale renewable energy research and development and pilot projects in aquatic environments

B6. CATEGORICAL EXCLUSIONS APPLICABLE TO ENVIRONMENTAL RESTORATION AND WASTE MANAGEMENT ACTIVITIES

B6.1 Cleanup actions
B6.2 Waste collection, treatment, stabilization, and containment facilities
B6.3 Improvements to environmental control systems
B6.4 Facilities for storing packaged hazardous waste for 90 days or less
B6.5 Facilities for characterizing and sorting packaged waste and overpacking waste
B6.6 Modification of facilities for storing, packaging, and repacking waste
B6.7 [Reserved]
B6.8 Modifications for waste minimization and reuse of materials
B6.9 Measures to reduce migration of contaminated groundwater
B6.10 Upgraded or replacement waste storage facilities

B7. CATEGORICAL EXCLUSIONS APPLICABLE TO INTERNATIONAL ACTIVITIES

B7.1 Emergency measures under the International Energy Program
B7.2 Import and export of special nuclear or isotopic materials

B. CONDITIONS THAT ARE INTEGRAL ELEMENTS OF THE CLASSES OF ACTIONS IN APPENDIX B

The classes of actions listed below include the following conditions as integral elements of the classes of actions. To fit within the classes of actions listed below, a proposal must be one that would not:

(1) Threaten a violation of applicable statutory, regulatory, or permit requirements for environment, safety, and health, or similar requirements of DOE or Executive Orders;

(2) Require siting and construction or major expansion of waste storage, disposal, recovery, or treatment facilities (including incinerators), but the proposal may include categorically excluded waste storage, disposal, recovery, or treatment actions or facilities;

(3) Disturb hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products that preexist in the environment such that there would be uncontrolled or unpermitted releases;

(4) Have the potential to cause significant impacts on environmentally sensitive resources. An environmentally sensitive resource is typically a resource that has been identified as needing protection through Executive Order, statute, or regulation by Federal, state, or local government, or a Federally recognized Indian tribe. An action may be categorically excluded if, although sensitive resources are present, the action would not have the potential to cause significant impacts on those resources (such as

construction of a building with its foundation well above a sole-source aquifer or upland surface soil removal on a site that has wetlands). Environmentally sensitive resources include, but are not limited to:

(i) Property (such as sites, buildings, structures, and objects) of historic, archeological, or architectural significance designated by a Federal, state, or local government, Federally recognized Indian tribe, or Native Hawaiian organization, or property determined to be eligible for listing on the National Register of Historic Places;

(ii) Federally-listed threatened or endangered species or their habitat (including critical habitat) or Federally-proposed or candidate species or their habitat (Endangered Species Act); state-listed or state-proposed endangered or threatened species or their habitat; Federally-protected marine mammals and Essential Fish Habitat (Marine Mammal Protection Act; Magnuson-Stevens Fishery Conservation and Management Act); and otherwise Federally-protected species (such as the Bald and Golden Eagle Protection Act or the Migratory Bird Treaty Act);

(iii) Floodplains and wetlands (as defined in 10 CFR 1022.4, ''Compliance with Floodplain and Wetland Environmental Review Requirements: Definitions,'' or its successor);

(iv) Areas having a special designation such as Federally- and state-designated wilderness areas, national parks, national monuments, national natural landmarks, wild and scenic rivers, state and Federal wildlife refuges, scenic areas (such as National Scenic and Historic Trails or National Scenic Areas), and marine sanctuaries;

(v) Prime or unique farmland, or other farmland of statewide or local importance, as defined at 7 CFR 658.2(a), ''Farmland Protection Policy Act: Definitions,'' or its successor;

(vi) Special sources of water (such as sole-source aquifers, wellhead protection areas, and other water sources that are vital in a region); and

(vii) Tundra, coral reefs, or rain forests; or

(5) Involve genetically engineered organisms, synthetic biology, governmentally designated noxious weeds, or invasive species, unless the proposed activity would be contained or confined in a manner designed and operated to prevent unauthorized release into the environment and conducted in accordance with applicable requirements, such as those of the Department of Agriculture, the Environmental Protection Agency, and the National Institutes of Health.

B1. Categorical Exclusions Applicable to Facility Operation

B1.1 Changing rates and prices

Changing rates for services or prices for products marketed by parts of DOE other than Power Marketing Administrations, and approval of rate or price changes for non-DOE entities, that are consistent with the change in the implicit price deflator for the Gross Domestic Product published by the Department of Commerce, during the period since the last rate or price change.

B1.2 Training exercises and simulations

Training exercises and simulations (including, but not limited to, firing-range training, small-scale and short-duration force-on-force exercises, emergency response training, fire fighter and rescue training, and decontamination and spill cleanup training) conducted under appropriately controlled conditions and in accordance with applicable requirements.

B1.3 Routine maintenance

Routine maintenance activities and custodial services for buildings, structures, rights-of-way, infrastructures (including, but not limited to, pathways, roads, and railroads), vehicles and equipment, and localized vegetation and pest control, during which operations may be suspended and resumed, provided that the activities would be conducted in a manner in accordance with applicable requirements. Custodial services are activities to preserve facility appearance, working conditions, and sanitation (such as cleaning, window washing, lawn mowing, trash collection, painting, and snow removal). Routine maintenance activities, corrective (that is, repair), preventive, and predictive, are required to maintain and preserve buildings, structures, infrastructures, and equipment in a condition suitable for a facility to be used for its designated purpose. Such maintenance may occur as a result of severe weather (such as hurricanes, floods, and tornados), wildfires, and other such events. Routine maintenance may result in replacement to the extent that replacement is in-kind and is not a substantial upgrade or improvement. In-kind replacement includes installation of new components to replace outmoded components, provided that the replacement does not result in a significant change in the expected useful life, design capacity, or function of the facility. Routine maintenance does not include replacement of a major component that significantly extends the originally intended useful life of a facility (for example, it does not include the replacement of a reactor vessel near the end of its useful life). Routine maintenance activities include, but are not limited to:

(a) Repair or replacement of facility equipment, such as lathes, mills, pumps, and presses;

(b) Door and window repair or replacement;

(c) Wall, ceiling, or floor repair or replacement;

(d) Reroofing;

(e) Plumbing, electrical utility, lighting, and telephone service repair or replacement;

(f) Routine replacement of high-efficiency particulate air filters;

(g) Inspection and/or treatment of currently installed utility poles;

(h) Repair of road embankments;

(i) Repair or replacement of fire protection sprinkler systems;

(j) Road and parking area resurfacing, including construction of temporary access to facilitate resurfacing, and scraping and grading of unpaved surfaces;

(k) Erosion control and soil stabilization measures (such as reseeding, gabions, grading, and revegetation);

(l) Surveillance and maintenance of surplus facilities in accordance with DOE Order 435.1, ''Radioactive Waste Management,'' or its successor;

(m) Repair and maintenance of transmission facilities, such as replacement of conductors of the same nominal voltage, poles, circuit breakers, transformers, capacitors, crossarms, insulators, and downed powerlines, in accordance, where appropriate, with 40 CFR part 761 (Polychlorinated Biphenyls Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions) or its successor;

(n) Routine testing and calibration of facility components, subsystems, or portable equipment (such as control valves, in-core monitoring devices, transformers, capacitors, monitoring wells, lysimeters, weather stations, and flumes);

(o) Routine decontamination of the surfaces of equipment, rooms, hot cells, or other interior surfaces of buildings (by such activities as wiping with rags, using strippable latex, and minor vacuuming), and removal of contaminated intact equipment and other material (not including spent nuclear fuel or special nuclear material in nuclear reactors); and

(p) Removal of debris.

B1.4 Air conditioning systems for existing equipment

Installation or modification of air conditioning systems required for temperature control for operation of existing equipment.

B1.5 Existing steam plants and cooling water systems

Minor improvements to existing steam plants and cooling water systems (including, but not limited to, modifications of existing cooling towers and ponds), provided that the improvements would not: (1) Create new sources of water or involve new receiving waters; (2) have the potential to significantly alter water withdrawal rates; (3) exceed the permitted temperature of discharged water; or (4) increase introductions of, or involve new introductions of, hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products.

B1.6 Tanks and equipment to control runoff and spills

Installation or modification of retention tanks or small (normally under one acre) basins and associated piping and pumps for existing operations to control runoff or spills (such as under 40 CFR part 112). Modifications include, but are not limited to, installing liners or covers. (See also B1.33 of this appendix.)

B1.7 Electronic equipment

Acquisition, installation, operation, modification, and removal of electricity transmission control and monitoring devices for grid demand and response, communication systems, data processing equipment, and similar electronic equipment.

B1.8 Screened water intake and outflow structures

Modifications to screened water intake and outflow structures such that intake velocities and volumes and water effluent quality and volumes are consistent with existing permit limits.

B1.9 Airway safety markings and painting

Placement of airway safety markings on, painting of, and repair and in-kind replacement of lighting on powerlines and antenna structures, wind turbines, and similar structures in accordance with applicable requirements (such as Federal Aviation Administration standards).

B1.10 Onsite storage of activated material

Routine, onsite storage at an existing facility of activated equipment and material (including, but not limited to, lead) used at that facility, to allow reuse after decay of radioisotopes with short half-lives.

B1.11 Fencing

Installation of fencing, including, but not limited to border marking, that would not have the potential to significantly impede wildlife population movement (including migration) or surface water flow.

B1.12 Detonation or burning of explosives or propellants after testing

Outdoor detonation or burning of explosives or propellants that failed (duds), were damaged (such as by fracturing), or were otherwise not consumed in testing. Outdoor detonation or burning would be in areas designated and routinely used for those purposes under existing applicable permits

issued by Federal, state, and local authorities (such as a permit for a RCRA miscellaneous unit (40 CFR part 264, subpart X)).

B1.13 Pathways, short access roads, and rail lines

Construction, acquisition, and relocation, consistent with applicable right-of-way conditions and approved land use or transportation improvement plans, of pedestrian walkways and trails, bicycle paths, small outdoor fitness areas, and short access roads and rail lines (such as branch and spur lines).

B1.14 Refueling of nuclear reactors

Refueling of operating nuclear reactors, during which operations may be suspended and then resumed.

B1.15 Support buildings

Siting, construction or modification, and operation of support buildings and support structures (including, but not limited to, trailers and prefabricated and modular buildings) within or contiguous to an already developed area (where active utilities and currently used roads are readily accessible). Covered support buildings and structures include, but are not limited to, those for office purposes; parking; cafeteria services; education and training; visitor reception; computer and data processing services; health services or recreation activities; routine maintenance activities; storage of supplies and equipment for administrative services and routine maintenance activities; security (such as security posts); fire protection; small-scale fabrication (such as machine shop activities), assembly, and testing of non-nuclear equipment or components; and similar support purposes, but exclude facilities for nuclear weapons activities and waste storage activities, such as activities covered in B1.10, B1.29, B1.35, B2.6, B6.2, B6.4, B6.5, B6.6, and B6.10 of this appendix.

B1.16 Asbestos removal

Removal of asbestos-containing materials from buildings in accordance with applicable requirements (such as 40 CFR part 61, ''National Emission Standards for Hazardous Air Pollutants''; 40 CFR part 763, ''Asbestos''; 29 CFR part 1910, subpart I, ''Personal Protective Equipment''; and 29 CFR part 1926, ''Safety and Health Regulations for Construction''; and appropriate state and local requirements, including certification of removal contractors and technicians).

B1.17 Polychlorinated biphenyl removal

Removal of polychlorinated biphenyl (PCB)-containing items (including, but not limited to, transformers and capacitors), PCB-containing oils flushed from transformers, PCB-flushing solutions, and PCB-containing spill materials from buildings or other aboveground locations in accordance with applicable requirements (such as 40 CFR part 761).

B1.18 Water supply wells

Siting, construction, and operation of additional water supply wells (or replacement wells) within an existing well field, or modification of an existing water supply well to restore production, provided that there would be no drawdown other than in the immediate vicinity of the pumping well, and the covered actions would not have the potential to cause significant long-term decline of the water table, and would not have the potential to cause significant degradation of the aquifer from the new or replacement well.

B1.19 Microwave, meteorological, and radio towers

Siting, construction, modification, operation, and removal of microwave, radio communication, and meteorological towers and associated facilities, provided that the towers and associated facilities would not be in a governmentally designated scenic area (see B(4)(iv) of this appendix) unless otherwise authorized by the appropriate governmental entity.

B1.20 Protection of cultural resources, fish and wildlife habitat

Small-scale activities undertaken to protect cultural resources (such as fencing, labeling, and flagging) or to protect, restore, or improve fish and wildlife habitat, fish passage facilities (such as fish ladders and minor diversion channels), or fisheries. Such activities would be conducted in accordance with an existing natural or cultural resource plan, if any.

B1.21 Noise abatement

Noise abatement measures (including, but not limited to, construction of noise barriers and installation of noise control materials).

B1.22 Relocation of buildings

Relocation of buildings (including, but not limited to, trailers and prefabricated buildings) to an already developed area (where active utilities and currently used roads are readily accessible).

B1.23 Demolition and disposal of buildings

Demolition and subsequent disposal of buildings, equipment, and support structures (including, but not limited to, smoke stacks and parking lot surfaces), provided that there would be no potential for release of substances at a level, or in a form, that could pose a threat to public health or the environment.

B1.24 Property transfers

Transfer, lease, disposition, or acquisition of interests in personal property (including, but not limited to, equipment and materials) or real property (including, but not limited to, permanent structures and land), provided that under reasonably foreseeable uses (1) there would be no potential for release of substances at a level, or in a form, that could pose a threat to public health or the environment and (2) the covered actions would not have the potential to cause a significant change in impacts from before the transfer, lease, disposition, or acquisition of interests.

B1.25 Real property transfers for cultural resources protection, habitat preservation, and wildlife management

Transfer, lease, disposition, or acquisition of interests in land and associated buildings for cultural resources protection, habitat preservation, or fish and wildlife management, provided that there would be no potential for release of substances at a level, or in a form, that could pose a threat to public health or the environment.

B1.26 Small water treatment facilities

Siting, construction, expansion, modification, replacement, operation, and decommissioning of small (total capacity less than approximately 250,000 gallons per day) wastewater and surface water treatment facilities whose liquid discharges are externally regulated, and small potable water and sewage treatment facilities.

B1.27 Disconnection of utilities

Activities that are required for the disconnection of utility services (including, but not limited to, water, steam, telecommunications, and electrical power) after it has been determined that the continued operation of these systems is not needed for safety.

B1.28 Placing a facility in an environmentally safe condition

Minor activities that are required to place a facility in an environmentally safe condition where there is no proposed use for the facility. These activities would include, but are not limited to, reducing surface contamination, and removing materials, equipment or waste (such as final defueling of a reactor, where there are adequate existing facilities for the treatment, storage, or disposal of the materials, equipment or waste). These activities would not include conditioning, treatment, or processing of spent nuclear fuel, high-level waste, or special nuclear materials.

B1.29 Disposal facilities for construction and demolition waste

Siting, construction, expansion, modification, operation, and decommissioning of small (less than approximately 10 acres) solid waste disposal facilities for construction and demolition waste, in accordance with applicable requirements (such as 40 CFR part 257, ''Criteria for Classification of Solid Waste Disposal Facilities and Practices,'' and 40 CFR part 61, ''National Emission Standards for Hazardous Air Pollutants'') that would not release substances at a level, or in a form, that could pose a threat to public health or the environment.

B1.30 Transfer actions

Transfer actions, in which the predominant activity is transportation, provided that (1) the receipt and storage capacity and management capability for the amount and type of materials, equipment, or waste to be moved already exists at the receiving site and (2) all necessary facilities and operations at the receiving site are already permitted, licensed, or approved, as appropriate. Such transfers are not regularly scheduled as part of ongoing routine operations.

B1.31 Installation or relocation of machinery and equipment

Installation or relocation and operation of machinery and equipment (including, but not limited to, laboratory equipment, electronic hardware, manufacturing machinery, maintenance equipment, and health and safety equipment), provided that uses of the installed or relocated items are consistent with the general missions of the receiving structure. Covered actions include modifications to an existing building, within or contiguous to a previously disturbed or developed area, that are necessary for equipment installation and relocation. Such modifications would not appreciably increase the footprint or height of the existing building or have the potential to cause significant changes to the type and magnitude of environmental impacts.

B1.32 Traffic flow adjustments

Traffic flow adjustments to existing roads (including, but not limited to, stop sign or traffic light installation, adjusting direction of traffic flow, and adding turning lanes), and road adjustments (including, but not limited to, widening and realignment) that are within an existing right-of-way and consistent with approved land use or transportation improvement plans.

B1.33 Stormwater runoff control

Design, construction, and operation of control practices to reduce stormwater runoff and maintain natural hydrology. Activities

include, but are not limited to, those that reduce impervious surfaces (such as vegetative practices and use of porous pavements), best management practices (such as silt fences, straw wattles, and fiber rolls), and use of green infrastructure or other low impact development practices (such as cisterns and green roofs).

B1.34 Lead-based paint containment, removal, and disposal

Containment, removal, and disposal of lead-based paint in accordance with applicable requirements (such as provisions relating to the certification of removal contractors and technicians at 40 CFR part 745, ''Lead-Based Paint Poisoning Prevention In Certain Residential Structures'').

B1.35 Drop-off, collection, and transfer facilities for recyclable materials

Siting, construction, modification, and operation of recycling or compostable material drop-off, collection, and transfer stations on or contiguous to a previously disturbed or developed area and in an area where such a facility would be consistent with existing zoning requirements. The stations would have appropriate facilities and procedures established in accordance with applicable requirements for the handling of recyclable or compostable materials and household hazardous waste (such as paint and pesticides). Except as specified above, the collection of hazardous waste for disposal and the processing of recyclable or compostable materials are not included in this class of actions.

B1.36 Determinations of excess real property

Determinations that real property is excess to the needs of DOE and, in the case of acquired real property, the subsequent reporting of such determinations to the General Services Administration or, in the case of lands withdrawn or otherwise reserved from the public domain, the subsequent filing of a notice of intent to relinquish with the Bureau of Land Management, Department of the Interior. Covered actions would not include disposal of real property.

B2. CATEGORICAL EXCLUSIONS APPLICABLE TO SAFETY AND HEALTH

B2.1 Workplace enhancements

Modifications within or contiguous to an existing structure, in a previously disturbed or developed area, to enhance workplace habitability (including, but not limited to, installation or improvements to lighting, radiation shielding, or heating/ventilating/air conditioning and its instrumentation, and noise reduction).

B2.2 Building and equipment instrumentation

Installation of, or improvements to, building and equipment instrumentation (including, but not limited to, remote control panels, remote monitoring capability, alarm and surveillance systems, control systems to provide automatic shutdown, fire detection and protection systems, water consumption monitors and flow control systems, announcement and emergency warning systems, criticality and radiation monitors and alarms, and safeguards and security equipment).

B2.3 Personnel safety and health equipment

Installation of, or improvements to, equipment for personnel safety and health (including, but not limited to, eye washes, safety showers, radiation monitoring devices, fumehoods, and associated collection and exhaust systems), provided that the covered actions would not have the potential to cause a significant increase in emissions.

B2.4 Equipment qualification

Activities undertaken to (1) qualify equipment for use or improve systems reliability or (2) augment information on safety-related system components. These activities include, but are not limited to, transportation container qualification testing, crane and lift-gear certification or recertification testing, high efficiency particulate air filter testing and certification, stress tests (such as ''burn-in'' testing of electrical components and leak testing), and calibration of sensors or diagnostic equipment.

B2.5 Facility safety and environmental improvements

Safety and environmental improvements of a facility (including, but not limited to, replacement and upgrade of facility components) that do not result in a significant change in the expected useful life, design capacity, or function of the facility and during which operations may be suspended and then resumed. Improvements include, but are not limited to, replacement/upgrade of control valves, in-core monitoring devices, facility air filtration systems, or substation transformers or capacitors; addition of structural bracing to meet earthquake standards and/or sustain high wind loading; and replacement of aboveground or belowground tanks and related piping, provided that there is no evidence of leakage, based on testing in accordance with applicable requirements (such as 40 CFR part 265, ''Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities'' and 40 CFR part 280, ''Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks''). These actions do

not include rebuilding or modifying substantial portions of a facility (such as replacing a reactor vessel).

B2.6 Recovery of radioactive sealed sources

Recovery of radioactive sealed sources and sealed source-containing devices from domestic or foreign locations provided that (1) the recovered items are transported and stored in compliant containers, and (2) the receiving site has sufficient existing storage capacity and all required licenses, permits, and approvals.

B3. CATEGORICAL EXCLUSIONS APPLICABLE TO SITE CHARACTERIZATION, MONITORING, AND GENERAL RESEARCH

B3.1 Site characterization and environmental monitoring

Site characterization and environmental monitoring (including, but not limited to, siting, construction, modification, operation, and dismantlement and removal or otherwise proper closure (such as of a well) of characterization and monitoring devices, and siting, construction, and associated operation of a small-scale laboratory building or renovation of a room in an existing building for sample analysis). Such activities would be designed in conformance with applicable requirements and use best management practices to limit the potential effects of any resultant ground disturbance. Covered activities include, but are not limited to, site characterization and environmental monitoring under CERCLA and RCRA. (This class of actions excludes activities in aquatic environments. See B3.16 of this appendix for such activities.) Specific activities include, but are not limited to:

(a) Geological, geophysical (such as gravity, magnetic, electrical, seismic, radar, and temperature gradient), geochemical, and engineering surveys and mapping, and the establishment of survey marks. Seismic techniques would not include large-scale reflection or refraction testing;

(b) Installation and operation of field instruments (such as stream-gauging stations or flow-measuring devices, telemetry systems, geochemical monitoring tools, and geophysical exploration tools);

(c) Drilling of wells for sampling or monitoring of groundwater or the vadose (unsaturated) zone, well logging, and installation of water-level recording devices in wells;

(d) Aquifer and underground reservoir response testing;

(e) Installation and operation of ambient air monitoring equipment;

(f) Sampling and characterization of water, soil, rock, or contaminants (such as drilling using truck- or mobile-scale equipment, and modification, use, and plugging of boreholes);

(g) Sampling and characterization of water effluents, air emissions, or solid waste streams;

(h) Installation and operation of meteorological towers and associated activities (such as assessment of potential wind energy resources);

(i) Sampling of flora or fauna; and

(j) Archeological, historic, and cultural resource identification in compliance with 36 CFR part 800 and 43 CFR part 7.

B3.2 Aviation activities

Aviation activities for survey, monitoring, or security purposes that comply with Federal Aviation Administration regulations.

B3.3 Research related to conservation of fish, wildlife, and cultural resources

Field and laboratory research, inventory, and information collection activities that are directly related to the conservation of fish and wildlife resources or to the protection of cultural resources, provided that such activities would not have the potential to cause significant impacts on fish and wildlife habitat or populations or to cultural resources.

B3.4 Transport packaging tests for radioactive or hazardous material

Drop, puncture, water-immersion, thermal, and fire tests of transport packaging for radioactive or hazardous materials to certify that designs meet the applicable requirements (such as 49 CFR 173.411 and 173.412 and 10 CFR 71.73).

B3.5 Tank car tests

Tank car tests under 49 CFR part 179 (including, but not limited to, tests of safety relief devices, pressure regulators, and thermal protection systems).

B3.6 Small-scale research and development, laboratory operations, and pilot projects

Siting, construction, modification, operation, and decommissioning of facilities for small-scale research and development projects; conventional laboratory operations (such as preparation of chemical standards and sample analysis); and small-scale pilot projects (generally less than 2 years) frequently conducted to verify a concept before demonstration actions, provided that construction or modification would be within or contiguous to a previously disturbed or developed area (where active utilities and currently used roads are readily accessible). Not included in this category are demonstration actions, meaning actions that are undertaken at a scale to show whether a technology would be viable on a larger scale and suitable for commercial deployment.

B3.7 New terrestrial infill exploratory and experimental wells

Siting, construction, and operation of new terrestrial infill exploratory and experimental (test) wells, for either extraction or injection use, in a locally characterized geological formation in a field that contains existing operating wells, properly abandoned wells, or unminable coal seams containing natural gas, provided that the site characterization has verified a low potential for seismicity, subsidence, and contamination of freshwater aquifers, and the actions are otherwise consistent with applicable best practices and DOE protocols, including those that protect against uncontrolled releases of harmful materials. Such wells may include those for brine, carbon dioxide, coalbed methane, gas hydrate, geothermal, natural gas, and oil. Uses for carbon sequestration wells include, but are not limited to, the study of saline formations, enhanced oil recovery, and enhanced coalbed methane extraction.

B3.8 Outdoor terrestrial ecological and environmental research

Outdoor terrestrial ecological and environmental research in a small area (generally less than 5 acres), including, but not limited to, siting, construction, and operation of a small-scale laboratory building or renovation of a room in an existing building for associated analysis. Such activities would be designed in conformance with applicable requirements and use best management practices to limit the potential effects of any resultant ground disturbance.

B3.9 Projects to reduce emissions and waste generation

Projects to reduce emissions and waste generation at existing fossil or alternative fuel combustion or utilization facilities, provided that these projects would not have the potential to cause a significant increase in the quantity or rate of air emissions. For this category of actions, ''fuel'' includes, but is not limited to, coal, oil, natural gas, hydrogen, syngas, and biomass; but ''fuel'' does not include nuclear fuel. Covered actions include, but are not limited to:

(a) Test treatment of the throughput product (solid, liquid, or gas) generated at an existing and fully operational fuel combustion or utilization facility;

(b) Addition or replacement of equipment for reduction or control of sulfur dioxide, oxides of nitrogen, or other regulated substances that requires only minor modification to the existing structures at an existing fuel combustion or utilization facility, for which the existing use remains essentially unchanged;

(c) Addition or replacement of equipment for reduction or control of sulfur dioxide, oxides of nitrogen, or other regulated substances that involves no permanent change in the quantity or quality of fuel burned or used and involves no permanent change in the capacity factor of the fuel combustion or utilization facility; and

(d) Addition or modification of equipment for capture and control of carbon dioxide or other regulated substances, provided that adequate infrastructure is in place to manage such substances.

B3.10 Particle accelerators

Siting, construction, modification, operation, and decommissioning of particle accelerators, including electron beam accelerators, with primary beam energy less than approximately 100 million electron volts (MeV) and average beam power less than approximately 250 kilowatts (kW), and associated beamlines, storage rings, colliders, and detectors, for research and medical purposes (such as proton therapy), and isotope production, within or contiguous to a previously disturbed or developed area (where active utilities and currently used roads are readily accessible), or internal modification of any accelerator facility regardless of energy, that does not increase primary beam energy or current. In cases where the beam energy exceeds 100 MeV, the average beam power must be less than 250 kW, so as not to exceed an average current of 2.5 milliamperes (mA).

B3.11 Outdoor tests and experiments on materials and equipment components

Outdoor tests and experiments for the development, quality assurance, or reliability of materials and equipment (including, but not limited to, weapon system components) under controlled conditions. Covered actions include, but are not limited to, burn tests (such as tests of electric cable fire resistance or the combustion characteristics of fuels), impact tests (such as pneumatic ejector tests using earthen embankments or concrete slabs designated and routinely used for that purpose), or drop, puncture, water-immersion, or thermal tests. Covered actions would not involve source, special nuclear, or byproduct materials, except encapsulated sources manufactured to applicable standards that contain source, special nuclear, or byproduct materials may be used for nondestructive actions such as detector/sensor development and testing and first responder field training.

B3.12 Microbiological and biomedical facilities

Siting, construction, modification, operation, and decommissioning of microbiological and biomedical diagnostic, treatment and research facilities (excluding Biosafety Level-3 and Biosafety Level-4), in accordance with applicable requirements and

best practices (such as Biosafety in Microbiological and Biomedical Laboratories, 5th Edition, Dec. 2009, U.S. Department of Health and Human Services) including, but not limited to, laboratories, treatment areas, offices, and storage areas, within or contiguous to a previously disturbed or developed area (where active utilities and currently used roads are readily accessible). Operation may include the purchase, installation, and operation of biomedical equipment (such as commercially available cyclotrons that are used to generate radioisotopes and radiopharmaceuticals, and commercially available biomedical imaging and spectroscopy instrumentation).

B3.13 Magnetic fusion experiments

Performing magnetic fusion experiments that do not use tritium as fuel, within existing facilities (including, but not limited to, necessary modifications).

B3.14 Small-scale educational facilities

Siting, construction, modification, operation, and decommissioning of small-scale educational facilities (including, but not limited to, conventional teaching laboratories, libraries, classroom facilities, auditoriums, museums, visitor centers, exhibits, and associated offices) within or contiguous to a previously disturbed or developed area (where active utilities and currently used roads are readily accessible). Operation may include, but is not limited to, purchase, installation, and operation of equipment (such as audio/visual and laboratory equipment) commensurate with the educational purpose of the facility.

B3.15 Small-scale indoor research and development projects using nanoscale materials

Siting, construction, modification, operation, and decommissioning of facilities for indoor small-scale research and development projects and small-scale pilot projects using nanoscale materials in accordance with applicable requirements (such as engineering, worker safety, procedural, and administrative regulations) necessary to ensure the containment of any hazardous materials. Construction and modification activities would be within or contiguous to a previously disturbed or developed area (where active utilities and currently used roads are readily accessible).

B3.16 Research activities in aquatic environments

Small-scale, temporary surveying, site characterization, and research activities in aquatic environments, limited to:

(a) Acquisition of rights-of-way, easements, and temporary use permits;

(b) Installation, operation, and removal of passive scientific measurement devices, including, but not limited to, antennae, tide gauges, flow testing equipment for existing wells, weighted hydrophones, salinity measurement devices, and water quality measurement devices;

(c) Natural resource inventories, data and sample collection, environmental monitoring, and basic and applied research, excluding (1) large-scale vibratory coring techniques and (2) seismic activities other than passive techniques; and

(d) Surveying and mapping.

These activities would be conducted in accordance with, where applicable, an approved spill prevention, control, and response plan and would incorporate appropriate control technologies and best management practices. None of the activities listed above would occur within the boundary of an established marine sanctuary or wildlife refuge, a governmentally proposed marine sanctuary or wildlife refuge, or a governmentally recognized area of high biological sensitivity, unless authorized by the agency responsible for such refuge, sanctuary, or area (or after consultation with the responsible agency, if no authorization is required). If the proposed activities would occur outside such refuge, sanctuary, or area and if the activities would have the potential to cause impacts within such refuge, sanctuary, or area, then the responsible agency shall be consulted in order to determine whether authorization is required and whether such activities would have the potential to cause significant impacts on such refuge, sanctuary, or area. Areas of high biological sensitivity include, but are not limited to, areas of known ecological importance, whale and marine mammal mating and calving/pupping areas, and fish and invertebrate spawning and nursery areas recognized as being limited or unique and vulnerable to perturbation; these areas can occur in bays, estuaries, near shore, and far offshore, and may vary seasonally. No permanent facilities or devices would be constructed or installed. Covered actions do not include drilling of resource exploration or extraction wells.

B4. CATEGORICAL EXCLUSIONS APPLICABLE TO ELECTRICAL POWER AND TRANSMISSION

B4.1 Contracts, policies, and marketing and allocation plans for electric power

Establishment and implementation of contracts, policies, and marketing and allocation plans related to electric power acquisition that involve only the use of the existing transmission system and existing generation resources operating within their normal operating limits.

B4.2 Export of electric energy

Export of electric energy as provided by Section 202(e) of the Federal Power Act over existing transmission systems or using

transmission system changes that are themselves categorically excluded.

B4.3 Electric power marketing rate changes

Rate changes for electric power, power transmission, and other products or services provided by a Power Marketing Administration that are based on a change in revenue requirements if the operations of generation projects would remain within normal operating limits.

B4.4 Power marketing services and activities

Power marketing services and power management activities (including, but not limited to, storage, load shaping and balancing, seasonal exchanges, and other similar activities), provided that the operations of generating projects would remain within normal operating limits.

B4.5 Temporary adjustments to river operations

Temporary adjustments to river operations to accommodate day-to-day river fluctuations, power demand changes, fish and wildlife conservation program requirements, and other external events, provided that the adjustments would occur within the existing operating constraints of the particular hydrosystem operation.

B4.6 Additions and modifications to transmission facilities

Additions or modifications to electric power transmission facilities within a previously disturbed or developed facility area. Covered activities include, but are not limited to, switchyard rock grounding upgrades, secondary containment projects, paving projects, seismic upgrading, tower modifications, load shaping projects (such as the installation and use of flywheels and battery arrays), changing insulators, and replacement of poles, circuit breakers, conductors, transformers, and crossarms.

B4.7 Fiber optic cable

Adding fiber optic cables to transmission facilities or burying fiber optic cable in existing powerline or pipeline rights-of-way. Covered actions may include associated vaults and pulling and tensioning sites outside of rights-of-way in nearby previously disturbed or developed areas.

B4.8 Electricity transmission agreements

New electricity transmission agreements, and modifications to existing transmission arrangements, to use a transmission facility of one system to transfer power of and for another system, provided that no new generation projects would be involved and no physical changes in the transmission system would be made beyond the previously disturbed or developed facility area.

B4.9 Multiple use of powerline rights-of-way

Granting or denying requests for multiple uses of a transmission facility's rights-of-way (including, but not limited to, grazing permits and crossing agreements for electric lines, water lines, natural gas pipelines, communications cables, roads, and drainage culverts).

B4.10 Removal of electric transmission facilities

Deactivation, dismantling, and removal of electric transmission facilities (including, but not limited to, electric powerlines, substations, and switching stations) and abandonment and restoration of rights-of-way (including, but not limited to, associated access roads).

B4.11 Electric power substations and interconnection facilities

Construction or modification of electric power substations or interconnection facilities (including, but not limited to, switching stations and support facilities).

B4.12 Construction of powerlines

Construction of electric powerlines approximately 10 miles in length or less, or approximately 20 miles in length or less within previously disturbed or developed powerline or pipeline rights-of-way.

B4.13 Upgrading and rebuilding existing powerlines

Upgrading or rebuilding approximately 20 miles in length or less of existing electric powerlines, which may involve minor relocations of small segments of the powerlines.

B5. CATEGORICAL EXCLUSIONS APPLICABLE TO CONSERVATION, FOSSIL, AND RENEWABLE ENERGY ACTIVITIES

B5.1 Actions to conserve energy or water

(a) Actions to conserve energy or water, demonstrate potential energy or water conservation, and promote energy efficiency that would not have the potential to cause significant changes in the indoor or outdoor concentrations of potentially harmful substances. These actions may involve financial and technical assistance to individuals (such as builders, owners, consultants, manufacturers, and designers), organizations (such as utilities), and governments (such as state, local, and tribal). Covered actions include, but are not limited to weatherization (such as insulation and replacing windows and doors); programmed lowering of thermostat settings; placement of timers on hot water heaters; installation or replacement of energy efficient lighting, low-flow plumbing fixtures (such as faucets, toilets, and showerheads), heating, ventilation, and air

conditioning systems, and appliances; installation of drip-irrigation systems; improvements in generator efficiency and appliance efficiency ratings; efficiency improvements for vehicles and transportation (such as fleet changeout); power storage (such as flywheels and batteries, generally less than 10 megawatt equivalent); transportation management systems (such as traffic signal control systems, car navigation, speed cameras, and automatic plate number recognition); development of energy-efficient manufacturing, industrial, or building practices; and small-scale energy efficiency and conservation research and development and small-scale pilot projects. Covered actions include building renovations or new structures, provided that they occur in a previously disturbed or developed area. Covered actions could involve commercial, residential, agricultural, academic, institutional, or industrial sectors. Covered actions do not include rulemakings, standard-settings, or proposed DOE legislation, except for those actions listed in B5.1(b) of this appendix.

(b) Covered actions include rulemakings that establish energy conservation standards for consumer products and industrial equipment, provided that the actions would not: (1) Have the potential to cause a significant change in manufacturing infrastructure (such as construction of new manufacturing plants with considerable associated ground disturbance); (2) involve significant unresolved conflicts concerning alternative uses of available resources (such as rare or limited raw materials); (3) have the potential to result in a significant increase in the disposal of materials posing significant risks to human health and the environment (such as RCRA hazardous wastes); or (4) have the potential to cause a significant increase in energy consumption in a state or region.

B5.2 Modifications to pumps and piping

Modifications to existing pump and piping configurations (including, but not limited to, manifolds, metering systems, and other instrumentation on such configurations conveying materials such as air, brine, carbon dioxide, geothermal system fluids, hydrogen gas, natural gas, nitrogen gas, oil, produced water, steam, and water). Covered modifications would not have the potential to cause significant changes to design process flow rates or permitted air emissions.

B5.3 Modification or abandonment of wells

Modification (but not expansion) or plugging and abandonment of wells, provided that site characterization has verified a low potential for seismicity, subsidence, and contamination of freshwater aquifers, and the actions are otherwise consistent with best practices and DOE protocols, including those that protect against uncontrolled releases of harmful materials. Such wells may include, but are not limited to, storage and injection wells for brine, carbon dioxide, coalbed methane, gas hydrate, geothermal, natural gas, and oil. Covered modifications would not be part of site closure.

B5.4 Repair or replacement of pipelines

Repair, replacement, upgrading, rebuilding, or minor relocation of pipelines within existing rights-of-way, provided that the actions are in accordance with applicable requirements (such as Army Corps of Engineers permits under section 404 of the Clean Water Act). Pipelines may convey materials including, but not limited to, air, brine, carbon dioxide, geothermal system fluids, hydrogen gas, natural gas, nitrogen gas, oil, produced water, steam, and water.

B5.5 Short pipeline segments

Construction and subsequent operation of short (generally less than 20 miles in length) pipeline segments conveying materials (such as air, brine, carbon dioxide, geothermal system fluids, hydrogen gas, natural gas, nitrogen gas, oil, produced water, steam, and water) between existing source facilities and existing receiving facilities (such as facilities for use, reuse, transportation, storage, and refining), provided that the pipeline segments are within previously disturbed or developed rights-of-way.

B5.6 Oil spill cleanup

Removal of oil and contaminated materials recovered in oil spill cleanup operations and disposal of these materials in accordance with applicable requirements (such as the National Oil and Hazardous Substances Pollution Contingency Plan).

B5.7 Import or export natural gas, with operational changes

Approvals or disapprovals of new authorizations or amendments of existing authorizations to import or export natural gas under section 3 of the Natural Gas Act that involve minor operational changes (such as changes in natural gas throughput, transportation, and storage operations) but not new construction.

B5.8 Import or export natural gas, with new cogeneration powerplant

Approvals or disapprovals of new authorizations or amendments of existing authorizations to import or export natural gas under section 3 of the Natural Gas Act that involve new cogeneration powerplants (as defined in the Powerplant and Industrial Fuel Use Act of 1978, as amended) within or contiguous to an existing industrial complex and requiring generally less than 10 miles of new natural gas pipeline or 20 miles within

previously disturbed or developed rights-of-way.

B5.9 Temporary exemptions for electric powerplants

Grants or denials of temporary exemptions under the Powerplant and Industrial Fuel Use Act of 1978, as amended, for electric powerplants.

B5.10 Certain permanent exemptions for existing electric powerplants

For existing electric powerplants, grants or denials of permanent exemptions under the Powerplant and Industrial Fuel Use Act of 1978, as amended, other than exemptions under section 312(c) relating to cogeneration and section 312(b) relating to certain state or local requirements.

B5.11 Permanent exemptions allowing mixed natural gas and petroleum

For new electric powerplants, grants or denials of permanent exemptions from the prohibitions of Title II of the Powerplant and Industrial Fuel Use Act of 1978, as amended, to permit the use of certain fuel mixtures containing natural gas or petroleum.

B5.12 Workover of existing wells

Workover (operations to restore production, such as deepening, plugging back, pulling and resetting lines, and squeeze cementing) of existing wells (including, but not limited to, activities associated with brine, carbon dioxide, coalbed methane, gas hydrate, geothermal, natural gas, and oil) to restore functionality, provided that workover operations are restricted to the existing wellpad and do not involve any new site preparation or earthwork that would have the potential to cause significant impacts on nearby habitat; that site characterization has verified a low potential for seismicity, subsidence, and contamination of freshwater aquifers; and the actions are otherwise consistent with best practices and DOE protocols, including those that protect against uncontrolled releases of harmful materials.

B5.13 Experimental wells for injection of small quantities of carbon dioxide

Siting, construction, operation, plugging, and abandonment of experimental wells for the injection of small quantities of carbon dioxide (and other incidentally co-captured gases) in locally characterized, geologically secure storage formations at or near existing carbon dioxide sources to determine the suitability of the formations for large-scale sequestration, provided that (1) The characterization has verified a low potential for seismicity, subsidence, and contamination of freshwater aquifers; (2) the wells are otherwise in accordance with applicable requirements, best practices, and DOE protocols, including those that protect against uncontrolled releases of harmful materials; and (3) the wells and associated drilling activities are sufficiently remote so that they would not have the potential to cause significant impacts related to noise and other vibrations. Wells may be used for enhanced oil or natural gas recovery or for secure storage of carbon dioxide in saline formations or other secure formations. Over the duration of a project, the wells would be used to inject, in aggregate, less than 500,000 tons of carbon dioxide into the geologic formation. Covered actions exclude activities in aquatic environments. (See B3.16 of this appendix for activities in aquatic environments.)

B5.14 Combined heat and power or cogeneration systems

Conversion to, replacement of, or modification of combined heat and power or cogeneration systems (the sequential or simultaneous production of multiple forms of energy, such as thermal and electrical energy, in a single integrated system) at existing facilities, provided that the conversion, replacement, or modification would not have the potential to cause a significant increase in the quantity or rate of air emissions and would not have the potential to cause significant impacts to water resources.

B5.15 Small-scale renewable energy research and development and pilot projects

Small-scale renewable energy research and development projects and small-scale pilot projects, provided that the projects are located within a previously disturbed or developed area. Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

B5.16 Solar photovoltaic systems

The installation, modification, operation, and removal of commercially available solar photovoltaic systems located on a building or other structure (such as rooftop, parking lot or facility, and mounted to signage, lighting, gates, or fences), or if located on land, generally comprising less than 10 acres within a previously disturbed or developed area. Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

B5.17 Solar thermal systems

The installation, modification, operation, and removal of commercially available

small-scale solar thermal systems (including, but not limited to, solar hot water systems) located on or contiguous to a building, and if located on land, generally comprising less than 10 acres within a previously disturbed or developed area. Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

B5.18 Wind turbines

The installation, modification, operation, and removal of a small number (generally not more than 2) of commercially available wind turbines, with a total height generally less than 200 feet (measured from the ground to the maximum height of blade rotation) that (1) Are located within a previously disturbed or developed area; (2) are located more than 10 nautical miles (about 11.5 miles) from an airport or aviation navigation aid; (3) are located more than 1.5 nautical miles (about 1.7 miles) from National Weather Service or Federal Aviation Administration Doppler weather radar; (4) would not have the potential to cause significant impacts on bird or bat populations; and (5) are sited or designed such that the project would not have the potential to cause significant impacts to persons (such as from shadow flicker and other visual effects, and noise). Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices. Covered actions include only those related to wind turbines to be installed on land.

B5.19 Ground source heat pumps

The installation, modification, operation, and removal of commercially available small-scale ground source heat pumps to support operations in single facilities (such as a school or community center) or contiguous facilities (such as an office complex) (1) Only where (a) major associated activities (such as drilling and discharge) are regulated, and (b) appropriate leakage and contaminant control measures would be in place (including for cross-contamination between aquifers); (2) that would not have the potential to cause significant changes in subsurface temperature; and (3) would be located within a previously disturbed or developed area. Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

B5.20 Biomass power plants

The installation, modification, operation, and removal of small-scale biomass power plants (generally less than 10 megawatts), using commercially available technology (1) Intended primarily to support operations in single facilities (such as a school and community center) or contiguous facilities (such as an office complex); (2) that would not affect the air quality attainment status of the area and would not have the potential to cause a significant increase in the quantity or rate of air emissions and would not have the potential to cause significant impacts to water resources; and (3) would be located within a previously disturbed or developed area. Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

B5.21 Methane gas recovery and utilization systems

The installation, modification, operation, and removal of commercially available methane gas recovery and utilization systems installed within a previously disturbed or developed area on or contiguous to an existing landfill or wastewater treatment plant that would not have the potential to cause a significant increase in the quantity or rate of air emissions. Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

B5.22 Alternative fuel vehicle fueling stations

The installation, modification, operation, and removal of alternative fuel vehicle fueling stations (such as for compressed natural gas, hydrogen, ethanol and other commercially available biofuels) on the site of a current or former fueling station, or within a previously disturbed or developed area within the boundaries of a facility managed by the owners of a vehicle fleet. Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

B5.23 Electric vehicle charging stations

The installation, modification, operation, and removal of electric vehicle charging stations, using commercially available technology, within a previously disturbed or developed area. Covered actions are limited to areas where access and parking are in accordance with applicable requirements (such

as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

B5.24 Drop-in hydroelectric systems

The installation, modification, operation, and removal of commercially available small-scale, drop-in, run-of-the-river hydroelectric systems that would (1) Involve no water storage or water diversion from the stream or river channel where the system is installed and (2) not have the potential to cause significant impacts on water quality, temperature, flow, or volume. Covered systems would be located up-gradient of an existing anadromous fish barrier that is not planned for removal and where fish passage retrofit is not planned and where there would not be the potential for significant impacts to threatened or endangered species or other species of concern (as identified in B(4)(ii) of this appendix). Covered actions would involve no major construction or modification of stream or river channels, and the hydroelectric systems would be placed and secured in the channel without the use of heavy equipment. Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

B5.25 Small-scale renewable energy research and development and pilot projects in aquatic environments

Small-scale renewable energy research and development projects and small-scale pilot projects located in aquatic environments. Activities would be in accordance with, where applicable, an approved spill prevention, control, and response plan, and would incorporate appropriate control technologies and best management practices. Covered actions would not occur (1) Within areas of hazardous natural bottom conditions or (2) within the boundary of an established marine sanctuary or wildlife refuge, a governmentally proposed marine sanctuary or wildlife refuge, or a governmentally recognized area of high biological sensitivity, unless authorized by the agency responsible for such refuge, sanctuary, or area (or after consultation with the responsible agency, if no authorization is required). If the proposed activities would occur outside such refuge, sanctuary, or area and if the activities would have the potential to cause impacts within such refuge, sanctuary, or area, then the responsible agency shall be consulted in order to determine whether authorization is required and whether such activities would have the potential to cause significant impacts on such refuge, sanctuary, or area. Areas of high biological sensitivity include, but are not limited to, areas of known ecological importance, whale and marine mammal mating and calving/pupping areas, and fish and invertebrate spawning and nursery areas recognized as being limited or unique and vulnerable to perturbation; these areas can occur in bays, estuaries, near shore, and far offshore, and may vary seasonally. No permanent facilities or devices would be constructed or installed. Covered actions do not include drilling of resource exploration or extraction wells, use of large-scale vibratory coring techniques, or seismic activities other than passive techniques.

B6. CATEGORICAL EXCLUSIONS APPLICABLE TO ENVIRONMENTAL RESTORATION AND WASTE MANAGEMENT ACTIVITIES

B6.1 Cleanup actions

Small-scale, short-term cleanup actions, under RCRA, Atomic Energy Act, or other authorities, less than approximately 10 million dollars in cost (in 2011 dollars), to reduce risk to human health or the environment from the release or threat of release of a hazardous substance other than high-level radioactive waste and spent nuclear fuel, including treatment (such as incineration, encapsulation, physical or chemical separation, and compaction), recovery, storage, or disposal of wastes at existing facilities currently handling the type of waste involved in the action. These actions include, but are not limited to:

(a) Excavation or consolidation of contaminated soils or materials from drainage channels, retention basins, ponds, and spill areas that are not receiving contaminated surface water or wastewater, if surface water or groundwater would not collect and if such actions would reduce the spread of, or direct contact with, the contamination;

(b) Removal of bulk containers (such as drums and barrels) that contain or may contain hazardous substances, pollutants, contaminants, CERCLA-excluded petroleum or natural gas products, or hazardous wastes (designated in 40 CFR part 261 or applicable state requirements), if such actions would reduce the likelihood of spillage, leakage, fire, explosion, or exposure to humans, animals, or the food chain;

(c) Removal of an underground storage tank including its associated piping and underlying containment systems in accordance with applicable requirements (such as RCRA, subtitle I; 40 CFR part 265, subpart J; and 40 CFR part 280, subparts F and G) if such action would reduce the likelihood of spillage, leakage, or the spread of, or direct contact with, contamination;

(d) Repair or replacement of leaking containers;

(e) Capping or other containment of contaminated soils or sludges if the capping or containment would not unduly limit future

groundwater remediation and if needed to reduce migration of hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products into soil, groundwater, surface water, or air;

(f) Drainage or closing of man-made surface impoundments if needed to maintain the integrity of the structures;

(g) Confinement or perimeter protection using dikes, trenches, ditches, or diversions, or installing underground barriers, if needed to reduce the spread of, or direct contact with, the contamination;

(h) Stabilization, but not expansion, of berms, dikes, impoundments, or caps if needed to maintain integrity of the structures;

(i) Drainage controls (such as run-off or run-on diversion) if needed to reduce offsite migration of hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum or natural gas products or to prevent precipitation or run-off from other sources from entering the release area from other areas;

(j) Segregation of wastes that may react with one another or form a mixture that could result in adverse environmental impacts;

(k) Use of chemicals and other materials to neutralize the pH of wastes;

(l) Use of chemicals and other materials to retard the spread of the release or to mitigate its effects if the use of such chemicals would reduce the spread of, or direct contact with, the contamination;

(m) Installation and operation of gas ventilation systems in soil to remove methane or petroleum vapors without any toxic or radioactive co-contaminants if appropriate filtration or gas treatment is in place;

(n) Installation of fences, warning signs, or other security or site control precautions if humans or animals have access to the release; and

(o) Provision of an alternative water supply that would not create new water sources if necessary immediately to reduce exposure to contaminated household or industrial use water and continuing until such time as local authorities can satisfy the need for a permanent remedy.

B6.2 Waste collection, treatment, stabilization, and containment facilities

The siting, construction, and operation of temporary (generally less than 2 years) pilot-scale waste collection and treatment facilities, and pilot-scale (generally less than 1 acre) waste stabilization and containment facilities (including siting, construction, and operation of a small-scale laboratory building or renovation of a room in an existing building for sample analysis), provided that the action (1) Supports remedial investigations/feasibility studies under CERCLA, or similar studies under RCRA (such as RCRA facility investigations/corrective measure studies) or other authorities and (2) would not unduly limit the choice of reasonable remedial alternatives (such as by permanently altering substantial site area or by committing large amounts of funds relative to the scope of the remedial alternatives).

B6.3 Improvements to environmental control systems

Improvements to environmental monitoring and control systems of an existing building or structure (such as changes to scrubbers in air quality control systems or ion-exchange devices and other filtration processes in water treatment systems), provided that during subsequent operations (1) Any substance collected by the environmental control systems would be recycled, released, or disposed of within existing permitted facilities and (2) there are applicable statutory or regulatory requirements or permit conditions for disposal, release, or recycling of any hazardous substance or CERCLA-excluded petroleum or natural gas products that are collected or released in increased quantity or that were not previously collected or released.

B6.4 Facilities for storing packaged hazardous waste for 90 days or less

Siting, construction, modification, expansion, operation, and decommissioning of an onsite facility for storing packaged hazardous waste (as designated in 40 CFR part 261) for 90 days or less or for longer periods as provided in 40 CFR 262.34(d), (e), or (f) (such as accumulation or satellite areas).

B6.5 Facilities for characterizing and sorting packaged waste and overpacking waste

Siting, construction, modification, expansion, operation, and decommissioning of an onsite facility for characterizing and sorting previously packaged waste or for overpacking waste, other than high-level radioactive waste, provided that operations do not involve unpacking waste. These actions do not include waste storage (covered under B6.4, B6.6, B6.10 of this appendix, and C16 of appendix C) or the handling of spent nuclear fuel.

B6.6 Modification of facilities for storing, packaging, and repacking waste

Modification (excluding increases in capacity) of an existing structure used for storing, packaging, or repacking waste other than high-level radioactive waste or spent nuclear fuel, to handle the same class of waste as currently handled at that structure.

B6.7 [Reserved]

B6.8 Modifications for waste minimization and reuse of materials

Minor operational changes at an existing facility to minimize waste generation and for reuse of materials. These changes include, but are not limited to, adding filtration and recycle piping to allow reuse of machining oil, setting up a sorting area to improve process efficiency, and segregating two waste streams previously mingled and assigning new identification codes to the two resulting wastes.

B6.9 Measures to reduce migration of contaminated groundwater

Small-scale temporary measures to reduce migration of contaminated groundwater, including the siting, construction, operation, and decommissioning of necessary facilities. These measures include, but are not limited to, pumping, treating, storing, and reinjecting water, by mobile units or facilities that are built and then removed at the end of the action.

B6.10 Upgraded or replacement waste storage facilities

Siting, construction, modification, expansion, operation, and decommissioning of a small upgraded or replacement facility (less than approximately 50,000 square feet in area) within or contiguous to a previously disturbed or developed area (where active utilities and currently used roads are readily accessible) for storage of waste that is already at the site at the time the storage capacity is to be provided. These actions do not include the storage of high-level radioactive waste, spent nuclear fuel or any waste that requires special precautions to prevent nuclear criticality. (See also B6.4, B6.5, B6.6 of this appendix, and C16 of appendix C.)

B7. CATEGORICAL EXCLUSIONS APPLICABLE TO INTERNATIONAL ACTIVITIES

B7.1 Emergency measures under the International Energy Program

Planning and implementation of emergency measures pursuant to the International Energy Program.

B7.2 Import and export of special nuclear or isotopic materials

Approval of import or export of small quantities of special nuclear materials or isotopic materials in accordance with applicable requirements (such as the Nuclear Non-Proliferation Act of 1978 and the ''Procedures Established Pursuant to the Nuclear Non-Proliferation Act of 1978'' (43 FR 25326, June 9, 1978)).

APPENDIX C TO SUBPART D OF PART 1021—CLASSES OF ACTIONS THAT NORMALLY REQUIRE EAS BUT NOT NECESSARILY EISS

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C3 ELECTRIC POWER MARKETING RATE CHANGES, NOT WITHIN NORMAL OPERATING LIMITS

Rate changes for electric power, power transmission, and other products or services provided by Power Marketing Administrations that are based on changes in revenue requirements if the operations of generation projects would not remain within normal operating limits.

C4 UPGRADING, REBUILDING, OR CONSTRUCTION OF POWERLINES

Upgrading or rebuilding more than approximately 20 miles in length of existing powerlines; or construction of powerlines (1) More than approximately 10 miles in length outside previously disturbed or developed powerline or pipeline rights-of-way or (2) more than approximately 20 miles in length within previously disturbed or developed powerline or pipeline rights-of-way.

C5 VEGETATION MANAGEMENT PROGRAM

Implementation of a Power Marketing Administration system-wide vegetation management program.

C6 EROSION CONTROL PROGRAM

Implementation of a Power Marketing Administration system-wide erosion control program.

C7 CONTRACTS, POLICIES, AND MARKETING AND ALLOCATION PLANS FOR ELECTRIC POWER

Establishment and implementation of contracts, policies, and marketing and allocation plans related to electric power acquisition that involve (1) The interconnection of, or acquisition of power from, new generation resources that are equal to or less than 50 average megawatts; (2) changes in the normal operating limits of generation resources equal to or less than 50 average megawatts; or (3) service to discrete new loads of less than10 average megawatts over a 12-month period.

C8 PROTECTION OF CULTURAL RESOURCES AND FISH AND WILDLIFE HABITAT

Large-scale activities undertaken to protect cultural resources (such as fencing, labeling, and flagging) or to protect, restore, or improve fish and wildlife habitat, fish passage facilities (such as fish ladders and minor diversion channels), or fisheries.

C9 WETLANDS DEMONSTRATION PROJECTS

Field demonstration projects for wetlands mitigation, creation, and restoration.

C10 [RESERVED]

C11 PARTICLE ACCELERATION FACILITIES

Siting, construction or modification, operation, and decommissioning of low- or medium-energy (when the primary beam energy exceeds approximately 100 million electron volts and the average beam power exceeds approximately 250 kilowatts or where the average current exceeds 2.5 milliamperes) particle acceleration facilities, including electron beam acceleration facilities, and associated beamlines, storage rings, colliders, and detectors for research and medical purposes, within or contiguous to a previously disturbed or developed area (where active utilities and currently used roads are readily accessible).

C12 ENERGY SYSTEM DEMONSTRATION ACTIONS

Siting, construction, operation, and decommissioning of energy system demonstration actions (including, but not limited to, wind resource, hydropower, geothermal, fossil fuel, biomass, and solar energy, but excluding nuclear). For purposes of this category, ''demonstration actions'' means actions that are undertaken at a scale to show whether a technology would be viable on a larger scale and suitable for commercial deployment.

C13 IMPORT OR EXPORT NATURAL GAS INVOLVING MINOR NEW CONSTRUCTION

Approvals or disapprovals of authorizations to import or export natural gas under section 3 of the Natural Gas Act involving minor new construction (such as adding new connections, looping, or compression to an existing natural gas or liquefied natural gas pipeline, or converting an existing oil pipeline to a natural gas pipeline using the same right-of-way).

C14 WATER TREATMENT FACILITIES

Siting, construction (or expansion), operation, and decommissioning of wastewater, surface water, potable water, and sewage treatment facilities with a total capacity greater than approximately 250,000 gallons per day, and of lower capacity wastewater and surface water treatment facilities whose liquid discharges are not subject to external regulation.

C15 RESEARCH AND DEVELOPMENT INCINERATORS AND NONHAZARDOUS WASTE INCINERATORS

Siting, construction (or expansion), operation, and decommissioning of research and development incinerators for any type of waste and of any other incinerators that would treat nonhazardous solid waste (as designated in 40 CFR 261.4(b)).

C16 LARGE WASTE PACKAGING AND STORAGE FACILITIES

Siting, construction, modification to increase capacity, operation, and decommissioning of packaging and unpacking facilities (such as characterization operations) and large storage facilities (greater than approximately 50,000 square feet in area) for waste, except high-level radioactive waste, generated onsite or resulting from activities connected to site operations. These actions do not include storage, packaging, or unpacking of spent nuclear fuel. (See also B6.4, B6.5, B6.6, and B6.10 of appendix B.)

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Establishment and implementation of contracts, policies, and marketing and allocation plans related to electric power acquisition that involve (1) The interconnection of, or acquisition of power from, new generation resources greater than 50 average megawatts; (2) changes in the normal operating limits of generation resources greater than 50 average megawatts; or (3) service to discrete new loads of 10 average megawatts or more over a 12-month period.

D8 IMPORT OR EXPORT OF NATURAL GAS INVOLVING MAJOR NEW FACILITIES

Approvals or disapprovals of authorizations to import or export natural gas under section 3 of the Natural Gas Act involving construction of major new natural gas pipelines or related facilities (such as liquefied natural gas terminals and regasification or storage facilities) or significant expansions and modifications of existing pipelines or related facilities.

D9 IMPORT OR EXPORT OF NATURAL GAS INVOLVING MAJOR OPERATIONAL CHANGE

Approvals or disapprovals of authorizations to import or export natural gas under section 3 of the Natural Gas Act involving major operational changes (such as a major increase in the quantity of liquefied natural gas imported or exported).

D10 TREATMENT, STORAGE, AND DISPOSAL FACILITIES FOR HIGH-LEVEL WASTE AND SPENT NUCLEAR FUEL

Siting, construction, operation, and decommissioning of major treatment, storage, and disposal facilities for high-level waste and spent nuclear fuel, including geologic repositories, but not including onsite replacement or upgrades of storage facilities for spent nuclear fuel at DOE sites where such replacement or upgrade would not result in increased storage capacity.

D11 WASTE DISPOSAL FACILITIES FOR TRANSURANIC WASTE

Siting, construction or expansion, and operation of disposal facilities for transuranic (TRU) waste and TRU mixed waste (TRU waste also containing hazardous waste as designated in 40 CFR part 261).

D12 INCINERATORS

Siting, construction, and operation of incinerators, other than research and development incinerators or incinerators for nonhazardous solid waste (as designated in 40 CFR 261.4(b)).

PART 1022—COMPLIANCE WITH FLOODPLAIN AND WETLAND ENVIRONMENTAL REVIEW REQUIREMENTS

Subpart A—General

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1022.23 Applicant responsibilities.
1022.24 Interagency cooperation.

AUTHORITY: 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.;* E.O. 11988, 42 FR 26951, 3 CFR, 1977 Comp., p. 117; E.O. 11990, 42 FR 26961, 3 CFR, 1977 Comp., p. 121; E.O. 12372, 47 FR 30959, 3 CFR, 1982 Comp., p. 197.

SOURCE: 68 FR 51432, Aug. 27, 2003, unless otherwise noted.

Subpart A—General

§ 1022.1 Background.

(a) Executive Order (E.O.) 11988—Floodplain Management (May 24, 1977) directs each Federal agency to issue or amend existing regulations and procedures to ensure that the potential effects of any action it may take in a floodplain are evaluated and that its planning programs and budget requests reflect consideration of flood hazards and floodplain management. Guidance for implementation of the E.O. is provided in the floodplain management guidelines of the U.S. Water Resources Council (40 FR 6030; February 10, 1978) and in ''A Unified National Program for Floodplain Management'' prepared by the Federal Interagency Floodplain Management Taskforce (Federal Emergency Management Agency, FEMA 248, June 1994). E.O. 11990—Protection of Wetlands (May 24, 1977) directs all Federal agencies to issue or amend existing procedures to ensure consideration of wetlands protection in decisionmaking and to ensure the evaluation of the potential impacts of any new construction proposed in a wetland.

(b) It is the intent of the E.O.s that Federal agencies implement both the floodplain and the wetland provisions through existing procedures such as those established to implement the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). In those instances where the impacts of the proposed action are not significant enough to require the preparation of an EIS under section 102(2)(C) of NEPA, alternative floodplain or wetland evaluation procedures are to be established. As stated in the E.O.s, Federal agencies are to avoid direct or indirect support of development in a floodplain or new construction in a wetland wherever there is a practicable alternative.

§ 1022.2 Purpose and scope.

(a) This part establishes policy and procedures for discharging the Department of Energy's (DOE's) responsibilities under E.O. 11988 and E.O. 11990, including:

(1) DOE policy regarding the consideration of floodplain and wetland factors in DOE planning and decisionmaking; and

(2) DOE procedures for identifying proposed actions located in a floodplain or wetland, providing opportunity for early public review of such proposed actions, preparing floodplain or wetland assessments, and issuing statements of findings for actions in a floodplain.

(b) To the extent possible, DOE shall accommodate the requirements of E.O. 11988 and E.O. 11990 through applicable DOE NEPA procedures or, when appropriate, the environmental review process under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. 9601 *et seq.*).

§ 1022.3 Policy.

DOE shall exercise leadership and take action to:

(a) Incorporate floodplain management goals and wetland protection considerations into its planning, regulatory, and decisionmaking processes, and shall to the extent practicable:

(1) Reduce the risk of flood loss;

(2) Minimize the impact of floods on human safety, health, and welfare;

(3) Restore and preserve natural and beneficial values served by floodplains;

(4) Require the construction of DOE structures and facilities to be, at a minimum, in accordance with FEMA National Flood Insurance Program building standards;

(5) Promote public awareness of flood hazards by providing conspicuous delineations of past and probable flood heights on DOE property that has suffered flood damage or is in an identified floodplain and that is used by the general public;

(6) Inform parties during transactions guaranteed, approved, regulated, or insured by DOE of the hazards associated with locating facilities and structures in a floodplain;

(7) Minimize the destruction, loss, or degradation of wetlands; and

(8) Preserve and enhance the natural and beneficial values of wetlands.

(b) Undertake a careful evaluation of the potential effects of any proposed floodplain or wetland action.

(c) Avoid to the extent possible the long- and short-term adverse impacts

associated with the destruction of wetlands and the occupancy and modification of floodplains and wetlands, and avoid direct and indirect support of development in a floodplain or new construction in a wetland wherever there is a practicable alternative.

(d) Identify, evaluate, and as appropriate, implement alternative actions that may avoid or mitigate adverse floodplain or wetland impacts.

(e) Provide opportunity for early public review of any plans or proposals for floodplain or wetland actions.

§ 1022.4 Definitions.

The following definitions apply to this part:

Action means any DOE activity necessary to carry out its responsibilities for:

(1) Acquiring, managing, and disposing of Federal lands and facilities;

(2) Providing DOE-undertaken, -financed, or -assisted construction and improvements; and

(3) Conducting activities and programs affecting land use, including but not limited to water- and related land-resources planning, regulating, and licensing activities.

Base floodplain means the 100-year floodplain, that is, a floodplain with a 1.0 percent chance of flooding in any given year.

Critical action means any DOE action for which even a slight chance of flooding would be too great. Such actions may include, but are not limited to, the storage of highly volatile, toxic, or water reactive materials.

Critical action floodplain means, at a minimum, the 500-year floodplain, that is, a floodplain with a 0.2 percent chance of flooding in any given year. When another requirement directing evaluation of a less frequent flood event also is applicable to the proposed action, a flood less frequent than the 500-year flood may be appropriate for determining the floodplain for purposes of this part.

Effects of national concern means those effects that because of the high quality or function of the affected resource or because of the wide geographic range of effects could create concern beyond the locale or region of the proposed action.

Environmental assessment (EA) means a document prepared in accordance with the requirements of 40 CFR 1501.4(b), 40 CFR 1508.9, 10 CFR 1021.320, and 10 CFR 1021.321.

Environmental impact statement (EIS) means a document prepared in accordance with the requirements of section 102(2)(C) of NEPA and its implementing regulations at 40 CFR Parts 1500–1508 and 10 CFR Part 1021.

Facility means any human-made or -placed item other than a structure.

FEMA means the Federal Emergency Management Agency, Department of Homeland Security.

Finding of no significant impact means a document prepared in accordance with the requirements of 40 CFR 1508.13 and 10 CFR 1021.322.

Flood or flooding means a temporary condition of partial or complete inundation of normally dry land areas from the overflow of inland or tidal waters, or the unusual and rapid accumulation or runoff of surface waters from any source.

Floodplain means the lowlands adjoining inland and coastal waters and relatively flat areas and floodprone areas of offshore islands.

Floodplain action means any DOE action that takes place in a floodplain, including any DOE action in a wetland that is also within the floodplain, subject to the exclusions specified at § 1022.5(c) and (d) of this part.

Floodplain and wetland values means the qualities of or functions served by floodplains and wetlands that can include, but are not limited to, living values (*e.g.*, conservation of existing flora and fauna including their long-term productivity, preservation of diversity and stability of species and habitats), cultural resource values (*e.g.*, archeological and historic sites), cultivated resource values (*e.g.*, agriculture, aquaculture, forestry), aesthetic values (*e.g.*, natural beauty), and other values related to uses in the public interest (*e.g.*, open space, scientific study, outdoor education, recreation).

Floodplain or wetland assessment means an evaluation consisting of a description of a proposed action, a discussion of its potential effects on the floodplain or wetland, and consideration of alternatives.

Floodplain statement of findings means a brief document issued pursuant to § 1022.14 of this part that describes the results of a floodplain assessment.

High-hazard areas means those portions of riverine and coastal floodplains nearest the source of flooding that are frequently flooded and where the likelihood of flood losses and adverse impacts on the natural and beneficial values served by floodplains is greatest.

Minimize means to reduce to the smallest degree practicable.

New construction, for the purpose of compliance with E.O. 11990 and this part, means the building of any structures or facilities, draining, dredging, channelizing, filling, diking, impounding, and related activities.

Notice of proposed floodplain action and notice of proposed wetland action mean a brief notice that describes a proposed floodplain or wetland action, respectively, and its location and that affords the opportunity for public review.

Practicable means capable of being accomplished within existing constraints, depending on the situation and including consideration of many factors, such as the existing environment, cost, technology, and implementation time.

Preserve means to prevent modification to the natural floodplain or wetland environment or to maintain it as closely as possible to its natural state.

Restore means to reestablish a setting or environment in which the natural functions of the floodplain or wetland can again operate.

Structure means a walled or roofed building, including mobile homes and gas or liquid storage tanks.

Wetland means an area that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, including swamps, marshes, bogs, and similar areas.

Wetland action means any DOE action related to new construction that takes place in a wetland not located in a floodplain, subject to the exclusions specified at § 1022.5(c) and (d) of this part.

§ 1022.5 Applicability.

(a) This part applies to all organizational units of DOE, including the National Nuclear Security Administration, except that it shall not apply to the Federal Energy Regulatory Commission.

(b) This part applies to all proposed floodplain or wetland actions, including those sponsored jointly with other agencies.

(c) This part does not apply to the issuance by DOE of permits, licenses, or allocations to private parties for activities involving a wetland that are located on non-Federal property.

(d) Subject to paragraph (e) of this section, subpart B of this part does not apply to:

(1) Routine maintenance of existing facilities and structures on DOE property in a floodplain or wetland. Maintenance is routine when it is needed to maintain and preserve the facility or structure for its designated purpose (*e.g.*, activities such as reroofing, plumbing repair, door and window replacement);

(2) Site characterization, environmental monitoring, or environmental research activities (*e.g.*, sampling and surveying water and air quality, flora and fauna abundance, and soil properties) in a floodplain or wetland, unless these activities would involve building any structure; involve draining, dredging, channelizing, filling, diking, impounding, or related activities; or result in long-term change to the ecosystem; and

(3) Minor modification (*e.g.*, upgrading lighting, heating, ventilation, and air conditioning systems; installing or improving alarm and surveillance systems; and adding environmental monitoring or control systems) of an existing facility or structure in a floodplain or wetland to improve safety or environmental conditions unless the modification would result in a significant change in the expected useful life of the facility or structure, or involve building any structure or involve draining, dredging, channelizing, filling, diking, impounding, or related activities.

(e) Although the actions listed in paragraphs (d)(1), (d)(2), and (d)(3) of this section normally have very small

or no adverse impact on a floodplain or wetland, where unusual circumstances indicate the possibility of adverse impact on a floodplain or wetland, DOE shall determine the need for a floodplain or wetland assessment.

§ 1022.6 Public inquiries.

Inquiries regarding DOE's floodplain and wetland environmental review requirements may be directed to the Office of NEPA Policy and Compliance, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0119, 202–586–4600, or a message may be left at 1–800–472–2756, toll free.

Subpart B—Procedures for Floodplain and Wetland Reviews

§ 1022.11 Floodplain or wetland determination.

(a) Concurrent with its review of a proposed action to determine appropriate NEPA or CERCLA process requirements, DOE shall determine the applicability of the floodplain management and wetland protection requirements of this part.

(b) DOE shall determine whether a proposed action would be located within a base or critical action floodplain consistent with the most authoritative information available relative to site conditions from the following sources, as appropriate:

(1) Flood Insurance Rate Maps or Flood Hazard Boundary Maps prepared by FEMA;

(2) Information from a land-administering agency (*e.g.*, Bureau of Land Management) or from other government agencies with floodplain-determination expertise (*e.g.*, U.S. Army Corps of Engineers, Natural Resources Conservation Service);

(3) Information contained in safety basis documents as defined at 10 CFR part 830; and

(4) DOE environmental documents, *e.g.*, NEPA and CERCLA documents.

(c) DOE shall determine whether a proposed action would be located within a wetland consistent with the most authoritative information available relative to site conditions from the following sources, as appropriate:

(1) U.S. Army Corps of Engineers ''Wetlands Delineation Manual,'' Wetlands Research Program Technical Report Y–87–1, January 1987, or successor document;

(2) U.S. Fish and Wildlife Service National Wetlands Inventory or other government-sponsored wetland or land-use inventories;

(3) U.S. Department of Agriculture Natural Resources Conservation Service Local Identification Maps;

(4) U.S. Geological Survey Topographic Maps; and

(5) DOE environmental documents, *e.g.*, NEPA and CERCLA documents.

(d) Pursuant to § 1022.5 of this part and paragraphs (b) and (c) of this section, DOE shall prepare:

(1) A floodplain assessment for any proposed floodplain action in the base floodplain or for any proposed floodplain action that is a critical action located in the critical action floodplain; or

(2) A wetland assessment for any proposed wetland action.

§ 1022.12 Notice of proposed action.

(a) For a proposed floodplain or wetland action for which an EIS is required, DOE shall use applicable NEPA procedures to provide the opportunity for early public review of the proposed action. A notice of intent to prepare the EIS may be used to satisfy the requirement for DOE to publish a notice of proposed floodplain or wetland action.

(b) For a proposed floodplain or wetland action for which no EIS is required, DOE shall take appropriate steps to send a notice of proposed floodplain or wetland action to appropriate government agencies (*e.g.*, FEMA regional offices, host and affected States, and tribal and local governments) and to persons or groups known to be interested in or potentially affected by the proposed floodplain or wetland action. DOE also shall distribute the notice in the area where the proposed action is to be located (*e.g.*, by publication in local newspapers, through public service announcements, by posting on- and off-site). In addition, for a proposed floodplain or wetland action that may result in effects of national concern to the floodplain or wetland or both, DOE

shall publish the notice in the FEDERAL REGISTER.

§ 1022.13 Floodplain or wetland assessment.

(a) A floodplain or wetland assessment shall contain the following information:

(1) *Project Description*. This section shall describe the proposed action and shall include a map showing its location with respect to the floodplain and/or wetland. For actions located in a floodplain, the nature and extent of the flood hazard shall be described, including the nature and extent of hazards associated with any high-hazard areas.

(2) *Floodplain or Wetland Impacts*. This section shall discuss the positive and negative, direct and indirect, and long- and short-term effects of the proposed action on the floodplain and/or wetland. This section shall include impacts on the natural and beneficial floodplain and wetland values (§ 1022.4) appropriate to the location under evaluation. In addition, the effects of a proposed floodplain action on lives and property shall be evaluated. For an action proposed in a wetland, the effects on the survival, quality, and function of the wetland shall be evaluated.

(3) *Alternatives*. DOE shall consider alternatives to the proposed action that avoid adverse impacts and incompatible development in the floodplain and/or wetland, including alternate sites, alternate actions, and no action. DOE shall evaluate measures that mitigate the adverse effects of actions in a floodplain and/or wetland including, but not limited to, minimum grading requirements, runoff controls, design and construction constraints, and protection of ecologically-sensitive areas.

(b) For proposed floodplain or wetland actions for which an EA or EIS is required, DOE shall prepare the floodplain or wetland assessment concurrent with and included in the appropriate NEPA document.

(c) For floodplain or wetland actions for which neither an EA nor an EIS is prepared, DOE shall prepare the floodplain or wetland assessment separately or incorporate it when appropriate into another environmental review process (*e.g.*, CERCLA).

§ 1022.14 Findings.

(a) If DOE finds that no practicable alternative to locating or conducting the action in the floodplain or wetland is available, then before taking action DOE shall design or modify its action in order to minimize potential harm to or within the floodplain or wetland, consistent with the policies set forth in E.O. 11988 and E.O. 11990.

(b) For actions that will be located in a floodplain, DOE shall issue a floodplain statement of findings, normally not to exceed three pages, that contains:

(1) A brief description of the proposed action, including a location map;

(2) An explanation indicating why the action is proposed to be located in the floodplain;

(3) A list of alternatives considered;

(4) A statement indicating whether the action conforms to applicable floodplain protection standards; and

(5) A brief description of steps to be taken to minimize potential harm to or within the floodplain.

(c) For floodplain actions that require preparation of an EA or EIS, DOE may incorporate the floodplain statement of findings into the finding of no significant impact or final EIS, as appropriate, or issue such statement separately.

(d) DOE shall send copies of the floodplain statement of findings to appropriate government agencies (*e.g.*, FEMA regional offices, host and affected states, and tribal and local governments) and to others who submitted comments on the proposed floodplain action.

(e) For proposed floodplain actions that may result in effects of national concern, DOE shall publish the floodplain statement of findings in the FEDERAL REGISTER, describing the location of the action and stating where a map is available.

(f) For floodplain actions subject to E.O. 12372—Intergovernmental Review of Federal Programs (July 14, 1982), DOE also shall send the floodplain statement of findings to the State in accordance with 10 CFR part 1005—Intergovernmental Review of Department of Energy Programs and Activities.

§ 1022.15 Timing.

(a) For a proposed floodplain action, DOE shall allow 15 days for public comment following issuance of a notice of proposed floodplain action. After the close of the public comment period and before issuing a floodplain statement of findings, DOE shall reevaluate the practicability of alternatives to the proposed floodplain action and the mitigating measures, taking into account all substantive comments received. After issuing a floodplain statement of findings, DOE shall endeavor to allow at least 15 days of public review before implementing a proposed floodplain action. If a FEDERAL REGISTER notice is required, the 15-day period begins on the date of publication in the FEDERAL REGISTER.

(b) For a proposed wetland action, DOE shall allow 15 days for public comment following issuance of a notice of proposed wetland action. After the close of the public comment period, DOE shall reevaluate the practicability of alternatives to the proposed wetland action and the mitigating measures, taking into account all substantive comments received, before implementing a proposed wetland action. If a FEDERAL REGISTER notice is required, the 15-day period begins on the date of publication in the FEDERAL REGISTER.

§ 1022.16 Variances.

(a) *Emergency actions*. DOE may take actions without observing all provisions of this part in emergency situations that demand immediate action. To the extent practicable prior to taking an emergency action (or as soon as possible after taking such an action) DOE shall document the emergency actions in accordance with NEPA procedures at 10 CFR 1021.343(a) or CERCLA procedures in order to identify any adverse impacts from the actions taken and any further necessary mitigation.

(b) *Timing*. If statutory deadlines or overriding considerations of program or project expense or effectiveness exist, DOE may waive the minimum time periods in § 1022.15 of this subpart.

(c) *Consultation*. To the extent practicable prior to taking an action pursuant to paragraphs (a) or (b) of this section (or as soon as possible after taking such an action) the cognizant DOE program or project manager shall consult with the Office of NEPA Policy and Compliance.

§ 1022.17 Follow-up.

For those DOE actions taken in a floodplain or wetland, DOE shall verify that the implementation of the selected alternative, particularly with regard to any adopted mitigation measures, is proceeding as described in the floodplain or wetland assessment and the floodplain statement of findings.

Subpart C—Other Requirements

§ 1022.21 Property management.

(a) If property in a floodplain or wetland is proposed for license, easement, lease, transfer, or disposal to non-Federal public or private parties, DOE shall:

(1) Identify those uses that are restricted under applicable floodplain or wetland regulations and attach other appropriate restrictions to the uses of the property; or

(2) Withhold the property from conveyance.

(b) Before completing any transaction that DOE guarantees, approves, regulates, or insures that is related to an area located in a floodplain, DOE shall inform any private party participating in the transaction of the hazards associated with locating facilities or structures in the floodplain.

§ 1022.22 Requests for authorizations or appropriations.

It is DOE policy to indicate in any requests for new authorizations or appropriations transmitted to the Office of Management and Budget, if a proposed action is located in a floodplain or wetland and whether the proposed action is in accord with the requirements of E.O. 11988 and E.O. 11990 and this part.

§ 1022.23 Applicant responsibilities.

DOE may require applicants for any use of real property (*e.g.*, license, easement, lease, transfer, or disposal), permits, certificates, loans, grants, contract awards, allocations, or other

forms of assistance or other entitlement related to activities in a floodplain or wetland to provide information necessary for DOE to comply with this part.

§ 1022.24 Interagency cooperation.

If DOE and one or more agencies are directly involved in a proposed floodplain or wetland action, in accordance with DOE's NEPA or CERCLA procedures, DOE shall consult with such other agencies to determine if a floodplain or wetland assessment is required by subpart B of this part, identify the appropriate lead or joint agency responsibilities, identify the applicable regulations, and establish procedures for interagency coordination during the environmental review process.

PART 1039—UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION FOR FEDERAL AND FEDERALLY ASSISTED PROGRAMS

AUTHORITY: Section 213, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91–646, 84 Stat. 1894 (42 U.S.C. 4601) as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987, Title IV of Pub. L. 100–17, 101 Stat. 246–256 (42 U.S.C. 4601 note).

§ 1039.1 Uniform relocation assistance and real property acquisition.

Regulations and procedures for complying with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91–646, 84 Stat. 1894, 42 U.S.C. 4601), as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Title IV of Pub. L. 100–17, 101 Stat. 246–255, 42 U.S.C. 4601 note) are set forth in 49 CFR part 24.

[52 FR 48017, Dec. 17, 1987; 54 FR 8912, 8913, Mar. 2, 1989]

PART 1040—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS OR ACTIVITIES

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APPENDIX A TO PART 1040—FEDERAL FINANCIAL ASSISTANCE OF THE DEPARTMENT OF ENERGY TO WHICH THIS PART APPLIES

AUTHORITY: 20 U.S.C. 1681–1686; 29 U.S.C. 794; 42 U.S.C. 2000d to 2000d–7, 3601–3631, 5891, 6101–6107, 7101 *et seq.*

SOURCE: 45 FR 40515, June 13, 1980, unless otherwise noted.

Subpart A—General Provisions

§ 1040.1 Purpose.

(a) The purpose of this part is to implement Title VI of the Civil Rights Act of 1964, Pub. L. 88–352; section 16 of the Federal Energy Administration Act of 1974, as amended, Pub. L. 93–275; section 401 of the Energy Reorganization Act of 1974, Pub. L. 93–438; Title IX of the Education Amendments of 1972, as amended, Pub. L. 92–318, Pub. L. 93–568 and Pub. L. 94–482; section 504 of the Rehabilitation Act of 1973, as amended, Pub. L. 93–112; the Age Discrimination Act of 1975, Pub. L. 94–135; Title VIII of the Civil Rights Act of 1968, Pub. L. 90–284; and civil rights provisions of statutes administered pursuant to authority under the DOE Organization Act, Pub. L. 95–91, so no person shall, on the ground of race, color, national origin, sex (when covered by section 16 and section 401), handicap, or age, be excluded from participation in, be denied the benefits of, be subjected to discrimination under, or be denied employment, where a primary purpose of the Federal financial assistance is to provide employment or when the delivery of services is affected by the recipient's employment practices (under section 504, all grantee and subgrantee employment practices are covered regardless of the purpose of the program), in connection with any program or activity receiving Federal financial assistance from the Department of Energy (after this referred to as DOE or the Department). Employment coverage may be broader in scope when section 16, section 401, or Title IX are applicable.

(b) DOE regulations on enforcement of nondiscrimination on the basis of handicap in programs or activities conducted by DOE are in part 1041 of this chapter.

(c) DOE regulations on enforcement of nondiscrimination on the basis of

sex, under Title IX of the Education Act Amendments of 1972, as amended, are in part 1042 of this chapter.

[45 FR 40515, June 13, 1980, as amended at 66 FR 4630, Jan. 18, 2001; 68 FR 51346, Aug. 26, 2003]

§ 1040.2 Application.

(a) The application of this part is to any program or activity for which Federal financial assistance is authorized under laws administered by DOE. Types of Federal financial assistance to which this part applies are listed in Appendix A of this part. appendix A is to be revised from time to time by notice published in the FEDERAL REGISTER. This part applies to money paid, property transferred, or other Federal financial assistance including cooperative agreements extended, by way of grant, loan, or contract by DOE, or grants awarded in the performance of a contract with DOE by an authorized contractor or subcontractor, the terms of which require compliance with this part. If any statutes implemented by this part are otherwise applicable, the failure to list a type of Federal financial assistance in appendix A does not mean that a program or activity is not covered by this part.

(b) This part does not apply to:

(1) Contracts of insurance or guaranty;

(2) Employment practices under any program or activity except as provided in §§ 1040.12, 1040.14, 1040.41, 1040.47 and 1040.66; or

(3) Procurement contracts under title 41 CFR part 1 or part 9.

[45 FR 40515, June 13, 1980, as amended at 68 FR 51346, Aug. 26, 2003]

§ 1040.3 Definitions—General.

(a) *Academic institution* includes any school, academy, college, university, institute, or other association, organization, or agency conducting or administering any aid, benefit, service, project, or facility designed to educate or train individuals.

(b) *Administrative law judge* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(c) *Agency* or *Federal agency* refers to any Federal department or agency which extends Federal financial assistance.

(d) *Applicant for assistance* means one who submits an application, request, or plan required to be approved by a Department official or by a primary recipient as a condition to becoming eligible for Federal financial assistance.

(e) *Assistant Attorney General* refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

(f) *Director, FAPD* refers to the Director, Federally Assisted Programs Division, Office of Equal Opportunity, DOE.

(g) *Compliance Review* means an analysis of a recipient's selected employment practices or delivery of services for adherence to provisions of any of the subparts of this part.

(h) *Department* means the Department of Energy (DOE).

(i) *FERC* means the Federal Energy Regulatory Commission, DOE.

(j) Where designation of persons by race, color, or national origin is required, the following designations are to be used:

(1) *Black*, not of Hispanic origin. A person having origins in any of the black racial groups of Africa.

(2) *Hispanic*. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race.

(3) *Asian or Pacific Islander*. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands. This includes, for example, China, India, Japan, Korea, the Philippine Islands, Hawaiian Islands, and Samoa.

(4) *American Indian or Alaskan Native*. A person having origins in any of the original peoples of North America and who maintains cultural identification through tribal affiliation or community recognition.

(5) *White, not of Hispanic origin*. A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

Additional subcategories based on national origin or primary language spoken may be used where appropriate on either a national or a regional basis. Paragraphs (j) (1) through (5), inclusive, set forth in this section are in

conformity with Directive No. 15 of the Office of Federal Statistical Policy and Standards. To the extent that these designations are modified, paragraphs (j) (1) through (5), inclusive, set forth in this section are to be interpreted to conform with those modifications.

(k) *Director* means the Director, Office of Equal Opportunity, DOE.

(l) *Disposition* means any treatment, handling, decision, sentencing, confinement, or other proscription of conduct.

(m) *Employment practices,* see individual section headings.

(n) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration, or acquisition of facilities.

(o) *Federal financial assistance* includes:

(1) Grants and loans of Federal funds,

(2) The grant or donation of Federal property and interest in property,

(3) The detail of or provision of services by Federal personnel,

(4) The sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property, the furnishing of services without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by the sale, lease, or furnishing of services to the recipient, and

(5) Any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(p) *General Counsel* mean the Office of the General Counsel Department of Energy.

(q) *Government organization* means the political subdivision for a prescribed geographical area.

(r) *Investigations* include fact-finding efforts and attempts to secure voluntary resolution of complaints.

(s) *Noncompliance* means the failure of a recipient or subrecipient to comply with any subpart of this part.

(t) *Primary recipient* means any person, group, organization, state, or local unit of government which is authorized or required to extend Federal financial assistance to another recipient.

(u) *Program or activity* and *program* mean all of the operations of any entity described in paragraphs (u)(1) through (4) of this section, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (u)(1), (2), or (3) of this section.

(v) *Responsible Departmental or DOE Official* means the official of the Department of Energy that has been assigned the principal responsibility for administration of the law extending Federal financial assistance.

(w) *Reviewing authority* means the component of the Department delegated authority by the Secretary to appoint, and to review the decisions of,

administrative law judges in cases arising under this part.

(x) *Secretary* means the Secretary of the Department of Energy.

(y) The term *United States* includes the states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Island, American Samoa, Guam, Wake Island, the Canal Zone, and all other territories and possessions of the United States, and the term *State* includes any one of the foregoing.

(z) *Headquarters* means DOE offices located in Washington, D.C.

[45 FR 40515, June 13, 1980, as amended at 68 FR 51346, Aug. 26, 2003]

§ 1040.4 Assurances required and preaward review.

(a) *Assurances.* An applicant for Federal financial assistance to which this part applies shall submit an assurance on a form specified by the Director that the program or activity will be operated in compliance with applicable subparts. Such assurances are to include provisions which give the United States a right to seek judicial enforcement.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structure on the property, the assurance obligates the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance obligates the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases, the assurance obligates the recipient to all terms and conditions contained in the certificate of assurance for the period during which Federal financial assistance is extended.

(c) *Covenants.* Where Federal financial assistance is provided in the form of real property, structures, improvements on or interests in the property, or in the case where Federal financial assistance is provided in the form of a transfer of real property or interest in the property from the Department:

(1) The instrument effecting or recording this transfer is to contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits; or

(2) Where no transfer of property is involved or imposed with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (c)(1) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant is to also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a material breach of the covenant. If a transferee of real property manages to mortgage or otherwise encumber the real property as security for financing construction of new or improvement of existing facilities on the property for the purpose for which the property was transferred, the Director may, upon request of the transferee and, if necessary to accomplish such financing and upon such conditions, as he or she deems appropriate, agree to forbear the exercise of the right to revert title for so long as the lien of the mortgage or other encumbrance remains effective.

(d) *Assurances from government agencies.* In the case of any application from any department, agency or office of any State or local government for Federal financial assistance for any specified purpose, the assurance required by this section is to extend to any other department, agency, or office of the same governmental unit.

(e) *Assurance from academic and other institutions.* (1) In the case of any application for Federal financial assistance for any purpose to an academic institution, the assurance required by this

section is to extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an academic institution, detention or correctional facility, or any other institution or facility, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, wards, inmates, persons subject to control, or clients of the institution or facility or to the opportunity to participate in the provision of services, disposition, treatment, or benefits to such individuals, shall be applicable to the entire institution or facility.

(f) *Continuing Federal financial assistance.* Any State or State agency applying for continuing Federal financial assistance subject to this part shall, as a condition for the extension of such assistance:

(1) Provide a statement that the program or activity is (or, in the case of a new program or activity, will be) conducted in compliance with applicable subparts; and

(2) Provide for such methods of administration as are found by the Director or a designee to give reasonable assurance that the primary recipient and all other recipients of Federal financial assistance under such program will comply with this part.

(g) *Assistance for construction.* Where the assistance is sought for the construction of a facility, or a part of a facility, the assurance is to extend to the entire facility. If a facility to be constructed is part of a larger system, the assurance is to extend to the larger system.

(h) *Pre-award review.* Prior to and as a condition of approval, all applications for Federal financial assistance are to be reviewed by the appropriate Civil Rights Department official who is to make a written determination of the applicant's compliance with this part. The basis for such a determination is to be the submission of the assurance of compliance as specified in paragraph (a) and a review of data to be submitted by the applicant as specified by the Director. For purposes of this subsection, the appropriate departmental official at headquarters level is the Director, FAPD, Office of Equal Opportunity, and at the regional level it is to be the Civil Rights Officer delegated by the Director as having review authority for determining compliance with requirements of this part. Where a determination of compliance cannot be made from this data, DOE may require the applicant to submit necessary additional information and may take other steps necessary to make the determination of compliance. Such other steps may include, for example, communicating with local government officials or protected class organizations and field reviews. Any agreement to achieve voluntary compliance as a result of a preaward review shall be in writing. In the case of Title VI, the Director will notify the Assistant Attorney General of instances of probable noncompliance determined as the result of application reviews. The opportunity for a hearing as provided under § 1040.113 is applicable to this section.

[45 FR 40515, June 13, 1980, as amended at 68 FR 51346, Aug. 26, 2003]

§ 1040.5 Designation of responsible employee.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to carry outs its responsibilities under this part. The recipient shall publish the name, office address and telephone number of the employee or employees appointed under this paragraph.

(b) A recipient shall display prominently, in reasonable numbers and places, posters which state that the recipient operates a program or activity subject to the nondiscrimination provisions of applicable subparts, summarize those requirements, note availability of information regarding this part from the recipient and DOE, and explain briefly the procedures for filing a complaint. Information on requirements of this part, complaint procedures and the rights of beneficiaries are to be included in handbooks, manuals, pamphlets, and other materials which are ordinarily distributed to the public to describe the federally assisted programs or activities and the requirements for participation by recipients and beneficiaries. To the extent that

recipients are required by law or regulation to publish or broadcast information in the news media, the recipient shall insure that such publications and broadcasts state that the program or activity in question is an equal opportunity program or activity or otherwise indicate that discrimination in the program is prohibited by Federal law.

(c) Where a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program or activity requires service or information in a language other than English in order to be informed of or to participate in the program, the recipient shall take reasonable steps, considering the scope of the program and size and concentration of such population, to provide information in appropriate languages (including braille) to such persons. This requirement applies to written material of the type which is ordinarily distributed to the public. The Department may require a recipient to take additional steps to carry out the intent of this subsection.

[45 FR 40515, June 13, 1980, as amended at 68 FR 51346, Aug. 26, 2003]

§ 1040.6 Notice.

(a) A recipient shall take appropriate, initial and continuing steps to notify participants, beneficiaries, applicants and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of race, color, national origin, sex (where sec. 16 or sec. 401 apply), handicap, or age. The notification is to state, where appropriate, that the recipient does not discriminate in admission or access to, and treatment of, or employment in its programs or activities and inform employees of their rights under this part. The notification is to include an identification of the responsible employee designated under § 1040.5. A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publications, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

(c) The provisions of § 1040.5(c) to provide information in appropriate languages (including braille), apply to this section.

[45 FR 40515, June 13, 1980, as amended at 68 FR 51346, Aug. 26, 2003]

§ 1040.7 Remedial and affirmative action and self-evaluation.

(a) *Remedial action*. If the Director finds that a recipient has discriminated against persons on the basis of race, color, national origin, sex, handicap, or age in any program or activity receiving Federal financial assistance, the recipient shall take remedial action as the Director considers necessary to overcome the effects of the discrimination.

(b) *Affirmative action*. In the absence of a finding of discrimination on the basis of race, color, national origin, sex, handicap, or age in any program or activity, a recipient may continue to encourage participation by all persons regardless of race, color, national origin, sex, handicap, or age.

(c) *Self-evaluation*. Each recipient shall, within one year of the effective date of this part:

(1) Whenever possible, evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(2) Modify any policies and practices which do not or may not meet the requirements of this part; and

(3) Take appropriate remedial steps to eliminate the effects of discrimination which resulted or may have resulted from adherence to these questionable policies and practices.

(d) Availability of self-evaluation and related materials. Recipient shall maintain on file, for at least three years following its completion, the evaluation required under paragraph (c) of this section, and shall provide to the Director, upon request, a description of any modifications made under paragraph (c)(2) of this section and of any remedial steps taken under paragraph (c)(3) of this section.

[45 FR 40515, June 13, 1980, as amended at 68 FR 51346, Aug. 26, 2003]

§ 1040.8 Effect of employment opportunity.

Due to limited opportunities in the past, certain protected groups may be underrepresented in some occupations or professions. A recipient's obligation to comply with this part is not alleviated by use of statistical information which reflects limited opportunities in those occupations or professions.

Subpart B—Title VI of the Civil Rights Act of 1964; Section 16 of the Federal Energy Administration Act of 1974, as Amended; and Section 401 of the Energy Reorganization Act of 1974

§ 1040.11 Purpose and application.

(a) The purpose of this subpart is to implement title VI of the Civil Rights Act of 1964 (title VI) and the pertinent regulations of DOE so that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving Federal financial assistance of the type subject to title VI. This subpart also implements section 16 of the Federal Energy Administration Act of 1974, as amended (section 16) and section 401 of the Energy Reorganization of 1974 (section 401) so that no person shall be excluded on the ground of sex from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance subject to section 16 or 401. The coverage of employment practices is explained in § 1040.14.

(b) The application of this subpart is to delivery of services by and the covered employment practices of recipients and subrecipients administering or participating in any program or activity receiving Federal financial assistance under laws administered by DOE covered by title VI. In addition to services and employment practices, this subpart applies to any activities of recipients or subrecipients receiving Federal financial assistance subject to section 16 and section 401.

[45 FR 40515, June 13, 1980, as amended at 68 FR 51347, Aug. 26, 2003]

§ 1040.12 Definitions.

(a) *Covered employment* means employment practices covered by title VI, section 16 and section 401.

(1) Under title VI, such practices are those which:

(i) Exist in a program where a primary objective of the Federal financial assistance is to provide employment; or

(ii) Cause discrimination on the basis of race, color, or national origin with respect to beneficiaries or potential beneficiaries of the assisted program.

(2) Under section 16 and section 401, such practices include, but are not limited to, employment practices covered by title VI when alleging discrimination on the basis of sex. All employment practices of a recipient or subrecipient of Federal financial assistance subject to section 16 and section 401 are covered employment practices.

(b) *Title VI* refers to title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq*. which prohibits discrimination on the ground of race, color or national origin in programs or activities receiving Federal financial assistance. The definitions set forth in § 1040.3 of subpart A to the extent not inconsistent with this subpart, are applicable to and incorporated into this subpart.

[45 FR 40515, June 13, 1980, as amended at 68 FR 51347, Aug. 26, 2003]

§ 1040.13 Discrimination prohibited.

(a) *General.* No person in the United States shall be excluded on the ground of race, color, national origin, or sex (when covered by section 16 or section 401), from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this subpart applies.

(b) *Specific discriminatory action prohibited.* A recipient to which this subpart applies may not, directly or through contractual or other arrangements, on the ground of race, color, national origin or sex (when covered by section 16 or section 401):

(1) Deny any individual any disposition, service, financial aid, or benefit provided under the program;

(2) Provide any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(3) Subject an individual to segregation or separate treatment in any matter related to his/her receipt of any disposition, service, financial aid, or benefit under the program;

(4) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, or benefit under the program;

(5) Treat an individual differently from others in determining whether such individual satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any disposition, service, financial aid, function or benefit provided under the program;

(6) Deny an individual an opportunity to participate in the program through the provision of services or otherwise afford such individual an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in § 1040.14 of this subpart); or

(7) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(c) A recipient, in determining the type of Federal financial assistance (i.e., disposition, services, financial aid, benefits, or facilities) which will be provided under any program, or the class of individuals to whom, or the situations in which the assistance will be provided, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex (when covered by section 16 and section 401) or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex (when covered by section 16 or section 401).

(d) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination because of race, color, national origin, or sex (when covered by section 16 or 401) or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of title VI or this subpart.

(e) For the purpose of this section, the disposition, services, financial aid, or benefits provided under a program receiving Federal financial assistance include all portions of the recipient's program or activity, including facilities, equipment, or property provided with the aid of Federal financial assistance.

(f) The enumeration of specific forms of prohibited discrimination in this paragraph and in § 1040.14 of this subpart does not limit the generality of the prohibition in paragraph (a) of this section.

(g) *Exemptions.* Exclusion from benefits for protected groups. An individual is not to be considered subjected to discrimination by reason of his/her exclusion from benefits limited to individuals of a particular race, color, national origin or sex different from his/hers when the exclusion is provided for

or required by Federal law, for example, Federal financial assistance provided exclusively to serve on-reservation Indians.

[45 FR 40515, June 13, 1980, as amended at 68 FR 51347, Aug. 26, 2003]

§ 1040.14 Covered employment.

(a) *Employment practices.* (1) Whenever a primary objective of the Federal financial assistance to a program to which this subpart applies is to provide employment, a recipient of the assistance may not (directly or through contractual or other arrangements) subject any individual to discrimination on the grounds of race, color, national origin, or sex (when covered by section 16 and section 401) in its employment practices under the program (including recruitment or recruitment advertising, employment, layoff, or termination, upgrading, demotion or transfer, training, participation in upward mobility projects, rates of pay or other forms of compensation, and use of facilities). This prohibition also applies to programs where the primary objective of the Federal financial assistance is:

(i) To assist individuals through employment to meet expenses incident to the commencement or continuation of their education or training;

(ii) To provide work experience which contributes to the education or training of the individuals involved;

(iii) To reduce the unemployment of individuals or to help them through employment to meet subsistence needs; or

(iv) To provide employment to individuals who, because of handicaps, cannot be readily absorbed in the competitive labor market. The requirements applicable to construction under any such program are to be those specified in or under part III of Executive Order 11246, as amended, or any Executive Order which supersedes it.

(2) In regard to Federal financial assistance which does not have provision of employment as a primary objective, the provisions of paragraph (a)(1) of this section apply to the employment practices of the recipient if discrimination on the ground of race, color, national origin, or sex (when covered by section 16 or section 401) in such employment practices tends to exclude persons from participation in, deny them the benefits of, or subject them to discrimination under the program receiving Federal financial assistance. In any such case, the provisions of paragraph (a)(1) of this section apply to the extent necessary to assure equality of opportunity to and nondiscriminatory treatment of beneficiaries.

(3) Paragraph (a)(1) also applies to covered employment as defined in § 1040.12(a)(2).

(b) Enforcement of title VI compliance with respect to covered employment practices is not to be superseded by State or local merit systems relating to the employment practices of the same recipient.

[45 FR 40515, June 13, 1980, as amended at 68 FR 51347, Aug. 26, 2003]

Subpart C [Reserved]

Subpart D—Nondiscrimination on the Basis of Handicap—Section 504 of the Rehabilitation Act of 1973, as Amended

GENERAL PROVISIONS

§ 1040.61 Purpose and application.

(a) The purpose of this subpart is to implement sec. 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

(b) This subpart applies to each recipient or subrecipient of Federal financial assistance from DOE and to each program or activity that receives assistance.

[45 FR 40515, June 13, 1980, as amended at 68 FR 51347, Aug. 26, 2003]

§ 1040.62 Definitions.

(a) *Executive Order* means Executive Order 11914, titled ''Nondiscrimination With Respect to the Handicapped in Federally Assisted Programs'' issued on April 28, 1976.

(b) *Section 504* means sec. 504 of the Rehabilitation Act of 1973, Pub. L. 93–112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93–516, 29 U.S.C. 794.

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

(d) As used in paragraph (c) of this section, the phrase:

(1) *Physical or mental impairment* means—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; 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 addiction and alcoholism, when current use of drugs and/or alcohol is not detrimental to or interferes with the employee's performance, nor constitutes a direct threat to property or safety of others.

(2) *Major life activities* means 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 that is treated by a recipient 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 paragraphs (d)(1) (i) and (ii) of this section, but is treated by a recipient as having such an impairment.

(e) *Qualified handicapped person* means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool, elementary, secondary, or adult education services, a handicapped person:

(i) Of an age during which non-handicapped persons are provided such services;

(ii) Of any age during which it is mandatory under state law to provide such services to handicapped persons; or

(iii) To whom a state is required to provide a free appropriate public education under sec. 612 of the Education for All Handicapped Children Act of 1975, Pub. L. 94–142.

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity; and

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(f) *Handicap* means condition or characteristic that renders a person a handicapped person as defined in paragraph (c) of this section.

(g) *Historic properties* means those architecturally, historically or culturally significant properties listed in or eligible for listing in the National Register of Historic Places or such properties designated under a statute of the appropriate State or local governmental body.

(h) *Building alterations* means those changes to the existing conditions and equipment of a building which do not involve any structural changes, but which typically improve and upgrade a building, such as alterations to stairways, doors, toilets, elevators, and site improvements.

(i) *Structural changes* means those changes which alter the structure of a historic building including, but not limited to, its bearing walls and all types of post and beam systems in wood, steel, iron or concrete.

The definitions set forth in § 1040.3 of this part, to the extent not inconsistent with this subpart, are made applicable to and incorporated into this subpart.

§ 1040.63 Discrimination prohibited.

(a) *General.* 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 that receives Federal financial assistance from DOE.

(b) *Discriminatory actions prohibited.* (1) A recipient, 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 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 the action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or services to beneficiaries of the recipient's program or activity;

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

(vii) 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) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of permissible separate or different aid, benefits, or services, a recipient may not deny a qualified handicapped person the opportunity to participate in aid, benefits, or services that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration that:

(i) Have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap;

(ii) Have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons; or

(iii) Perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

(5) In determining the site of a facility, an applicant for assistance or a recipient may not make selections that—

(i) Have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives Federal financial assistance from DOE; or

(ii) Have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving from

Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Aid, benefits, or services limited by Federal law.* The exclusion of non-handicapped persons from aid, benefits, or services limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from aid, benefits, or services limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) Recipients shall take appropriate steps to ensure that communications with their applicants, employees and handicapped persons participating in federally assisted programs or activities or receiving aids, benefits or services, are available to persons with impaired vision and hearing.

(e) The enumeration of specific forms of prohibited discrimination in this paragraph does not limit the generality of the prohibition in paragraph (a) of this section.

[45 FR 40515, June 13, 1980, as amended at 68 FR 51347, Aug. 26, 2003]

§ 1040.64 Effect of State or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for non-handicapped persons.

(c) *Effect of other regulations.* All regulations, orders, or similar directions issued by any officer of DOE which impose requirements designed to prohibit discrimination against individuals on the grounds of race, color, national origin, sex, age or handicap under any program or activity to which this part applies, and which authorize the suspension, termination or refusal to grant or to continue Federal financial assistance for failure to comply with these requirements, are superseded to the extent that discrimination is prohibited by this part. Nothing in this part is to relieve any person of the obligation assumed or imposed under any superseded regulation, order, instruction, or similar direction prior to the effective date of this part. Nothing in this part is to supersede the effective date of this part. Nothing in this part is to supersede Executive Orders 10925, 11114, 11063, 11246, and regulations issued under these authorities, or supersede any other regulations or instructions which prohibit discrimination on the ground of race, color, national origin, sex, age, or handicap in any program or activity to which this part does not apply.

[45 FR 40515, June 13, 1980, as amended at 68 FR 51347, Aug. 26, 2003]

§ 1040.65 Procedures.

The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are adopted and incorporated in this section by reference. These procedures may be found in subparts G and H of this part.

EMPLOYMENT PRACTICES

§ 1040.66 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination employment under any program or activity to which this subpart applies.

(2) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(3) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by

this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, labor unions, organizations providing or administering fringe benefits to employees of the recipient, and organizations providing training and apprenticeships.

(b) *Specific activities*. The provisions of this subpart apply to:

(1) Recruitment, advertising, and processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick or otherwise;

(6) Fringe benefits available by virtue of employment, whether administered by the recipient or not;

(7) Selection and provision of financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including those that are social or recreational; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

[45 FR 40515, June 13, 1980, as amended at 68 FR 51347, Aug. 26, 2003]

§ 1040.67 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity.

(b) Reasonable accommodation may include:

(1) Making facilities used by employees readily accessible to and usable by handicapped persons; and

(2) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining, under paragraph (a) of this section, whether an accommodation would impose an undue hardship on the operation of a recipient's program or activity, factors to be considered include:

(1) The overall size of the recipient's program or activity with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

[45 FR 40515, June 13, 1980, as amended at 68 FR 51347, Aug. 26, 2003]

§ 1040.68 Employment criteria.

(a) A recipient may not use any employment test or other selection criterion that screens out or tends to screen out handicapped persons unless the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question.

(b) A recipient shall select and administer tests concerning employment to best ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude or other factors the test purports to measure except where those skills are the factors that the test purports to measure.

§ 1040.69 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a pre-employment

medical examination or may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make pre-employment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination, under § 1040.7 of this part, or is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity under § 1040.7 of subpart A of this part, or when a recipient is taking affirmative action under Sec. 503 of the Rehabilitation Act of 1973, as amended, the recipient may invite applicants for employment to indicate whether, and to what extent, they are handicapped *Provided that:*

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally, if no written questionnaire is used, that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this subpart.

(c) Nothing in this section is to prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty provided that all entering employees are subjected to the examination regardless of handicap or absence of handicap and results of the examination are used only in accordance with the requirements of this subpart.

(d) Information obtained in accordance with this section concerning the medical condition or history of the applicant is to be collected and maintained on separate forms that are to be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with Sec. 504 of the Rehabilitation Act of 1973, as amended, shall be provided relevant information upon request.

ACCESSIBILITY

§ 1040.71 Discrimination prohibited.

No handicapped person shall, because a recipient's facilities are inaccessible to or unuseable by handicapped persons, be denied the benefits of, be excluded from participation in, or be subjected to discrimination under any program or activity that receives or benefits from Federal financial assistance from DOE.

§ 1040.72 Existing facilities.

(a) *Accessibility*. A recipient shall operate any program or activity to which this subpart applies so that when each part is viewed in its entirety it is readily accessible and usable by handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and useable by handicapped persons.

(b) *Methods*. A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aids to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 1040.73 or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for

meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that serve handicapped persons in the most integrated setting appropriate.

(c) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within 60 days of the effective date of this subpart except that where structural changes in facilities are necessary, the changes are to be made as expeditiously as possible, but in no event later than three years after the effective date of this subpart.

(d) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within 6 months of the effective date of this subpart, a transition plan setting forth the steps necessary to complete the changes. The plan is to be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, and the plan is to meet with the approval of the Director, Federally Assisted Programs Division, Office of Equal Opportunity, DOE. A copy of the transition plan is to be made available for public inspection. At a minimum, the plan is to:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility to and usability by handicapped persons of its program or activity.

(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 full accessibility under §1040.72(a) and, if the time period or 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 person responsible for implementation of the plan.

(e) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information concerning the existence and location of services, activities, and facilities that are accessible to, and useable by, handicapped persons.

[45 FR 40515, June 13, 1980, as amended at 68 FR 51347, Aug. 26, 2003]

§1040.73 New construction.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient is to be designed and constructed in a manner that the facility or part of the facility is readily accessible to, and useable by, handicapped persons, if the construction was commenced after the effective date of this subpart.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this subpart in a manner that affects or could affect the usability of the facility or part of the facility is, to the maximum extent feasible, to be altered in a manner that the altered portion of the facility is readily accessible to and useable by handicapped persons.

(c) *Conformance with Uniform Federal Accessibility Standards.* (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (USAF) (appendix A to 41 CFR subpart 101–19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations

that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

[45 FR 40515, June 13, 1980, as amended at 55 FR 52138, 52140, Dec. 19, 1990]

§ 1040.74 Accessibility in historic properties.

(a) *Methods to accomplish accessibility.* Recipients shall operate each program or activity involving historic properties so that when each part is viewed in its entirety it is readily accessible to and usable by handicapped persons. The recipient shall exhaust subsection (b)(1) (methods to accomplish accessibility without building alterations or structural changes) before proceeding to subsection (b)(2) (methods to accomplish program accessibility resulting in building alterations). The recipient shall exhaust subsection (b)(2) (methods to accomplish accessibility resulting in building alterations) before proceeding to subsection (b)(3) (methods to accomplish accessibility resulting in structural changes).

(1) *Methods to accomplish accessibility without building alterations or structural changes.* The recipient shall investigate compliance methods which do not alter the historic character or architectural integrity of the property and shall utilize such methods unless such methods are ineffective in achieving accessibility. Such methods may include, but are not limited to:

(i) Reassigning aid, benefits, or services to accessible locations within the facility.

(ii) Assigning persons to aid handicapped persons into or through an otherwise inaccessible facility.

(iii) Delivering aid, benefits, or services at alternative accessible sites operated by or available for such use by the recipient.

(iv) Adopting other innovative methods which make aid, benefits, or services accessible to the handicapped.

(2) *Methods to accomplish accessibility resulting in building alterations.* The recipient shall determine that accessibility cannot feasibly be accomplished by Methods to Accomplish Accessibility without Building Alterations or Structural Changes, subsection (b)(1) prior to utilizing building alteration as a method of accomplishing program accessibility. Alterations must comply with the accessibility standards adopted in these regulations. Building alterations shall be undertaken so as not to alter or destroy historically, architecturally, or culturally significant elements or features.

(3) *Methods to accomplish accessibility resulting in structural changes.* The recipient shall determine that accessibility cannot feasibly be accomplished by Methods to Accomplish Accessibility without Building Alterations or Structural Changes, subsection (b)(2) before considering structural changes as a method of accomplishing program accessibility. Structural changes must comply with the accessibility standards adopted in these regulations. Structural changes shall be undertaken so as not to alter or destroy historically, architecturally or culturally significant elements or features.

(b) *Modification or waiver of accessibility standards.* The applicability of the accessibility standards set forth in these regulations may be modified or waived on a case-by-case basis, upon application to the Director, FAPD, where the recipient can demonstrate that, because of the nature of the activity, the provision of access would be infeasible or would substantially impair the historic, architectural or cultural integrity of the historic property.

(National Historic Preservation Act of 1966, Pub. L. 89–665, 80 Stat 915, 16 U.S.C. 470; 11593, 3 CFR 1971 Comp., p. 154; 36 CFR part 800)

[45 FR 40515, June 13, 1980, as amended at 68 FR 51347, Aug. 26, 2003]

Subpart E—Nondiscrimination on the Basis of Age—Age Discrimination Act of 1975, as Amended

AUTHORITY: Age Discrimination Act of 1975, as amended (42 U.S.C. 6101 *et seq.*); 45 CFR part 90.

SOURCE: 50 FR 8089, Feb. 27, 1985, unless otherwise noted.

GENERAL PROVISIONS

§ 1040.81 Purpose.

The purpose of these regulations is to implement the Age Discrimination Act of 1975, as Amended, which prohibits

discrimination on the basis of age in programs or activities receiving Federal financial assistance. In accordance with the Age Discrimination Act, federally assisted programs or activities and recipients of Federal funds may continue to use age distinctions and factors other than age which meet the requirements of the Act and these regulations.

[50 FR 8089, Feb. 27, 1985, as amended at 68 FR 51348, Aug. 26, 2003]

§ 1040.82 Application.

(a) These regulations apply to each program or activity which receives Federal financial assistance provided by DOE.

(b) These regulations do not apply to—

(1) An age distinction contained in that part of a Federal, State, or local statute or ordinance adopted by an elected, general purpose legislative body which:

(i) Provides any benefits or assistance to persons based on age; or

(ii) Establishes criteria for participation in age-related terms; or

(iii) Describes intended beneficiaries or target groups in age-related terms.

(2) Any employment practice of any employer, employment agency, labor organization, or any labor-management joint apprenticeship training program.

[50 FR 8089, Feb. 27, 1985, as amended at 68 FR 51348, Aug. 26, 2003]

§ 1040.83 Definitions.

(a) *Act* means the Age Discrimination Act of 1975 as amended title III of Pub. L. 94–135, 42 U.S.C. 6101 *et seq*.

(b) *Action* means any act, activity, policy, rule, standard or method of administration; or the use of any policy, rule, standard, or method of administration.

(c) *Age* means how old a person is or the number of years from the date of a person's birth.

(d) *Age distinction* means any action using age or an age-related term (for example, ''18 or over'').

(e) *Age-related term* means a word or words which necessarily imply a particular age or range of ages (for example, ''children'', ''adult'', ''older persons'', but not ''student'').

(f) *Days* mean calendar days.

(g) *Discrimination* means unlawful treatment based on age.

(h) *FERC* means the Federal Energy Regulatory Commission.

(i) *Field Civil Rights Officer* means the official in each DOE field office with responsibility for administering DOE's Civil Rights Program related to nondiscrimination in Federally assisted programs or activities.

(j) *Recipient* means any State or its political subdivision, instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended, directly or through another recipient. Recipient includes any successor, assignee, or transferee, but excludes an individual who is the ultimate beneficiary of the assistance.

(k) *Secretary* means the Secretary, Department of Energy.

[50 FR 8089, Feb. 27, 1985, as amended at 68 FR 51348, Aug. 26, 2003]

STANDARDS FOR DETERMINING AGE DISCRIMINATION

§ 1040.84 Rules against age discrimination.

The rules stated in this section are limited by the exceptions contained in § 1040.86 and of these regulations.

(a) *General rule*. No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

(b) *Specific rules*. A recipient may not, in any program or activity receiving Federal financial assistance, directly or through contractual, licensing, or other arrangements use age distinctions or take any other actions which have the effect, on the basis of age, of:

(1) Excluding individuals from, denying them the benefits of, or subjecting them to discrimination under, a program or activity receiving Federal financial assistance; or

(2) Denying or limiting individuals in their opportunity to participate in any

program or activity receiving Federal financial assistance.

(3) The specific forms of age discrimination listed in paragraph (b) of this section do not necessarily constitute a complete list.

§ 1040.85 Definitions of "Normal Operation" and "Statutory Objective".

For purpose of §§ 1040.86 and 1040.87, the terms *normal operation* and *statutory objective* shall have the following meanings:

(a) *Normal operation* means the operation of a program or activity without significant changes that would impair its ability to meet its objectives.

(b) *Statutory objective* means any purpose of a program or activity expressly stated in any Federal, State, or local statute or ordinance adopted by an elected, general purpose legislative body.

§ 1040.86 Exceptions to the rules against age discrimination. Normal operation or statutory objective of any program or activity.

A recipient is permitted to take an action, otherwise prohibited by § 1040.84, if the action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity. An action reasonably takes into account age as a factor necessary to the normal operation of a program or activity if:

(a) Age is used as a measure or approximation of one or more other characteristics;

(b) The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue or to achieve any statutory objective of the program or activity;

(c) The other characteristic(s) can be reasonably measured or approximated by the use of age; and

(d) The other characteristic(s) are impractical to measure directly on an individual basis.

§ 1040.87 Exceptions to the rules against age discrimination. Reasonable factors other than age.

A recipient is permitted to take an action otherwise prohibited by § 1040.84 which is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages. An action may be based on a factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

§ 1040.88 Remedial and affirmative action by recipients.

(a) Where a recipient is found to have discriminated on the basis of age, the recipient shall take such remedial action as the Director, Office of Civil Rights and Diversity, considers necessary to overcome the effects of the discrimination.

(b) Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity on the basis of age.

(c) If a recipient operating a program or activity which serves the elderly or children, in addition to persons of other ages, provides special benefits to the elderly or to children, the provision of those benefits shall be presumed to be voluntary affirmative action provided that it does not have the effect of excluding otherwise eligible persons from participation in the program or activity.

[50 FR 8089, Feb. 27, 1985, as amended at 68 FR 51348, Aug. 26, 2003]

§ 1040.89 Burden of proof.

The burden of proving that an age distinction or other action falls within the exceptions outlined in §§ 1040.86 and 1040.87 is on the recipient of Federal financial assistance.

RESPONSIBILITIES OF DOE RECIPIENTS

§ 1040.89–1 General responsibilities.

Each DOE recipient has primary responsibility to ensure that its programs or activities are in compliance with the Act and these regulations. A recipient also has responsibility to maintain records, provide information, and afford access to its records to DOE, to the extent required to determine

whether it is in compliance with the Act and these regulations.

[50 FR 8089, Feb. 27, 1985, as amended at 68 FR 51348, Aug. 26, 2003]

§ 1040.89–2 Notice to subrecipients.

Where a recipient awards Federal financial assistance from DOE to its subrecipients, the recipient shall provide the subrecipients written notice of their obligations under these regulations.

§ 1040.89–3 Information requirements.

Each recipient shall: (a) Upon request make available to DOE information necessary to determine whether the recipient is complying with the Act and these regulations.

(b) Permit reasonable access by DOE, upon request, to the books, records, accounts, and other recipient facilities and sources of information to the extent necessary to determine whether the recipient is in compliance with the Act and these regulations.

INVESTIGATION, CONCILIATION AND ENFORCEMENT PROCEDURES

§ 1040.89–4 Compliance reviews.

(a) DOE may conduct preaward and postaward compliance reviews of recipients as prescribed in this part or use other similar procedures that will permit it to investigate and correct violations of the Act and these regulations. DOE may conduct these reviews even in the absence of a complaint against a recipient. The review may be as comprehensive as necessary to determine whether a violation of these regulations has occurred.

(b) If a compliance review indicates a violation of the Act or these regulations, DOE will attempt to achieve voluntary compliance with the Act. If voluntary compliance cannot be achieved, DOE will arrange for enforcement as described in § 1040.89–10.

§ 1040.89–5 Complaints.

(a) Any person, individually or as a member of a class or on behalf of others, may file a written complaint with DOE alleging discrimination prohibited by the Act or these regulations. A complainant must file a complaint within 180 days from the date he/she first had knowledge of the alleged act of discrimination. For good cause shown, however, the Director, Office of Civil Rights and Diversity, may extend the time limit for filing a complaint. Complaints may be submitted to Field Civil Rights Officers located in DOE's field offices or to the Director, Office of Civil Rights and Diversity, Forrestal Building, 1000 Independence Avenue, SW., Washington, D.C. 20585.

(b) The Director, Office of Civil Rights and Diversity, will attempt to facilitate the filing of complaints wherever possible, including taking the following measures:

(1) Accepting as a sufficient complaint any written statement which identifies the parties involved and the date the complainant first had knowledge of the alleged violation, describes generally the action or practice complained of, and is signed by the complainant.

(2) Freely permitting a complainant to add information to the complaint to meet the requirements of a sufficient complaint.

(3) Widely disseminating information regarding the obligations of recipients under the Act and these regulations.

(4) Notifying the complainant and the recipient of their rights and obligations under the complaint procedure, including the right to have a representative at all stages of the complaint procedure.

(5) Notifying the complainant and the recipient (or their representatives) of their right to contact DOE for information and assistance regarding the complaint resolution process.

(c) The Director, Office of Civil Rights and Diversity, will refer any complaint outside the jurisdiction of DOE to the proper Federal department or agency and will also notify the complainant and the recipient of the referral. The notification will contain an explanation for the referral and the name, telephone number, and address of the Federal department or agency office having jurisdiction over the matter complained.

[50 FR 8089, Feb. 27, 1985, as amended at 68 FR 51348, Aug. 26, 2003]

§ 1040.89–6 Mediation.

(a) *Referral of complaints for mediation.* DOE will refer to the Federal Mediation and Conciliation Service, in accordance with 45 CFR 90.43(c)(3), all complaints that:

(1) Fall within the jurisdiction of the Act and these regulations; and

(2) Contain all information necessary for further processing.

(b) Both the complainant and the recipient shall participate in the mediation process to the extent necessary to reach an agreement or make an informed judgment that an agreement is not possible. There must be at least one meeting with the mediator before the Director, Office of Civil Rights and Diversity, will accept a judgment that an agreement is not possible. However, the recipient and the complainant need not meet with the mediator at the same time.

(c) If the complainant and the recipient reach an agreement, the mediator shall prepare a written statement of the agreement and have the complainant and the recipient sign it. The mediator shall send a copy of the agreement to the Director, Office of Civil Rights and Diversity, DOE. DOE will take no further action on the complaint unless the complainant or the recipient fails to comply with the agreement.

(d) DOE will use the mediation process for a maximum of 60 days after referring a complaint to mediation. Mediation ends if:

(1) 60 days elapse from the time the mediation agency receives the complaint; or

(2) Prior to the end of the 60 day mediation period, an agreement is reached; or

(3) Prior to the end of that 60 day mediation period, the mediator determines that an agreement cannot be reached.

(e) The mediator shall return unresolved complaints to the Director, Office of Civil Rights and Diversity, DOE.

[50 FR 8089, Feb. 27, 1985, as amended at 68 FR 51348, Aug. 26, 2003]

§ 1040.89–7 Investigation.

(a) *Informal Investigation.* (1) The Director, Office of Civil Rights and Diversity, will review complaints that are unresolved after mediation or are reopened because of a violation of a mediation agreement.

(2) As part of this review, Field Civil Rights Officers will use informal fact finding methods, including joint or separate discussions with the complainant and recipient, to establish the facts and, if possible, settle the complaint on terms that are mutually agreeable to the parties.

(3) If the complaint is resolved during the informal investigation, DOE will put the agreement in writing and have it signed by the parties and the Director, Office of Civil Rights and Diversity.

(4) The settlement shall not affect the operation of any other enforcement effort of DOE, including compliance reviews and investigation of other complaints which may involve the recipient.

(5) The settlement is not a finding of discrimination against a recipient.

(b) *Formal Investigation.* If Field Civil Rights Officers cannot resolve the complaint through informal inquiry, the Director, Office of Civil Rights and Diversity, will assign an Investigator to conduct a formal investigation of the complaint. If the investigation indicates a violation of the Act or these regulations, DOE will attempt to obtain voluntary compliance. If DOE cannot obtain voluntary compliance, it will begin enforcement as described in § 1040.89–10 and 10 CFR part 1040, subpart H, § 1040.111.

[50 FR 8089, Feb. 27, 1985, as amended at 68 FR 51348, Aug. 26, 2003]

§ 1040.89–8 Prohibition against intimidation or retaliation.

A recipient may not engage in acts of intimidation or retaliation against any person who:

(a) Attempts to assert a right protected by the Act or these regulations; or

(b) Cooperates in any mediation, investigation, hearing, or other part of DOE's investigation, conciliation, and enforcement process.

§ 1040.89–9 Compliance procedure.

(a) DOE may enforce the Act and these regulations through procedures

precribed in subpart H of DOE regulation 10 CFR part 1040—Nondiscrimination in Federally Assisted Programs or Activities, which calls for—

(1) Termination of a recipient's Federal financial assistance from DOE for a program activity in which the recipient has violated the Act or these regulations. The determination of the recipient's violation may be made only after a recipient has had an opportunity for a hearing on the record before the Federal Energy Regulatory Commission (FERC). Therefore, cases which are settled in mediation, or prior to a hearing, will not involve termination of a recipient's Federal financial assistance from DOE under this section.

(2) Any other means authorized by law including, but not limited to:

(i) Referral to the Department of Justice for proceedings to enforce any rights of the United States or obligations of the recipient created by the Act or these regulations, or under the terms of the Federal financial assistance.

(ii) Use of any requirement of, or referral to, any Federal, State, or local government agency that will have the effect of correcting a violation of the Act of these regulations.

(b) DOE will limit any termination under § 1040.89–9(a)(1) to the particular recipient and particular program or activity DOE finds in violation of these regulations. DOE will not base any part of a termination on a finding with respect to any program or activity of the recipient which does not receive Federal financial assistance from DOE.

(c) DOE will take no action under paragraph (a) until:

(1) The Director, Office of Civil Rights and Diversity, has advised the recipient of its failure to comply with the Act, these regulations, or the terms of the Federal financial assistance and has determined that voluntary compliance cannot be obtained.

(2) Thirty (30) days have elapsed after the Secretary or the Secretary's designee has sent a written report of the circumstances and grounds of the action to the committees of the Congress having legislative jurisdiction over the program or activity involved. The Secretary will file a report whenever any action is taken under paragraph (a) of this section.

(d) DOE also may defer granting new Federal financial assistance to a recipient when a hearing under § 1040.89–10 is initiated.

(1) New Federal financial assistance from DOE includes all assistance for which DOE requires an application or approval, including renewal or continuation of existing activities, or authorization of new activities during the deferral period. New Federal financial assistance from DOE does not include increases in funding as a result of changes, computation of formula awards, or assistance awarded prior to the beginning of a hearing under § 1040.89–10.

(2) DOE will not defer new assistance until the recipient has received a notice of an opportunity for a hearing under § 1040.89–10. DOE will not continue a deferral for more than 60 days unless a hearing has begun within that time or the time for beginning the hearing has been extended by mutual consent of the recipient and FERC. DOE will not continue a deferral for more than 30 days after the close of the hearing, unless the hearing resulted in a finding against the recipient.

[50 FR 8089, Feb. 27, 1985, as amended at 68 FR 51348, Aug. 26, 2003]

§ 1040.89–10 Hearings, decisions, post-termination proceedings.

DOE procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to DOE enforcement of these regulations. They are 10 CFR subpart H §§ 1040.121 through 1040.124.

§ 1040.89–11 Remedial action by recipients.

Where the Director, Office of Civil Rights and Diversity, finds a recipient has discriminated on the basis of age, the recipient shall take such remedial action as the Director, OEO, may require to end the discrminatory practice or policy and/or to overcome the effects of the discrimination.

[50 FR 8089, Feb. 27, 1985, as amended at 68 FR 51348, Aug. 26, 2003]

§ 1040.89–12 Alternate funds disbursal procedure.

(a) When DOE withholds funds from a recipient under these regulations, the Secretary or designee may disburse the withheld funds directly to an alternate recipient(s), any public or private organization or agency, or State or political subdivision of the State.

(b) The Secretary or designee will require any alternate recipient to demonstrate:

(1) The ability to comply with these regulations; and

(2) The ability to achieve the goals of the Federal statute authorizing the Federal financial assistance.

[50 FR 8089, Feb. 27, 1985, as amended at 68 FR 51348, Aug. 26, 2003]

§ 1040.89–13 Exhaustion of administrative remedies.

(a) A complainant may file a civil action following the exhaustion of administrative remedies under the Act. Administrative remedies are exhausted if:

(1) One hundred eighty (180) days have elapsed since the complainant filed the complaint and DOE has made no findings with regard to the complainant; or

(2) DOE issues any findings in favor of the recipient.

(b) If DOE fails to make a finding within 180 days or issues a finding in favor of the recipient, the Director, Office of Civil Rights and Diversity, will:

(1) Promptly advise the complainant of this fact; and

(2) Advise the complainant of his or her right to bring a civil action for injunctive relief; and

(3) Inform the complainant:

(i) That the complainant may bring a civil action only in a United States District Court for the district in which the recipient is located or transacts business;

(ii) That a complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney fees, but that the complainant must demand these costs in the complaint;

(iii) That, before commencing the action, the complainant shall give 30 days notice, by registered mail, to the Secretary of DOE, the Secretary of the Department of Health and Human Services, the Attorney General of the United States, and the recipient;

(iv) That the notice must state: the alleged violation of the Act and these regulations; the relief requested; the court in which the complainant is bringing the action; and whether or not attorney fees are demanded in the event the complainant prevails; and

(v) That the complainant may not bring an action if the same alleged violation of the Act by the same recipient is the subject of a pending action in any court of the United States.

[50 FR 8089, Feb. 27, 1985, as amended at 68 FR 51348, Aug. 26, 2003]

APPENDIX A TO SUBPART E OF PART 1040—DOE FEDERALLY ASSISTED PROGRAMS CONTAINING AGE DISTINCTIONS

Statute, Name, Public Law, and U.S. Code	Section and age distinction	Use of age/age related team			Popular name	CFDA No.
		Conditions benefits or assistance	Establishes criteria for participation	Describes beneficiaries or target groups		
Energy Conservation and Production Act, Title IV, Part A; Public Law 94–385, 42 U.S.C. 6861–6870.	Section 413(a). The Administrator shall develop and conduct, in accordance with the purpose and provisions of this part, a weatherization program. In developing and conducting such program, the Administrator may, in accordance with this part and regulations promulgated under this part, make grants (1) to States, and (2) in accordance with the provisions of subsection (d), to Indian tribal organizations to serve Native Americans. Such grants shall be made for the purpose of providing financial assistance with regard to projects designed to provide for the weatherization of dwelling units, particularly those where elderly or handicapped low-income persons reside, in which the head of the household is a low-income person.			X	Weatherization Assistance Program for Low-Income Persons.	81.042
Interagency Agreement between the United States Department of Energy and the United States Department of Labor, Interagency Agreement No. 99–9–1656–07–11; Authority: Comprehensive Employment and Training Act of 1978 (CETA) (Pub. L. 95–524, October 27, 1978; 92 Stat. 1909; 29 U.S.C. 801), the Energy Reorganization Act of 1974, as amended (Pub. L. 93–438, October 11, 1974; 88 Stat. 1233), and the Department of Energy Organization Act (DOE Act) (Pub. L. 95–91, August 4, 1977); 91 Stat. 565; 42 U.S.C. 7101).	Interagency Agreement, Section 1, Purpose: ''The purpose of this agreement is to provide for a transfer of funds from the Department of Labor, Employment and Training Administration (ETA), Office of Youth Programs (OYP) to the Department of Energy, Directorate of Administration (AD), Office of Industrial Relations (OIR), to fund the Summer Science Student Program (SSSP). The SSSP will grant monies from DOL through DOE/OIR to DOE contractors to fund 480 participant slots for economically disadvantaged youths in an integrated program of career motivation and basic academic skill enrichment. The program is designed to motivate economically disadvantaged and academically talented youths to continue their education and to pursue energy-related careers upon graduation from high school.			X	Summer Science Student Program.	N/A

Statute, Name, Public Law, and U.S. Code	Section and age distinction	Use of age/age related team			Popular name	CFDA No.
		Conditions benefits or assistance	Establishes criteria for participation	Describes beneficiaries or target groups		
Executive Office of the President, Office of Science and Technology Policy, Memorandum, Subject: Research Apprenticeships for Minority High Schoolers, dated October 23, 1979.	Quotation from October 23, 1979 memorandum, paragraph 2, "The objectives are to stimulate broader interest in the minority communities in careers in science and engineering and to establish individual working relationships of high school students with active researchers who may become helpful mentors when students need advice on college and careers and need letters of recommendation".			X	Summer Research Apprenticeship Program.	N/A

[50 FR 8089, Feb. 27, 1985, as amended at 68 FR 51348, Aug. 26, 2003]

Subpart F—Nondiscrimination Under Title VIII of the Civil Rights Act of 1968, as Amended [Reserved]

Subpart G—Program Monitoring

§ 1040.101 Compliance reviews.

(a) The Director shall periodically conduct compliance reviews of selected recipients of DOE Federal financial assistance.

(b) The Director shall seek to review those recipients which have the most serious equal opportunity problems which cause the greatest disparity in delivery of services on a nondiscriminatory basis. Selection for review is to be made on the basis of the following criteria, among others:

(1) The relative disparity between the percentage of minorities, women, or handicapped persons, in the relevant labor market, and the percentage of minorities, women, or handicapped persons, employed by the recipient if employment practices are covered by this part;

(2) The percentage of individuals covered by the Age Discrimination Act of 1975, minorities, women and handicapped persons in the population receiving program benefits.

(3) The number and nature of discrimination complaints filed against a recipient with DOE or other Federal agencies;

(4) The scope of the problems revealed by an investigation commenced on the basis of a complaint filed with DOE against a recipient; and

(5) The amount of assistance provided to the recipient.

(c) After selection of a recipient for review, the Director Federally Assisted Programs Division or the Director's designee, shall inform the recipient of the selection. The notice shall be in writing and posted thirty days prior to the scheduled review. The letter will ordinarily request data pertinent to the review and advise the recipient of:

(1) The practices to be reviewed;

(2) The programs or activities affected by the review;

(3) The opportunity to make, at any time prior to receipt of DOE's finding, a written submission responding to DOE which explains, validates, or otherwise addresses the practices under review; and

(4) The schedule under which the review will be conducted and a determination of compliance or noncompliance made.

(d) Within 90 days of arriving on-site to conduct the review, the Director, FAPD, shall advise the recipient, in writing, of:

(1) Preliminary findings;

(2) Where appropriate, recommendations for achieving voluntary compliance; and

(3) The opportunity to request DOE to engage in voluntary compliance negotiations prior to the Director's final determination of compliance or noncompliance. The Director or the Director's designee shall notify the Assistant Attorney General at the same time the recipient is notified of any matter where recommendations for achieving voluntary compliance are made.

(e) If, within 45 days of the recipient's notification under paragraph (d) of this section, the Director's (FAPD) recommendations for compliance are not met, or voluntary compliance is not secured, or the preliminary findings are not shown to be false, the matter will be forwarded to the Director for a determination of compliance or noncompliance. The determination is to be made no later than 60 days after the recipient has been notified of the preliminary findings. If the Director makes a determination of noncompliance, the Department shall institute actions specified in subparts G and H.

(f) Where the Director makes a formal determination of noncompliance, the recipient and the Assistant Attorney General shall be immediately advised, in writing, of the determination and of the fact that the recipient has an additional 10 days in which to come into voluntary compliance. If voluntary compliance has not been achieved within the 10 days, the Director shall institute proceedings under subpart H.

(g) All agreements to come into voluntary compliance shall be in writing and signed by the Director and an official who has authority to legally bind the recipient.

§ 1040.102 Compliance information.

(a) *Cooperation and assistance.* Each responsible Departmental official shall, to the fullest extent practicable, seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep reports and submit to the responsible Department official or his/her designee, timely, complete, and accurate compliance reports at the times, in such form, and containing information as the responsible Department official or the designee may determine to be necessary to enable him/her to ascertain whether the recipient has complied or is complying with this part. In general, recipients should have available for DOE data on program participants, identified by race, color, national origin, sex, age and handicap status. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient or subcontracts with any other person or group, such other recipient shall also submit compliance reports to the primary recipient which will enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his/her designee during normal business hours to books, records, personnel records, accounts, other sources of information, and its facilities, which are pertinent to ascertain compliance with this part. The requirement for access to sources of information shall be contained in the certificate of assurance and agreed to by the recipient as a condition to award. Whenever any information required of a recipient is in the exclusive possession of any other agency, institution, or person and that agency, institution, or person fails or refuses to furnish that information, the recipient shall certify this in its report and set forth the efforts which it has made to obtain the information. The sub-recipient in such case shall be subject to proceedings described under subpart H of this part.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons information regarding the provisions of this section and its applicability to the program under which the recipient receives Federal financial assistance. Information is to be made available to beneficiaries, participants, and other interested persons in a manner which the responsible Department officials find necessary to inform such persons

of the protections against discrimination assured them by this part and the statutes to which this part applies.

§ 1040.103 [Reserved]

§ 1040.104 Complaint investigation.

(a) The Director, FAPD, shall investigate complaints of discrimination that allege a violation of—

(1) Title VI of the Civil Rights Act of 1964, Sec. 16 of the Federal Energy Administration Act of 1974, as amended, or Sec. 401 of the Energy Reorganization Act of 1974;

(2) Title IX of the Education Amendments of 1972, as amended;

(3) Section 504 of the Rehabilitation Act of 1973, as amended;

(4) Age Discrimination Act of 1975, as amended, (reserved in this part);

(5) Title VIII of the Civil Rights Act of 1968, as amended, (reserved in this part);

(6) This part; and

(7) Civil rights provisions of statutes administered pursuant to the DOE Organization Act, Pub. L. 95–91.

(b) No complaint will be investigated if it is received by an appropriate Departmental official more than 180 days after the date of the alleged discrimination, unless the time for filing is extended by the Director, FAPD, for good cause shown. Where a complaint is accepted for investigation, the Director, FAPD, will initiate a DOE investigation. The Director, FAPD, who is responsible for the investigation, shall notify the complainant, in writing, if the complaint has been accepted or rejected.

(c) The Director, FAPD, or his/her designee shall conduct investigations of complaints as follows:

(1) Within 35 days of receipt of a complaint, the Director, FAPD, shall:

(i) determine whether DOE has jurisdiction under paragraphs (a) and (b) of this section;

(ii) If jurisdiction is not found, wherever possible, refer the complaint to the Federal agency with such jurisdiction and advise the complainant;

(iii) If jurisdiction is found, notify the recipient alleged to be discriminating of receipt of the complaint; and

(iv) Initiate the investigation.

(2) The investigation will ordinarily be initiated by a letter requesting data pertinent to the complaint and advising the recipient of:

(i) The nature of the complaint and, with the written consent of the complainant, the identity of the complainant. The identity of the complainant may be revealed by the Director, FAPD, OEO, without the complainant's written consent if the Director, FAPD, OEO, determines that such action is necessary for resolution of the complaint;

(ii) The program or activities affected by the complaint;

(iii) The opportunity to make, at any time prior to receipt of DOE's findings, a documentary submission responding to, rebutting, or denying the allegations made in the complaint; and

(iv) The schedule under which the complaint will be investigated and a determination of compliance made.

(3) Within 90 days of initiating the investigation, the Director, FAPD, shall advise the recipient, in writing of:

(i) Preliminary findings;

(ii) Where appropriate, recommendations for achieving voluntary compliance; and

(iii) The opportunity to request DOE to engage in voluntary compliance negotiations prior to the Director's final determination of compliance or noncompliance. The Director or the Director's designee shall notify the Assistant Attorney General and the recipient of any matter where recommendations for achieving voluntary compliance are made.

(4) If, within 45 days of the recipient's notification under paragraph (c)(3) of this section, the Director's (FAPD) recommendations for compliance are not met, or voluntary compliance is not secured, or the preliminary findings are not shown to be false, the matter will be forwarded to the Director, OEO, for a determination of compliance or noncompliance. The determination is to be made no later than 60 days after the recipient has been notified of the preliminary findings. If the Director makes a determination of noncompliance, the Department shall institute actions specified in subpart H.

(5) Where the Director makes a formal determination of noncompliance,

the recipient and the Assistant Attorney General shall be immediately advised, in writing, of the determination and of the fact that the recipient has an additional 10 days in which to come into voluntary compliance. If voluntary compliance has not been achieved within the 10 days, the Director shall institute proceedings under subpart H. All agreements to come into voluntary compliance shall be in writing and signed by the Director, OEO, and an official who has authority to legally bind the recipient. The complainant shall also be notified of any action taken including the closing of the complaint or achievement of voluntary compliance.

(6) If the complainant or party other than the Attorney General has filed suit in Federal or State court alleging the same discrimination alleged in a complaint to DOE, and if during DOE's investigation, the trial of that suit would be in progress, DOE will consult with the Assistant Attorney General and court records to determine the need to continue or suspend the investigation and will monitor the litigation through the court docket and contacts with the complainant. Upon receipt of notice that the court has made a finding of discrimination against a recipient that would constitute a violation of this part, the DOE may institute administrative proceedings as specified in subpart H after DOE has advised the recipient, in writing, of an opportunity to request voluntary compliance under this section. All agreements to come into voluntary compliance shall be in writing and signed by the Director and an official who has authority to legally bind the recipient.

(7) The time limits listed in paragraphs (c)(1) through (c)(6) of this section shall be appropriately adjusted where DOE requests another Federal agency to act on the complaint. DOE is to monitor the progress of the matter through liaison with the other agency. Where the request to act does not result in timely resolution of the matter, DOE is to institute appropriate proceedings as required by this part.

(d) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws implemented in this part or because the complainant has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subpart. The identity of complainants is to be kept confidential except as determined by the Director, FAPD, to be necessary to carry out the purpose of this subpart, including investigations, hearings, or judicial proceedings arising thereunder.

Subpart H—Enforcement

MEANS OF EFFECTING COMPLIANCE

§ 1040.111 Means available.

If there appears to be a failure or threatened failure to comply with any of the provisions of this part, and if the noncompliance or threatened noncompliance cannot be corrected by voluntary means, compliance with this part may be effected by the suspension, termination of, or refusal to grant or to continue Federal financial assistance, or by any other means authorized by law. Such other means may include, but are not limited to:

(a) Referral to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law including the Civil Rights Act of 1964, other statutes to which this part applies, or any assurance or other contractual undertaking; and

(b) Any applicable proceeding under State or local law.

§ 1040.112 Noncompliance with assurances.

If an applicant fails or refuses to furnish an assurance required under § 1040.4 of subpart A of this part, or otherwise fails or refuses to comply with a requirement imposed by this part, such as § 1040.102(c), subpart G of this part, action to refuse Federal financial assistance shall be taken in accordance with procedures of § 1040.114 of this subpart.

§ 1040.113 Deferral.

DOE may defer action on pending applications for assistance in such a case during pendency of administrative proceedings under § 1040.114 of this subpart.

§ 1040.114 Termination of or refusal to grant or to continue Federal financial assistance.

No order suspending, terminating, or refusing to grant or continue Federal financial assistance is to become effective until:

(a) Informational notice of the proposed order is given to the Executive Assistant to the Secretary, if the action is contemplated against a State or local government;

(b) The Director has advised the applicant or recipient of his/her failure to comply and has determined that compliance cannot be secured by voluntary means. (It will be determined by the Director that compliance cannot be secured by voluntary means if it has not been secured within the time periods specifically set forth by this part.)

(c) There has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with the requirement imposed by or under this part:

(d) The FERC has notified the Secretary of its finding of noncompliance; and

(e) The expiration of 30 days after the Secretary or a designee has filed with the committee of the House of Representatives and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend, terminate, or to refuse to grant or to continue Federal financial assistance is to be limited to the particular political entity or part of that entity or other applicant or recipient to whom the finding has been made and shall be limited in its effect to the particular program or part of the program in which the noncompliance has been found.

§ 1040.115 Other means authorized by law.

No action to effect compliance by any other means authorized by law is to be taken until—

(a) The Director has determined that compliance cannot be secured by voluntary means;

(b) The recipient or other person has been notified by the Director, in writing, that it has been found in formal noncompliance and that it has 10 days before formal enforcement proceedings begin in which to enter into a written voluntary compliance agreement.

(c) The expiration of at least ten (10) days from the mailing of the notice to the recipient or other person.

OPPORTUNITY FOR HEARING

§ 1040.121 Notice of opportunity for hearing.

(a) Whenever an opportunity for hearing is required by § 1040.113, the Director, OEO, or his/her designee shall serve on the applicant or recipient, by registered, certified mail, or return receipt requested, a notice of opportunity for hearing which will:

(1) Inform the applicant or recipient of the action proposed to be taken and of his/her right within twenty (20) days of the date of the notice of opportunity for hearing, or another period which may be specified in the notice, to request a hearing;

(2) Set forth the alleged item or items of noncompliance with this part;

(3) Specify the issues;

(4) State that compliance with this part may be effected by an order providing for the termination of or refusal to grant or to continue assistance, as appropriate, under the program involved; and

(5) Provide that the applicant or recipient may file a written answer with the Director, OEO, to the notice of opportunity for hearing under oath or affirmation within twenty (20) days of its date, or another period which may be specified in the notice.

(b) An applicant or recipient may file an answer, and waive or fail to request a hearing, without waiving the requirement for findings of fact and conclusions of law or the right to seek review by the FERC in accordance with the

provisions established by the FERC. At the time an answer is filed, the applicant or recipient may also submit written information or argument for the record if he/she does not request a hearing.

(c) An answer or stipulation may consent to the entry of an order in substantially the form set forth in the notice of opportunity for hearing. The order may be entered by the General Counsel or his/her designee. The consent of the applicant or recipient to the entry of an order shall constitute a waiver by him/her of a right to:

(1) A hearing under Sec. 902 of title IX of the Education Amendments of 1972, Section 602 of title VI of the Civil Rights Act of 1964, Section 16, Section 401 and § 1040.113;

(2) Findings of fact and conclusions of law; and

(3) Seek review by the FERC.

(d) The failure of an applicant or recipient to file an answer within the period prescribed or, if the applicant or recipient requests a hearing, his failure to appear at the hearing shall constitute a waiver by him/her of a right to:

(1) A hearing under Section 902 of title IX of the Education Amendments of 1972, Section 602 of title VI of the Civil Rights Act of 1964, Section 16, Section 401, and § 1040.113;

(2) Conclusions of law; and

(3) Seek review by the FERC.

In the event of such a waiver, the Secretary or a designee may find the facts on the basis of the record available and enter an order in substantially the form set forth in the notice of opportunity for hearing.

(e) An order entered in accordance with paragraph (c) or (d) of this section shall constitute the final decision of DOE unless the FERC, within forty-five (45) days after entry of the order, issues a subsequent decision which shall then constitute the final decision of DOE.

(f) A copy of an order entered by the FERC official shall be mailed to the applicant or recipient and to the complainant, if any.

§ 1040.122 Request for hearing or review.

Whenever an applicant or recipient requests a hearing or review in accordance with § 1040.121(a)(1) or (b), the DOE General Counsel or his/her designee shall submit such request along with other appropriate documents to the FERC.

§ 1040.123 Consolidated or joint hearings.

In cases in which the same or related facts are asserted to constitute noncompliance with this part with respect to two or more programs to which this part applies or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued to implement the requirements of the laws cited in this part, the Secretary or a designee, in coordination with FERC may, by agreement with other departments or agencies, where applicable, provide for the conduct of consolidated or joint hearings and for the application to such hearings of rules of procedure not inconsistent with this part. Final decision in such cases, insofar as programs subject to this part are concerned, shall be made in accordance with procedures established by the FERC.

§ 1040.124 Responsibility of the Federal Energy Regulatory Commission.

The FERC has authority under section 402(b) of the DOE Organization Act, Pub. L. 95–91, to promulgate regulations regarding the conduct of hearings to deny or terminate Federal financial assistance. Rules for conduct of hearings will be published by the FERC and will be placed in title 18 CFR.

JUDICIAL REVIEW

§ 1040.131 Judicial review.

Final DOE actions taken under this part to withhold or terminate Federal financial assistance are subject to judicial review under the following laws:

(a) Title VI—Section 603 of the Civil Rights Act of 1964;

(b) Title IX—Section 903 of the Education Amendments of 1972;

(c) Section 16, Section 401, Section 504—Pub. L. 89–554, 5 U.S.C. 702;

(d) Section 419 and Section 420 of the Energy Conservation and Production Act of 1976, as amended.

APPENDIX A TO PART 1040—FEDERAL FINANCIAL ASSISTANCE OF THE DEPARTMENT OF ENERGY TO WHICH THIS PART APPLIES

1. *Access permits.* Atomic Energy Act of 1954, as amended, Sections 1, 2, 3 and 161(i), Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2011–13, 2201; and Title I Section 104(c) of the Energy Reorganization Act of 1974, Public Law 93–438; 88 Stat. 1237; 42 U.S.C. 5814; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

2. *Motion pictures film libraries.* Atomic Energy Act of 1954, as amended, Public Law 83–703, Sections 3 and 141(b), (68 Stat. 919), 42 U.S.C. 2013 and 2161; the Energy Reorganization Act of 1974, Public Law 93–438, Title I, Sections 103 and 107, (88 Stat. 1240), 42 U.S.C. 5817; Department of Energy Organization Act, Public Law 95–91, Title I, Section 102, and Title III, Section 301, (19 Stat. 565), 42 U.S.C. 7101; the National Energy Extension Service Act, Title V, Public Law 95–39, (91 Stat. 191), 42 U.S.C. 7001.

3. *Granting of patent licenses.* Atomic Energy Act of 1954, as amended, Sections 156 and 161(g); Public Law 83–703; 68 Stat. 919, 42 U.S.C. 2186 and 2201; Federal Nonnuclear Energy Research and Development Act of 1974; Section 9(f)(g)(h); Public Law 93–577; 88 Stat. 1887; 42 U.S.C. 5908(f)(g)(h); Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

4. *University Laboratory Cooperative Program.* Atomic Energy Act of 1954, as amended, Section 31 (a) and (b); Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93–438; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

5. *Facility training institutes, short courses, and workshops on energy and environmental subjects.* Atomic Energy Act of 1954, as amended, Section 31 (a) and (b); Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107, of the Energy Reorganization Act of 1974; 42 U.S.C. 7101; Public Law 93–438; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

6. *Reactor sharing and fuel assistance.* Atomic Energy Act of 1954, as amended, Section 31 (a) and (b), Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93–438, 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

7. *Traineeships for graduate students in energy related fields.* Atomic Energy Act of 1954, as amended, Sections 31 (a) (b); Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93–458; 88 Stat. 1240; 42 U.S.C. 5817; Public Law 93–409, Section 12(a); Public Law 94–163, Section 337; Public Law 93–577, Section 4(d); Public Law 93–275, Section 5; Public Law 95–39, Title V, Section 502(7); Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

8. *Energy related laboratory equipment grants.* Atomic Energy Act of 1954, as amended, Section 31 (a) and (b); Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93–438; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

9. *Information services exhibits, public speakers publications, reference and analysis.* Atomic Energy Act of 1954, as amended, Section 3 and 141b; Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2013 and 2161; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93–438; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

10. *Payments in lieu of property taxes.* Atomic Energy Act of 1954, as amended, Section 168; Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2208; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93–438; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act; 42 U.S.C. 7101; Public Law 95–91.

11. *Radiological emergency assistance.* Atomic Energy Act of 1954, as amended, Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2011 *et seq.;* and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93–438; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

12. *Nuclear industry seminars.* Atomic Energy Act of 1954, as amended, Section 141(b); Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2161, and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93–438, 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

13. *Work experience.* Atomic Energy Act of 1954, as amended, Section 3, Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2013; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93–438; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act; 42 U.S.C. 7101; Public Law 95–91.

14. *Citizens: Workshops.* Atomic Energy Act of 1954, as amended, Public Law 83–703, Section 3 and 141(b), 68 Stat. 919; 42 U.S.C. 2013 and 2161; the Energy Reorganization Act of 1974; Public Law 93–438, Title I, Section 103 and 107, 88 Stat. 1240; 42 U.S.C. 5817, Department of Energy Organization Act, Public Law 95–91, Title I, Section 102, and Title III, Section 301, 91 Stat. 565; 42 U.S.C. 7101; the

National Energy Extension Service Act, Title V, Public Law 95–39, 91 Stat. 191; 42 U.S.C. 7001.

15. *Research and development in energy conservation.* Atomic Energy Act of 1954, as amended, Section 31; Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93–438; 88 Stat. 1240; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

16. *Energy related inventions.* Section 14 of the Federal Non-Nuclear Energy Research and Development Act of 1974; Public Law 93–577; 68 Stat. 1894; 42 U.S.C. 5913; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

17. *Research and development fission, fossil, solar, geothermal, electric and storage systems, magnetic fusion.* Amendments to the Energy Reorganization Act of 1974 and the Atomic Energy Act of 1954; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

18. *Energy Information Administration Clearinghouse (EIAC).* Department of Energy Organization Act, Section 205; Public Law 95–91.

19. *National Energy Information Center (NEIC).* Federal Energy Administration Act of 1974, as amended, Section 20(a)(4); Public Law 93–175; 15 U.S.C. 779; Department of Energy Organization Act, Section 301; Public Law 95–91.

20. *Grants for Offices of Consumer Services.* Title II, Section 205 of the Energy Conservation and Production Act, Public Law 94–385; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

21. *State Energy Conservation Program.* Title III, Sections 361–366, Part C of the Energy Policy and Conservation Act, Public Law 94–163; 42 U.S.C. 6321–6326; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

22. *Weatherization Assistance Program for low income persons.* Title IV, Part A of the Energy Conservation and Production Act, Public Law 94–385; 42 U.S.C. 6861–6870; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

23. *Supplemental State Energy Conservation Program.* Title IV, Section 432(a), Part B of the Energy Conservation and Production Act of 1976, Public Law 94–385; 42 U.S.C. 6801 *et seq.;* Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

24. *Public education in energy.* Atomic Energy Act of 1954, as amended, Sections 31(a) and 31(b); Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107 of the Energy Reorganization Act of 1974; Public Law 93–458; 88 Stat. 1240; 42 U.S.C. 5817; Public Law 93–409, Section 12(a); Public Law 94–163, Section 337; Public Law 93–577, Section 4(d); Public Law 93–275, Section 5; Public Law 95–39, Title V, Section 502(7); Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

25. *Special studies and projects in energy education and training.* Atomic Energy Act of 1954, as amended, Sections 31(a) and 31(b); Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107 of the Energy Reorganization Act of 1974; Public Law 93–458; 88 Stat. 1240; 42 U.S.C. 5817; Public Law 93–409, Section 12(a); Public Law 93–163, Section 337; Public Law 93–577, Section 4(d); Public Law 93–275, Section 5; Public Law 95–39, Title V, Section 502(7).

26. *Research and development in biomedical and environmental sciences.* Atomic Energy Act of 1954, as amended, Section 31; Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2051; Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93–438; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

27. *Preface (Pre-Freshman and Cooperative Education for Minorities In Engineering).* Atomic Energy Act of 1954, as amended, Sections 31(a) and 31(b); Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107 of the Energy Reorganization Act of 1974; Public Law 93–458; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, Public Law 95–91, Sections 102 and 203; Public Law 93–409, Section 12(a); Public Law 94–163, Section 337; Public Law 93–577, Section 4(d); Public Law 93–275, Section 5; Public Law 95–39, Title V, Section 502(7).

28. *Materials allocation.* Section 104, Energy Policy and Conservation Act (EPCA), Section 101(c) Defense Production Act of 1950, as amended (DPA), 50 U.S.C. 2071(c), Section 7, Executive Order 11912, April 13, 1976. Defense Mobilization Order No. 13, September 22, 1976, 41 FR 43720; Department of Commerce, Bureau of Domestic Commerce, Delegation 4, 41 FR 52331, MA Regulations 10 CFR 216; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

29. *Basic energy sciences, high energy and nuclear physics, and advanced technology and assessment projects.* Atomic Energy Act of 1954, as amended, Section 31; Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93–438; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act; 42 U.S.C. 7101; Public Law 95–91.

30. *Energy Extension Service.* National Energy Extension Service Act; Title V, Public Law 95–39; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.

PART 1041—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE DEPARTMENT OF ENERGY

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§ 1041.101 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.

§ 1041.102 Application.

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

§ 1041.103 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 alcholism.

(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 subparagraph (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 § 1041.140.

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 4574, Feb. 5, 1986; 51 FR 7543, MAr. 5, 1986. Redesignated at 52 FR 1902, Jan. 16, 1987]

§§ 1041.104–1041.109 [Reserved]

§ 1041.110 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.

§ 1041.111 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.

§§ 1041.112–1041.129 [Reserved]

§ 1041.130 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 qualfied 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 permissibly 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.

§§ 1041.131–1041.139 [Reserved]

§ 1041.140 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.

§§ 1041.141–1041.148 [Reserved]

§ 1041.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 1041.150, 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.

§ 1041.150 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 § 1041.150(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 nor 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 4574, Feb. 5, 1986; 51 FR 7543, Mar. 5, 1986. Redesignated at 52 FR 1902, Jan. 16, 1987]

§ 1041.151 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.

§§ 1041.152–1041.159 [Reserved]

§ 1041.160 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 § 1041.160 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.

§§ 1041.161–1041.169 [Reserved]

§ 1041.170 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) The Manager of Federally Assisted Programs shall be responsible for coordinating implementing of this section. Complaints may be sent to Director of Equal Opportunity, U.S. Department of Energy, Room 4B-112, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-2218.

(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 §1041.170(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 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 4574, Feb. 5, 1986. Redesignated and amended at 52 FR 1902, Jan. 16, 1987]

§§ 1041.171–1041.999 [Reserved]

PART 1042—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—Introduction

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AUTHORITY: 20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688; 42 U.S.C. 7101 *et seq.;* and 50 U.S.C. 2401 *et seq.*

SOURCE: 66 FR 4630, Jan. 18, 2001, unless otherwise noted.

Subpart A—Introduction

§ 1042.100 Purpose and effective date.

The purpose of these Title IX regulations is to effectuate Title IX of the Education Amendments of 1972, as amended (except sections 904 and 906 of those Amendments) (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688), which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in these Title IX regulations. The effective date of these Title IX regulations is February 20, 2001.

§ 1042.105 Definitions.

As used in these Title IX regulations, the term:

Administratively separate unit means a school, department, or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

Admission means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

Applicant means one who submits an application, request, or plan required to be approved by an official of the Department of Energy, or by a recipient, as a condition to becoming a recipient of Federal financial assistance.

Designated agency official means the Director, Office of Civil Rights and Diversity or any official to whom the Director's functions under this part are relegated.

Educational institution means a local educational agency (LEA) as defined by 20 U.S.C. 8801(18), a preschool, a private elementary or secondary school, or an applicant or recipient that is an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education, as defined in this section.

Federal financial assistance means any of the following, when authorized or extended under a law administered by the Federal agency that awards such assistance:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement that has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

Institution of graduate higher education means an institution that:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences;

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

Institution of professional education means an institution (except any institution of undergraduate higher education) that offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary of Education.

Institution of undergraduate higher education means:

(1) An institution offering at least two but less than four years of college-level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body that certifies credentials or offers degrees, but that may or may not offer academic study.

Institution of vocational education means a school or institution (except an institution of professional or graduate or undergraduate higher education) that has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers full-time study.

Recipient means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and that operates an education program or activity that receives such assistance, including any subunit, successor, assignee, or transferee thereof.

Student means a person who has gained admission.

Title IX means Title IX of the Education Amendments of 1972, Public Law 92–318, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. 1681–1688) (except sections 904 and 906 thereof), as amended by section 3 of Public Law 93–568, 88 Stat. 1855, by section 412 of the Education Amendments of 1976, Public Law 94–482, 90 Stat. 2234, and by Section 3 of Public Law 100–259, 102 Stat. 28, 28–29

(20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688).

Title IX regulations means the provisions set forth in this 10 CFR Part 1042.

Transition plan means a plan subject to the approval of the Secretary of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, 20 U.S.C. 1681(a)(2), under which an educational institution operates in making the transition from being an educational institution that admits only students of one sex to being one that admits students of both sexes without discrimination.

§ 1042.110 Remedial and affirmative action and self-evaluation.

(a) *Remedial action*. If the designated agency official finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the designated agency official deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action*. In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex. Nothing in these Title IX regulations shall be interpreted to alter any affirmative action obligations that a recipient may have under Executive Order 11246, 3 CFR, 1964–1965 Comp., p. 339; as amended by Executive Order 11375, 3 CFR, 1966–1970 Comp., p. 684; as amended by Executive Order 11478, 3 CFR, 1966–1970 Comp., p. 803; as amended by Executive Order 12086, 3 CFR, 1978 Comp., p. 230; as amended by Executive Order 12107, 3 CFR, 1978 Comp., p. 264.

(c) *Self-evaluation*. Each recipient education institution shall, within one year of February 20, 2001:

(1) Evaluate, in terms of the requirements of these Title IX regulations, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and nonacademic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices that do not or may not meet the requirements of these Title IX regulations; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination that resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials*. Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the designated agency official upon request, a description of any modifications made pursuant to paragraph (c)(2) of this section and of any remedial steps taken pursuant to paragraph (c)(3) of this section.

§ 1042.115 Assurance required.

(a) *General*. Either at the application stage or the award stage, the Department of Energy must ensure that applications for Federal financial assistance or awards of Federal financial assistance contain, be accompanied by, or be covered by a specifically identified assurance from the applicant or recipient, satisfactory to the designated agency official, that each education program or activity operated by the applicant or recipient and to which these Title IX regulations apply will be operated in compliance with these Title IX regulations. An assurance of compliance with these Title IX regulations shall not be satisfactory to the designated agency official if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 1042.110(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior to or subsequent to the submission to the designated agency official of such assurance.

(b) *Duration of obligation*. (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used

to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* (1) The assurances required by paragraph (a) of this section, which may be included as part of a document that addresses other assurances or obligations, shall include that the applicant or recipient will comply with all applicable Federal statutes relating to nondiscrimination. These include but are not limited to: Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681–1683, 1685–1688).

(2) The designated agency official will specify the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

§ 1042.120 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee that operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government, both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of §§ 1042.205 through 1042.235(a).

§ 1042.125 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by these Title IX regulations are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, 3 CFR, 1964–1965 Comp., p. 339; as amended by Executive Order 11375, 3 CFR, 1966–1970 Comp., p. 684; as amended by Executive Order 11478, 3 CFR, 1966–1970 Comp., p. 803; as amended by Executive Order 12087, 3 CFR, 1978 Comp., p. 230; as amended by Executive Order 12107, 3 CFR, 1978 Comp., p. 264; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 295m, 298b–2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act of 1963 (29 U.S.C. 206); and any other Act of Congress or Federal regulation.

(b) *Effect of State or local law or other requirements.* The obligation to comply with these Title IX regulations is not obviated or alleviated by any State or local law or other requirement that would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with these Title IX regulations is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association that would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and that receives Federal financial assistance.

§ 1042.130 Effect of employment opportunities.

The obligation to comply with these Title IX regulations is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

§ 1042.135 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carryout its responsibilities under these Title IX regulations, including any investigation of any complaint communicated to such recipient alleging its noncompliance with these Title IX regulations or alleging any actions that would be prohibited by these Title IX regulations.

The recipient shall notify all its students and employees of the name, office address, and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by these Title IX regulations.

§ 1042.140 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities that it operates, and that it is required by Title IX and these Title IX regulations not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the designated agency official finds necessary to apprise such persons of the protections against discrimination assured them by Title IX and these Title IX regulations, but shall state at least that the requirement not to discriminate in education programs or activities extends to employment therein, and to admission thereto unless §§ 1042.300 through 1042.310 do not apply to the recipient, and that inquiries concerning the application of Title IX and these Title IX regulations to such recipient may be referred to the employee designated pursuant to § 1042.135, or to the designated agency official.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of February 20, 2001 or of the date these Title IX regulations first apply to such recipient, whichever comes later, which notification shall include publication in:

(i) Newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and

(ii) Memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form that it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in paragraph (b)(1) of this section that suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by these Title IX regulations.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b)(1) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and shall require such representatives to adhere to such policy.

Subpart B—Coverage

§ 1042.200 Application.

Except as provided in §§ 1042.205 through 1042.235(a), these Title IX regulations apply to every recipient and to each education program or activity operated by such recipient that receives Federal financial assistance.

§ 1042.205 Educational institutions and other entities controlled by religious organizations.

(a) *Exemption.* These Title IX regulations do not apply to any operation of an educational institution or other entity that is controlled by a religious organization to the extent that application of these Title IX regulations would not be consistent with the religious tenets of such organization.

(b) *Exemption claims.* An educational institution or other entity that wishes to claim the exemption set forth in paragraph (a) of this section shall do so by submitting in writing to the designated agency official a statement by the highest-ranking official of the institution, identifying the provisions of these Title IX regulations that conflict with a specific tenet of the religious organization.

§ 1042.210 Military and merchant marine educational institutions.

These Title IX regulations do not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

§ 1042.215 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* These Title IX regulations do not apply to the membership practices of social fraternities and sororities that are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts, and Camp Fire Girls.* These Title IX regulations do not apply to the membership practices of the Young Men's Christian Association (YMCA), the Young Women's Christian Association (YWCA), the Girl Scouts, the Boy Scouts, and Camp Fire Girls.

(c) *Voluntary youth service organizations.* These Title IX regulations do not apply to the membership practices of a voluntary youth service organization that is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

§ 1042.220 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by these Title IX regulations.

(b) *Administratively separate units.* For the purposes only of this section, §§ 1042.225 and 1042.230, and §§ 1042.300 through 1042.310, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of §§ 1042.300 through 1042.310.* Except as provided in paragraphs (d) and (e) of this section, §§ 1042.300 through 1042.310 apply to each recipient. A recipient to which §§ 1042.300 through 1042.310 apply shall not discriminate on the basis of sex in admission or recruitment in violation of §§ 1042.300 through 1042.310.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients that are educational institutions, §§ 1042.300 through 1042.310 apply only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* §§ 1042.300 through 1042.310 do not apply to any public institution of undergraduate higher education that traditionally and continually from its establishment has had a policy of admitting students of only one sex.

§ 1042.225 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which §§ 1042.300 through 1042.310 apply that:

(1) Admitted students of only one sex as regular students as of June 23, 1972; or

(2) Admitted students of only one sex as regular students as of June 23, 1965, but thereafter admitted, as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of §§ 1042.300 through 1042.310.

§ 1042.230 Transition plans.

(a) *Submission of plans.* An institution to which § 1042.225 applies and that is composed of more than one administratively separate unit may submit either a single transition plan applicable to

all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 1042.225 applies shall result in treatment of applicants to or students of such recipient in violation of §§ 1042.300 through 1042.310 unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 1042.225 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs that emphasize the institution's commitment to enrolling students of the sex previously excluded.

§ 1042.235 Statutory amendments.

(a) This section, which applies to all provisions of these Title IX regulations, addresses statutory amendments to Title IX.

(b) These Title IX regulations shall not apply to or preclude:

(1) Any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference;

(2) Any program or activity of a secondary school or educational institution specifically for:

(i) The promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) The selection of students to attend any such conference;

(3) Father-son or mother-daughter activities at an educational institution or in an education program or activity, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided to students of the other sex;

(4) Any scholarship or other financial assistance awarded by an institution of higher education to an individual because such individual has received such award in a single-sex pageant based upon a combination of factors related to the individual's personal appearance, poise, and talent. The pageant, however, must comply with other nondiscrimination provisions of Federal law.

(c) *Program or activity* or *program* means:

(1) All of the operations of any entity described in paragraphs (c)(1)(i) through (iv) of this section, any part of which is extended Federal financial assistance:

(i)(A) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(ii)(A) A college, university, or other post-secondary institution, or a public system of higher education; or

(B) A local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(iii)(A) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(*1*) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(*2*) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(iv) Any other entity that is established by two or more of the entities described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2)(i) *Program or activity* does not include any operation of an entity that is controlled by a religious organization if the application of 20 U.S.C. 1681 to such operation would not be consistent with the religious tenets of such organization.

(ii) For example, all of the operations of a college, university, or other post-secondary institution, including but not limited to traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities are part of a ''program or activity'' subject to these Title IX regulations if the college, university, or other institution receives Federal financial assistance.

(d)(1) Nothing in these Title IX regulations shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Medical procedures, benefits, services, and the use of facilities, necessary to save the life of a pregnant woman or to address complications related to an abortion are not subject to this section.

(2) Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion. Accordingly, subject to paragraph (d)(1) of this section, no person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, employment, or other educational program or activity operated by a recipient that receives Federal financial assistance because such individual has sought or received, or is seeking, a legal abortion, or any benefit or service related to a legal abortion.

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 1042.300 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which §§ 1042.300 through 1042.310 apply, except as provided in §§ 1042.225 and 1042.230.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 1042.300 through 1042.310 apply shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission that has a disproportionately adverse effect on persons on the

basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria that do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 1042.300 through 1042.310 apply:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant that treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice that so discriminates or excludes;

(3) Subject to § 1042.235(d), shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is ''Miss'' or ''Mrs.'' A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

§ 1042.305 Preference in admission.

A recipient to which §§ 1042.300 through 1042.310 apply shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity that admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of §§ 1042.300 through 1042.310.

§ 1042.310 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which §§ 1042.300 through 1042.310 apply shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 1042.110(a), and may choose to undertake such efforts as affirmative action pursuant to § 1042.110(b).

(b) *Recruitment at certain institutions.* A recipient to which §§ 1042.300 through 1042.310 apply shall not recruit primarily or exclusively at educational institutions, schools, or entities that admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of §§ 1042.300 through 1042.310.

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

§ 1042.400 Education programs or activities.

(a) *General.* Except as provided elsewhere in these Title IX regulations, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives Federal financial assistance. Sections 1042.400 through 1042.455 do not apply to actions of a recipient in connection with admission of its students to an education program or activity of a recipient to which §§ 1042.300 through 1042.310 do not apply, or an entity, not a recipient, to which §§ 1042.300 through 1042.310 would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in §§ 1042.400 through 1042.455, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, that are designed to provide opportunities to study abroad, and that are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided*, that a recipient educational institution that administers or assists in the administration of such scholarships, fellowships, or other awards that are restricted to members of one sex provides, or otherwise makes available, reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Aids, benefits or services not provided by recipient.* (1) This paragraph (d) applies to any recipient that requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or that facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient that these Title IX regulations would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

§ 1042.405 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than that provided by such recipient.

(2)(i) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(A) Proportionate in quantity; and

(B) Comparable in quality and cost to the student.

(ii) A recipient may render such assistance to any agency, organization,

or person that provides all or part of such housing to students of only one sex.

§ 1042.410 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

§ 1042.415 Access to course offerings.

(a) A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(b)(1) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from February 20, 2001. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from February 20, 2001.

(2) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(4) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have such effect.

(5) Portions of classes in elementary and secondary schools, or portions of education programs or activities, that deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(6) Recipients may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

§ 1042.420 Access to schools operated by LEAs.

A recipient that is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

§ 1042.425 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient that uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials that permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

§ 1042.430 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amounts or types of such assistance, limit eligibility for such assistance that is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities, or other services, assist any foundation, trust, agency, organization, or person that provides assistance to any of such recipient's students in a manner that discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance that treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government that require that awards be made to members of a particular sex specified therein; *Provided,* that the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) A recipient may provide separate athletic scholarships or grants-in-aid for members of each sex as part of separate athletic teams for members of each sex to the extent consistent with this paragraph (c) and § 1042.450.

§ 1042.435 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient that assists any agency, organization, or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person that discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient that employs any of its students shall not do so in a manner that violates §§ 1042.500 through 1042.550.

§ 1042.440 Health and insurance benefits and services.

Subject to § 1042.235(d), in providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner that would violate §§ 1042.500 through 1042.550 if it were

provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service that may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient that provides full coverage health service shall provide gynecological care.

§ 1042.445 Marital or parental status.

(a) *Status generally*. A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status that treats students differently on the basis of sex.

(b) *Pregnancy and related conditions*. (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation as long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient that operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section, shall ensure that the separate portion is comparable to that offered to non-pregnant students.

(4) Subject to § 1042.235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan, or policy that such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient that does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence for as long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status that she held when the leave began.

§ 1042.450 Athletics.

(a) *General*. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club, or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams*. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of these Title IX regulations, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity*. (1) A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the designated agency official will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively

accommodate the interests and abilities of members of both sexes;

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

(vii) Provision of locker rooms, practice, and competitive facilities;

(viii) Provision of medical and training facilities and services;

(ix) Provision of housing and dining facilities and services;

(x) Publicity.

(2) For purposes of paragraph (c)(1) of this section, unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the designated agency official may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period*. A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from February 20, 2001. A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from February 20, 2001.

§ 1042.455 Textbooks and curricular material.

Nothing in these Title IX regulations shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

§ 1042.500 Employment.

(a) *General*. (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient that receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way that could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by §§ 1042.500 through 1042.550, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity that admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of these Title IX regulations.

(b) *Application*. The provisions of §§ 1042.500 through 1042.550 apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications, and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

§ 1042.505 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity that has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

§ 1042.510 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have so discriminated in the past, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities that furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of §§ 1042.500 through 1042.550.

§ 1042.515 Compensation.

A recipient shall not make or enforce any policy or practice that, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and that are performed under similar working conditions.

§ 1042.520 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements that classify persons on the basis of sex, unless sex is a bona fide occupational qualification for the positions in question as set forth in § 1042.550.

§ 1042.525 Fringe benefits.

(a) *''Fringe benefits'' defined.* For purposes of these Title IX regulations, *fringe benefits* means: Any medical, hospital, accident, life insurance, or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 1042.515.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan that does not provide for equal periodic benefits for members of each sex and for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan that establishes different optional or compulsory retirement ages based on sex or that otherwise discriminates in benefits on the basis of sex.

§ 1042.530 Marital or parental status.

(a) *General*. A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment that treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy*. A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability*. Subject to § 1042.235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, recovery therefrom, and any temporary disability resulting therefrom as any other temporary disability for all job-related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave*. In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status that she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

§ 1042.535 Effect of state or local law or other requirements.

(a) *Prohibitory requirements*. The obligation to comply with §§ 1042.500 through 1042.550 is not obviated or alleviated by the existence of any State or local law or other requirement that imposes prohibitions or limits upon employment of members of one sex that are not imposed upon members of the other sex.

(b) *Benefits*. A recipient that provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

§ 1042.540 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job in question.

§ 1042.545 Pre-employment inquiries.

(a) *Marital status*. A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is ''Miss'' or ''Mrs.''

(b) *Sex*. A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

§ 1042.550 Sex as a bona fide occupational qualification.

A recipient may take action otherwise prohibited by §§ 1042.500 through 1042.550 provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action

is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

Subpart F—Other Provisions

§ 1042.600 Covered programs.

The financial assistance programs to which this part applies are listed in Appendix A to 10 CFR part 1040.

§ 1042.605 Enforcement procedures.

The investigative, compliance, and enforcement procedural provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) are hereby adopted and applied to these Title IX regulations. These procedures may be found at 10 CFR part 1040, subparts G and H.

PART 1044—SECURITY REQUIREMENTS FOR PROTECTED DISCLOSURES UNDER SECTION 3164 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2000

Sec.

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AUTHORITY: 42 U.S.C. 7101 *et seq.*, 7239, and 50 U.S.C. 2401 *et seq.*

SOURCE: 66 FR 4642, Jan. 18, 2001, unless otherwise noted.

§ 1044.01 What are the purpose and scope of this part?

(a) *Purpose.* This part prescribes the security requirements for making protected disclosures of classified or unclassified controlled nuclear information under the whistleblower protection provisions of section 3164 of the National Defense Authorization Act for Fiscal Year 2000.

(b) *Scope.* The security requirements for making protected disclosures in this part are independent of, and not subject to any limitations that may be provided in, the Whistleblower Protection Act of 1989 (Public Law 101–12) or any other law that may provide protection for disclosures of information by employees of DOE or of a DOE contractor.

[66 FR 54645, Oct. 30, 2001]

§ 1044.02 Who must follow the requirements contained in this part?

The requirements apply to you if you are:

(a) An employee of DOE, including the National Nuclear Security Administration, or one of its contractors;

(b) Engaged in DOE defense activities; and

(c) Wish to make a protected disclosure as described in § 1044.04 of this part.

§ 1044.03 What definitions apply to this part?

The following definitions apply to this subpart:

Atomic Energy Act means the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*

Classified information means:

(1) Information classified as Restricted Data or Formerly Restricted Data under the Atomic Energy Act; or

(2) Information that has been determined pursuant to Executive Order 12958 or prior Executive Orders to require protection against unauthorized disclosure and is marked to indicate its classification status when in document form (also referred to as ''National Security Information'' in 10 CFR Part 1045 or ''defense information'' in the Atomic Energy Act).

Contractor means any industrial, educational, commercial or other entity, grantee or licensee at any tier, including an individual, that has executed an agreement with the Federal Government for the purpose of performing under a contract, license or other agreement.

Defense activities means activities of DOE engaged in support of:

(1) The production, testing, sampling, maintenance, repair, modification, assembly, disassembly, utilization, transportation, or retirement of nuclear weapons or components of nuclear weapons;

(2) The production, utilization, or transportation of nuclear material for military applications; or

(3) The safeguarding of activities, equipment, or facilities which support the production of nuclear weapons or nuclear material for nuclear weapons.

DOE means the Department of Energy, including the National Nuclear Security Administration.

Unclassified controlled nuclear information means unclassified government information prohibited from unauthorized dissemination under section 148 of the Atomic Energy Act and DOE implementing regulations in 10 CFR part 1017.

§ 1044.04 What is a protected disclosure?

A protected disclosure is:

(a) A disclosure of classified or unclassified controlled nuclear information that you reasonably believe provides direct and specific evidence of—

(1) A violation of law or Federal regulation;

(2) Gross mismanagement, a gross waste of funds, or an abuse of authority; or

(3) A false statement to Congress on pursuant to an issue of material fact; and

(b) Protected pursuant to the procedures in this part, including the security procedures referenced in § 1044.11; and

(c) Revealed only to a person or organization described in § 1044.06.

§ 1044.05 What is the effect of a disclosure qualifying as a "protected disclosure"?

If a DOE or DOE contractor employee follows the procedures of this part when making a disclosure of classified or unclassified controlled nuclear information, then the employer (DOE or DOE contractor as applicable) may not discharge, demote, or otherwise discriminate against the employee as a reprisal for making the disclosure.

§ 1044.06 Who may receive a protected disclosure?

The following persons or organizations may receive a protected disclosure:

(a) A member of a committee of Congress having primary responsibility for oversight of the department, agency, or element of the Government to which the disclosed information relates;

(b) An employee of Congress who is a staff member of such a committee and has an appropriate security access authorization for the information being disclosed;

(c) The Inspector General of the Department of Energy;

(d) The Federal Bureau of Investigation; or

(e) Any other element of the Government designated by the Secretary of Energy as authorized to receive the information being disclosed.

§ 1044.07 How can you find out if a particular person is authorized to receive a protected disclosure?

You must contact the Department of Energy Inspector General for help in determining whether a particular person is authorized to receive the classified or unclassified controlled nuclear information you wish to disclose. The Inspector General will contact the Office of Personnel Security as necessary

to determine the security access authorization of the person to receive the protected disclosure.

[66 FR 4642, Jan. 18, 2001, as amended at 71 FR 68736, Nov. 28, 2006]

§ 1044.08 Do you have to submit the documents for classification review before you give them to someone?

Yes, you must submit each document with a classification or control marking and any unmarked document generated in a classified or controlled subject area to the Inspector General. The Inspector General forwards each document to the Office of Classification for a determination as to whether the information in the document is properly classified, controlled, or may be released to the public.

[66 FR 4642, Jan. 18, 2001, as amended at 71 FR 68736, Nov. 28, 2006]

§ 1044.09 What do you do if you plan to disclose classified or unclassified controlled nuclear information orally rather than by providing copies of documents?

You must describe in detail to the Inspector General what information you wish to disclose. The Inspector General may require that the information to be disclosed be put in writing in order to ensure the Inspector General obtains and provides accurate advice. The Inspector General will consult with the Office of Classification who will provide you with advice, through the Inspector General, as to whether the information is classified or controlled and any steps needed to protect the information.

[66 FR 4642, Jan. 18, 2001, as amended at 71 FR 68736, Nov. 28, 2006]

§ 1044.10 Will your identity be protected?

Yes, both the Inspector General and the Office of Classification must protect, consistent with legal requirements, your identity and any information about your disclosure.

[66 FR 4642, Jan. 18, 2001, as amended at 71 FR 68736, Nov. 28, 2006]

§ 1044.11 How do you protect the information that you want to disclose?

To protect classified information and unclassified controlled nuclear information you plan to disclose, you must:

(a) Only disclose the information to personnel who possess the appropriate clearance and need-to-know for the information disclosed as required in 10 CFR part 710, after verifying any special authorizations or accesses, such as Sensitive Compartmented Information, Special Access Program, and Weapon Data information;

(b) Use only equipment (such as computers or typewriters) that is approved for classified processing for the generation of classified documents;

(c) Mark documents as required by 10 CFR part 1045 (classified information), 10 CFR Part 1017 (unclassified controlled nuclear information), or as required by the Office of Classification.

(d) Use only approved copiers to reproduce documents;

(e) Store classified documents in facilities approved by the U.S. Government for the storage of classified material;

(f) Use only approved destruction devices to destroy classified documents;

(g) Use only appropriate secure means, such as secure facsimile or secure telephone, to provide classified information orally or electronically when transmitting or communicating that information (e.g. the applicable classified mailing address); and

(h) Follow any additional specific instructions from the Office of Health, Safety and Security on how to protect the information.

[66 FR 4642, Jan. 18, 2001, as amended at 71 FR 68736, Nov. 28, 2006]

§ 1044.12 What procedures can you invoke if you believe you have been discharged, demoted, or otherwise discriminated against as a reprisal for making a protected disclosure?

If you believe you have been discriminated against as a reprisal for making a protected disclosure, you may submit a complaint to the Director of the Office of Hearings and Appeals, HG–1/L'Enfant Plaza Building, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC

20585–1615, or you may send your complaint to the Director, Office of Hearings and Appeals, by facsimile to FAX number (202) 287–1415. In your complaint, you should give your reasons for believing that you have been discriminated against as a reprisal for making a protected disclosure, and include any information you think is relevant to your complaint. The Office of Hearings and Appeals will conduct an investigation of your complaint unless the Director determines your complaint is frivolous. The Director will notify you in writing if your complaint is found to be frivolous. If an investigation is conducted, the Director will submit a report of the investigation to you, to the employer named in your complaint, and to the Secretary of Energy, or the Secretary's designee. The Secretary, or the Secretary's designee, will take appropriate action, pursuant to 42 U.S.C. 7239(k), to abate any discriminatory actions taken as reprisal for making a protected disclosure.

[66 FR 4642, Jan. 18, 2001, as amended at 71 FR 68736, Nov. 28, 2006]

PART 1045—NUCLEAR CLASSIFICATION AND DECLASSIFICATION

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AUTHORITY: 42 U.S.C. 2011; E.O. 12958, 60 FR 19825, 3 CFR, 1995 Comp., p. 333; E.O. 13292, 68 FR 15315, 3 CFR 2004 Comp., p. 196.

SOURCE: 62 FR 68509, Dec. 31, 1997, unless otherwise noted.

Subpart A—Program Management of the Restricted Data and Formerly Restricted Data Classification System

§ 1045.1 Purpose and scope.

This subpart establishes responsibilities associated with this part, describes the Openness Advisory Panel, defines key terms, describes sanctions related to violation of the policies and procedures in this part, and describes how to submit suggestions or complaints concerning the Restricted Data classification and declassification program, and how to request procedural exceptions.

§ 1045.2 Applicability.

This subpart applies to—

(a) Any person with authorized access to RD or FRD;

(b) Any agency with access to RD or FRD; and

(c) Any person who might generate information determined to be RD or FRD.

§ 1045.3 Definitions.

As used in this part:

Agency means any ''Executive Agency'' as defined in 5 U.S.C. 105; any ''Military Department'' as defined in 5 U.S.C. 102; and any other entity within the executive branch that comes into possession of RD or FRD information or documents.

Atomic Energy Act means the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*).

Authorized Holder means a person with the appropriate security clearance required to have access to classified information and the need to know the information in the performance of Government-approved activities.

Automatic Declassification means the declassification of information or documents based solely upon:

(1) The occurrence of a specific date or event as determined by the classifier; or

(2) The expiration of a maximum time frame for duration of classification established under Executive Order 12958.

Chief Health, Safety and Security officer means the Department of Energy Chief Health, Safety and Security Officer, or any person to whom the Chief's duties are delegated.

Classification means the act or process by which information is determined to be classified information.

Classification Guide means a written record of detailed instructions as to whether specific information is classified, usually concerning a system, plan, project, or program. It identifies information to be classified and specifies the level (and duration for NSI only) of classification assigned to such information. Classification guides are the primary basis for reviewing documents to determine whether they contain classified information.

Classification Level means one of three designators:

(1) *Top Secret* is applied to information (RD, FRD, or NSI), the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the appropriate official is able to identify or describe.

(2) *Secret* is applied to information (RD, FRD, or NSI), the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the appropriate official is able to identify or describe.

(3) *Confidential.* (i) For NSI, Confidential is applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the appropriate official is able to identify or describe.

(ii) For RD and FRD, Confidential is applied to information, the unauthorized disclosure of which could reasonably be expected to cause undue risk to the common defense and security that the appropriate official is able to identify or describe.

Classified Information means:

(1) Information classified as RD or FRD under the Atomic Energy Act; or

(2) Information determined to require protection against unauthorized disclosure under Executive Order (E.O.) 12958 or prior Executive Orders (also identified as National Security Information or NSI).

Contractor means any industrial, educational, commercial or other entity,

grantee or licensee at all tiers, including an individual, that has executed an agreement with the Federal Government for the purpose of performing under a contract, license or other agreement.

Declassification means a determination by appropriate authority that information or documents no longer require protection, as classified information, against unauthorized disclosure in the interests of national security.

Department or DOE means Department of Energy.

Director of Classification means the Department of Energy Director, Office of Classification, or any person to whom the Director's duties are delegated. The Director of Classification is subordinate to the Chief Health, Safety and Security Officer.

Document means the physical medium on or in which information is recorded, or a product or substance which contains or reveals information, regardless of its physical form or characteristics.

Formerly Restricted Data (FRD) means classified information jointly determined by DOE and the DoD to be related primarily to the military utilization of nuclear weapons and removed (by transclassification) from the RD category pursuant to section 142(d) of the Atomic Energy Act.

Government means the executive branch of the Federal Government of the United States.

Government Information means information that is owned by, produced by or for, or is under the control of the U.S. Government.

Information means facts, data, or knowledge itself, as opposed to the medium in which it is contained.

Interagency Security Classification Appeals Panel (ISCAP) means a panel created pursuant to Executive Order 12958 to perform functions specified in that order with respect to National Security Information.

National Security means the national defense or foreign relations of the United States.

National Security Information (NSI) means information that has been determined pursuant to Executive Order 12958 or prior Executive Orders to require protection against unauthorized disclosure and is marked to indicate its classification status when in document form. NSI is referred to as ''defense information'' in the Atomic Energy Act.

Nuclear weapon means atomic weapon.

Person means:

(1) Any individual, contractor, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency, any State, or any political subdivision thereof, or any political entity within a State; and

(2) Any legal successor, representative, agent, or agency of the foregoing.

Portion Marking means the application of certain classification markings to individual words, phrases, sentences, paragraphs, or sections of a document to indicate their specific classification level and category.

Restricted Data (RD) means a kind of classified information that consists of all data concerning the following, but not including data declassified or removed from the RD category pursuant to section 142 of the Atomic Energy Act:

(1) Design, manufacture, or utilization of atomic weapons;

(2) Production of special nuclear material; or

(3) Use of special nuclear material in the production of energy.

Restricted Data Classifier means an individual who derivatively classifies RD or FRD documents. Within the DoD, RD classifiers may also declassify FRD documents.

Restricted Data Management Official means an individual appointed by any agency with access to RD and FRD who is responsible for managing the implementation of this part within that agency or any person to whom these duties are delegated. This person may be the senior agency official required by E.O. 12958.

Secretary means the Secretary of Energy.

Source Document means a classified document, other than a classification guide, from which information is extracted for inclusion in another document. The classification of the information extracted is determined by the classification markings shown in the source document.

Special Nuclear Material means plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Secretary determines to be special nuclear material pursuant to the Atomic Energy Act.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68736, Nov. 28, 2006]

§ 1045.4 Responsibilities.

(a) The Director of Classification shall:

(1) Manage the Government-wide system for the classification and declassification of RD and FRD in accordance with the Atomic Energy Act;

(2) In coordination with the DoD, develop regulations to implement the RD and FRD classification system;

(3) Determine whether nuclear-related information is RD;

(4) Oversee agency implementation of the RD and FRD classification system to ensure compliance with this part;

(5) Review agency implementing policies and conduct on-site reviews of each agency's program established under this part;

(6) Prepare and distribute classification guides concerning RD and FRD and review such guides developed by any agency;

(7) Consider and take action on complaints and suggestions from any person with respect to administration of this program; and

(8) Periodically meet with interested members of the public to solicit input for the classification and declassification program.

(b) The Chief Health, Safety and Security Officer shall:

(1) Declassify RD which may be published without undue risk to the common defense and security;

(2) Jointly with the DoD, determine which information in the RD category relating primarily to the miliary utilization of nuclear weapons may be declassified or placed into the FRD category; and

(3) Jointly with the DoD, declassify FRD which may be published without undue risk to the common defense and security.

(c) The DoD jointly with the DOE shall:

(1) Determine which information in the RD category relating primarily to the military utilization of nuclear weapons may be declassified or placed into the FRD category;

(2) Ensure that classification guides for FRD and RD relating primarily to the military utilization of nuclear weapons are prepared; and

(3) Declassify FRD and RD relating primarily to the military utilization of nuclear weapons which may be published without undue risk to the common defense and security.

(d) The Nuclear Regulatory Commission (NRC) shall:

(1) Jointly with the DOE, develop classification guides for programs over which both agencies have cognizance; and

(2) Ensure the review and proper classification of RD by RD classifiers under this part, which is generated by the NRC or by its licensed or regulated facilities and activities.

(e) Heads of Agencies with access to RD and FRD shall:

(1) Ensure that RD and FRD are classified in such a manner as to assure the common defense and security in accordance with the policies established in this part;

(2) Designate an RD management official to direct and administer the RD classification program within the agency; and

(3) Promulgate implementing directives.

(f) Agency RD management officials shall:

(1) Jointly with the DOE, develop classification guides for programs over which both agencies have cognizance;

(2) Ensure that agency and contractor personnel who generate RD and FRD documents have access to any classification guides needed;

(3) Ensure that persons with access to RD and FRD are trained on the authorities required to classify and declassify RD and FRD information and documents and on handling procedures and that RD classifiers are trained on the procedures for classifying, declassifying, marking and handling RD and FRD information and documents; and

(4) Cooperate and provide information as necessary to the Director of

Classification to fulfill responsibilities under this part.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68736, Nov. 28, 2006]

§ 1045.5 Sanctions.

(a) Knowing, willful, or negligent action contrary to the requirements of this part which results in the misclassification of information may result in appropriate sanctions. Such sanctions may range from administrative sanctions to civil or criminal penalties, depending on the nature and severity of the action as determined by appropriate authority, in accordance with applicable laws.

(b) Other violations of the policies and procedures contained in this part may be grounds for administrative sanctions as determined by appropriate authority.

§ 1045.6 Openness Advisory Panel.

The DOE shall maintain an Openness Advisory Panel, in accordance with the Federal Advisory Committee Act, to provide the Secretary with independent advice and recommendations on Departmental openness initiatives, including classification and declassification issues that affect the public.

§ 1045.7 Suggestions or complaints.

(a) Any person who has suggestions or complaints regarding the Department's classification and declassification policies and procedures may direct them in writing to the Director, Office of Classification, HS–90/Germantown Building, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585–1290.

(b) Such letters should include a description of the issue or problem, the suggestion or complaint, all applicable background information, and an address for the response.

(c) DOE will make every effort to respond within 60 days.

(d) Under no circumstances shall persons be subject to retribution for making a suggestion or complaint regarding the Department's classification and declassification policies or programs.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68736, Nov. 28, 2006]

§ 1045.8 Procedural exemptions.

(a) Exemptions to the procedural provisions of this part may be granted by the Director of Classification.

(b) A request for an exemption shall be made in writing to the Director of Classification and shall provide all relevant facts, justification, and a proposed alternate procedure.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.9 RD classification performance evaluation.

(a) Heads of agencies shall ensure that RD management officials and those RD classifiers whose duties involve the classification or declassification of significant numbers of RD or FRD documents shall have their personnel performance evaluated with respect to classification activities.

(b) Procedures for the evaluation under paragraph (a) of this section may be the same as those in place for NSI related classification activities as required by Executive Order 12958.

Subpart B—Identification of Restricted Data and Formerly Restricted Data Information

§ 1045.10 Purpose and scope.

(a) This subpart implements sections 141 and 142 (42 U.S.C. 2161 and 2162) of the Atomic Energy Act, which provide for Government-wide policies and procedures concerning the classification and declassification of RD and FRD information.

(b) This subpart establishes procedures for classification prohibitions for RD and FRD, describes authorities and procedures for identifying RD and FRD information, and specifies the policies and criteria DOE shall use in determining if nuclear-related information is RD or FRD.

§ 1045.11 Applicability.

This subpart applies to—

(a) Any person with authorized access to RD or FRD;

(b) Any agency with access to RD or FRD; and

(c) Any person who might generate information determined to be RD or FRD.

§ 1045.12 Authorities.

(a) The Director of Classification may determine whether nuclear-related information is RD.

(b) Except as provided in paragraph (c) of this section, the Chief Health, Safety and Security Officer may declassify RD information.

(c) The Chief Health, Safety and Security Officer, jointly with the DoD, may determine which information in the RD category relating primarily to the military utilization of nuclear weapons may be declassified or placed into the FRD category.

(d) The Chief Health, Safety and Security Officer jointly with the DoD may declassify FRD information.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.13 Classification prohibitions.

In no case shall information be classified RD or FRD in order to:

(a) Conceal violations of law, inefficiency, or administrative error;

(b) Prevent embarrassment to a person, organization, or Agency;

(c) Restrain competition;

(d) Prevent or delay the release of information that does not require protection for national security or nonproliferation reasons;

(e) Unduly restrict dissemination by assigning an improper classification level; or

(f) Prevent or delay the release of information bearing solely on the physical environment or public or worker health and safety.

§ 1045.14 Process for classification and declassification of restricted data and formerly restricted data information.

(a) *Classification of Restricted Data*(1) *Submission of Potential RD for Evaluation*. Any authorized holder who believes he or she has information which may be RD shall submit it to an RD classifier for evaluation. The RD classifier shall follow the process described in this paragraph whenever he or she is unable to locate guidance in a classification guide that can be applied to the information. The RD classifier shall forward the information to the Director of Classification via their local classification or security office. The Director of Classification shall determine whether the information is RD within 90 days of receipt by doing the following:

(i) Determine whether the information is already classified RD under current classification guidance; or

(ii) If it is not already classified, determine if the information concerns the design, manufacture, or utilization of nuclear weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy; and

(A) Apply the criteria in § 1045.16 and § 1045.17 as the basis for determining the appropriate classification; and

(B) Provide notification of the decision by revising applicable classification guides, if appropriate.

(2) *Protection of Potential RD during Evaluation*. Pending a determination by the Director of Classification, potential RD submitted for evaluation by authorized holders shall be protected at a minimum as Confidential Restricted Data.

(b) *Declassification of Restricted Data*. The Chief Health, Safety and Security Officer shall apply the criteria in § 1045.16 when determining whether RD may be declassified.

(c) *Classification of Formerly Restricted Data*. The Chief Health, Safety and Security Officer, jointly with the DoD, shall remove information which relates primarily to the military utilization of nuclear weapons from the RD classification category and classify it as FRD.

(d) *Declassification of Formerly Restricted Data*. The Chief Health, Safety and Security Officer, jointly with the DoD, shall apply the criteria in § 1045.16 when determining whether FRD may be declassified.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.15 Classification and declassification presumptions.

(a) The Director of Classification and the Chief Health, Safety and Security Officer shall consider the presumptions listed in paragraphs (d) and (e) of this section before applying the criteria in § 1045.16.

(b) Not all areas of nuclear-related information are covered by the presumptions.

(c) In general, existing information listed in paragraphs (d) and (e) of this section has the classification status indicated. Inclusion of specific existing information in one of the presumption categories does not mean that new information in a category is or is not classified, but only that arguments to differ from the presumed classification status of the information should use the appropriate presumption as a starting point.

(d) The Director of Classification and the Chief Health, Safety and Security Officer shall presume that information in the following areas is unclassified unless application of the criteria in § 1045.16 indicates otherwise:

(1) Basic science: mathematics, chemistry, theoretical and experimental physics, engineering, materials science, biology and medicine;

(2) Magnetic confinement fusion technology;

(3) Civilian power reactors, including nuclear fuel cycle information but excluding technologies for uranium enrichment;

(4) Source materials (defined as uranium and thorium and ores containing them);

(5) Fact of use of safety features (e.g., insensitive high explosives, fire resistant pits) to lower the risks and reduce the consequences of nuclear weapon accidents;

(6) Generic weapons effects;

(7) Physical and chemical properties of uranium and plutonium, most of their alloys and compounds, under standard temperature and pressure conditions;

(8) Nuclear fuel reprocessing technology and reactor products not revealing classified production rates or inventories;

(9) The fact, time, location, and yield range (e.g., less than 20 kilotons or 20–150 kilotons) of U.S. nuclear tests;

(10) General descriptions of nuclear material production processes and theory of operation;

(11) DOE special nuclear material aggregate inventories and production rates not revealing size or details concerning the nuclear weapons stockpile;

(12) Types of waste products resulting from all DOE weapon and material production operations;

(13) Any information solely relating to the public and worker health and safety or to environmental quality; and

(14) The simple association or simple presence of any material (i.e., element, compound, isotope, alloy, etc.) at a specified DOE site.

(e) The Director of Classification and the Chief Health, Safety and Security Officer shall presume that information in the following areas is classified unless the application of the criteria in § 1045.16 indicates otherwise:

(1) Detailed designs, specifications, and functional descriptions of nuclear explosives, whether in the active stockpile or retired;

(2) Material properties under conditions achieved in nuclear explosions that are principally useful only for design and analysis of nuclear weapons;

(3) Vulnerabilities of U.S. nuclear weapons to sabotage, countermeasures, or unauthorized use;

(4) Nuclear weapons logistics and operational performance information (e.g., specific weapon deployments, yields, capabilities), related to military utilization of those weapons required by the DoD;

(5) Details of the critical steps or components in nuclear material production processes; and

(6) Features of military nuclear reactors, especially naval nuclear propulsion reactors, that are not common to or required for civilian power reactors.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.16 Criteria for evaluation of restricted data and formerly restricted data information.

(a) The Director of Classification shall classify information as RD and the Chief Health, Safety and Security Officer shall maintain the classification of RD (and FRD in coordination with the DoD) only if undue risk of damage to the common defense and security from its unauthorized disclosure can be identified and described.

(b) The Director of Classification shall not classify information and the Chief Health, Safety and Security Officer shall declassify information if

there is significant doubt about the need to classify the information.

(c) The Director of Classification and the Chief Health, Safety and Security Officer shall consider the presumptions in § 1045.15 (d) and (e) before applying the criteria in paragraph (d) of this section.

(d) In determining whether information should be classified or declassified, the Director of Classification and the Chief Health, Safety and Security Officer shall consider the following:

(1) Whether the information is so widely known or readily apparent to knowledgeable observers that its classification would cast doubt on the credibility of the classification system;

(2) Whether publication of the information would assist in the development of countermeasures or otherwise jeopardize any U.S. weapon or weapon system;

(3) Whether the information would hinder U.S. nonproliferation efforts by significantly assisting potential adversaries to develop or improve a nuclear weapon capability, produce nuclear weapons materials, or make other military use of nuclear energy;

(4) Whether publication of the information would have a detrimental effect on U.S. foreign relations;

(5) Whether publication of the information would benefit the public welfare, taking into account the importance of the information to public discussion and education and potential contribution to economic growth; and, 6) Whether publication of the information would benefit the operation of any Government program by reducing operating costs or improving public acceptance.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.17 Classification levels.

(a) *Restricted Data*. The Director of Classification shall assign one of the following classification levels to RD information to reflect the sensitivity of the information to the national security. The greater the damage expected from unauthorized disclosure, the higher the classification level assigned to the information.

(1) *Top Secret*. The Director of Classification shall classify RD information Top Secret if it is vital to the national security and if its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples of RD information that warrant Top Secret classification include detailed technical descriptions of critical features of a nuclear explosive design that would enable a proliferant or nuclear power to build or substantially improve a nuclear weapon, information that would make possible the unauthorized use of a U.S. nuclear weapon, or information revealing catastrophic failure or operational vulnerability in a U.S. nuclear weapon.

(2) *Secret*. The Director of Classification shall classify RD information as Secret if its unauthorized disclosure could reasonably be expected to cause serious damage to the national security, but the RD information is not sufficiently comprehensive to warrant designation as Top Secret. Examples of RD information that warrant Secret classification include designs for specific weapon components (not revealing critical features), key features of uranium enrichment technologies, or specifications of weapon materials.

(3) *Confidential*. The Director of Classification shall classify RD information as Confidential if it is deemed to be of significant use to a potential adversary or nuclear proliferant and its unauthorized disclosure could reasonably be expected to cause undue risk to the common defense and security. Examples of RD information that warrant Confidential classification are the amount of high explosives used in nuclear weapons, gaseous diffusion design information, and design information for Naval reactors.

(b) *Formerly Restricted Data*. The Director of Classification, jointly with the DoD, shall assign one of the classification levels in paragraph (a) of this section to FRD information to reflect its sensitivity to the national security.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.18 Newly generated information in a previously declassified subject area.

(a) The Director of Classification may evaluate newly generated specific

information in a previously declassified subject area using the criteria in section 1045.16 and classify it as RD, if warranted.

(b) The Director of Classification shall not classify the information in such cases if it is widely disseminated in the public domain.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.19 Accountability for classification and declassification determinations.

(a) Whenever a classification or declassification determination concerning RD or FRD information is made, the Director of Classification and the Chief Health, Safety and Security Officer shall be able to justify the determination. For FRD and RD primarily related to military utilization, the Director of Classification and the Chief Health, Safety and Security Officer shall coordinate the determination and justification with the DoD. If the determination involves a departure from the presumptions in § 1045.15, the justification shall include a rationale for the departure. Often the justification itself will contain RD or FRD information. In such a case, the Director of Classification and the Chief Health, Safety and Security Officer shall ensure that a separate justification can be prepared which is publicly releasable. The publicly releasable justification shall be made available to any interested person upon request to the Director of Classification.

(b) The Director of Classification shall prepare a report on an annual basis on the implementation of this part. This report shall be available to any interested person upon request to the Director of Classification. Requests may be submitted to the Director Office of Classification, HS–90/Germantown Building, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585–1290.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.20 Ongoing call for declassification proposals.

The Chief Health, Safety and Security Officer shall consider proposals from the public or agencies or contractors for declassification of RD and FRD information on an ongoing basis. Declassification proposals for RD and FRD information shall be forwarded to the Chief Health, Safety and Security Officer, HS–1/Forrestal Building, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585. Any proposed action shall include a description of the information concerned and may include a reason for the request. DOE and DoD shall coordinate with one another concerning declassification proposals for FRD information.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.21 Privately generated restricted data.

(a) DOE may classify RD which is privately generated by persons not pursuant to Government contracts, in accordance with the Atomic Energy Act.

(b) In order for information privately generated by persons to be classified as RD, the Secretary or Deputy Secretary shall make the determination personally and in writing. This authority shall not be delegated.

(c) DOE shall publish a FEDERAL REGISTER notice when privately generated information is classified as RD, and shall ensure that the content of the notice is consistent with protecting the national security and the interests of the private party.

§ 1045.22 No comment policy.

(a) Authorized holders of RD and FRD shall not confirm or expand upon the classification status or technical accuracy of classified information in the public domain.

(b) Unauthorized disclosure of classified information does not automatically result in the declassification of that information.

(c) If the disclosure of classified information is sufficiently authoritative or credible, the Chief Health, Safety and Security Officer shall examine the possibility of declassification.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

Subpart C—Generation and Review of Documents Containing Restricted Data and Formerly Restricted Data

§ 1045.30 Purpose and scope.

This subpart specifies Government-wide classification program implementation requirements for agencies with access to RD and FRD, describes authorities and procedures for RD and FRD document classification and declassification, provides for periodic or systematic review of RD and FRD documents, and describes procedures for the mandatory review of RD and FRD documents. This subpart applies to all RD and FRD documents, regardless of whether they also contain National Security Information (NSI), or other controlled information such as ''For Official Use Only'' information or ''Unclassified Controlled Nuclear Information.''

§ 1045.31 Applicability.

This subpart applies to—

(a) Any person with authorized access to RD or FRD;

(b) Any agency with access to RD or FRD; and

(c) Any person generating a document containing RD or FRD.

§ 1045.32 Authorities.

(a) *Classification of RD and FRD documents.* (1) To the maximum extent practical, all RD and FRD documents shall be classified based on joint DOE-Agency classification guides or Agency guides coordinated with the DOE. When it is not practical to use classification guides, source documents may be used as an alternative.

(2) Only individuals designated as RD classifiers may classify RD and FRD documents, except within the DoD. Within the DoD, any individual with access to RD and FRD who has been trained may classify RD and FRD documents.

(3) RD classifiers shall classify only documents in subject areas in which they have programmatic expertise.

(4) RD classifiers may upgrade or downgrade the classification level of RD or FRD documents in accordance with joint DOE-Agency classification guides or Agency guides coordinated with the DOE. When it is not practical to use classification guides, source documents may be used as an alternative.

(b) *Declassification of RD and FRD documents.* (1) Only designated individuals in the DOE may declassify documents containing RD.

(2) Except as provided in paragraph (b)(3) of this section, only designated individuals in the DOE or appropriate individuals in DoD may declassify documents marked as FRD in accordance with joint DoD-DOE classification guides or DoD guides coordinated with the DOE.

(3) The DOE and DoD may delegate these authorities to other agencies and to contractors. Contractors without the delegated authority shall send any document marked as RD or FRD that needs to be considered for declassification to the appropriate agency office.

§ 1045.33 Appointment of restricted data management official.

(a) Each agency with access to RD or FRD shall appoint an official to be responsible for the implementation of this part and shall advise the Director of Classification of such appointment.

(b) This official shall ensure the proper implementation of this part within his or her agency and shall serve as the primary point of contact for coordination with the Director of Classification on RD and FRD classification and declassification issues.

(c) Within the DoD, an RD management official shall be appointed in each DoD agency.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.34 Designation of restricted data classifiers.

(a) Except within the DoD, RD management officials shall ensure that persons who derivatively classify RD or FRD documents are designated by position or by name as RD classifiers.

(b) All contractor organizations with access to RD and FRD, including DoD contractors, shall designate RD classifiers.

§ 1045.35 Training requirements.

(a) RD management officials shall ensure that persons with access to RD

and FRD information are trained on the authorities required to classify and declassify RD and FRD information and documents and on handling procedures. RD management officials shall ensure that RD classifiers are trained on the procedures for classifying, declassifying, marking and handling RD and FRD information and documents.

(b) The Director of Classification shall develop training materials related to implementation of this part and shall provide these materials to RD management officials and any other appropriate persons.

(c) The Director of Classification shall review any RD-related training material submitted by agency and contractor representatives to ensure consistency with current policy.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.36 Reviews of agencies with access to restricted data and formerly restricted data.

(a) The DOE and each agency with access to RD and FRD shall consult periodically to assure appropriate implementation of this part. Such consultations may result in DOE conducting an on-site review within the agency if DOE and the RD management official determine that such a review would be mutually beneficial or that it is necessary to remedy a problem.

(b) To address issues concerning implementation of this part, the Director of Classification shall establish a standing group of all RD management officials to meet periodically.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.37 Classification guides.

(a) The classification and declassification determinations made by the Director of Classification and the Chief Health, Safety and Security Officer under the classification criteria in § 1045.16 shall be promulgated in classification guides.

(b) DOE shall jointly develop classification guides with the DoD, NRC, NASA, and other agencies as required for programs for which DOE and these agencies share responsibility.

(c) Agencies shall coordinate with the Director of Classification whenever they develop or revise classification guides with RD or FRD information topics.

(d) Originators of classification guides with RD or FRD topics shall review such guides at least every five years and make revisions as necessary.

(e) RD classifiers shall use classification guides as the primary basis for classifying and declassifying documents containing RD and FRD.

(f) Each RD management official shall ensure that all RD classifiers have access to all pertinent nuclear classification guides.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.38 Automatic declassification prohibition.

(a) Documents containing RD and FRD remain classified until a positive action by an authorized person is taken to declassify them.

(b) In accordance with the Atomic Energy Act, no date or event for automatic declassification ever applies to RD and FRD documents, even if such documents also contain NSI.

(c) E.O. 12958 acknowledges that RD and FRD are exempt from all provisions of the E.O., including automatic declassification.

§ 1045.39 Challenging classification and declassification determinations.

(a) Any authorized holder of an RD or FRD document who, in good faith, believes that the RD or FRD document has an improper classification status is encouraged and expected to challenge the classification with the RD Classifier who classified the document.

(b) Agencies shall establish procedures under which authorized holders of RD and FRD documents are encouraged and expected to challenge any classification status they believe is improper. These procedures shall assure that:

(1) Under no circumstances are persons subject to retribution for bringing forth a classification challenge.

(2) The individual who initially receives the challenge provides a response within 90 days to the person bringing forth the challenge.

(3) A decision concerning a challenge involving RD or FRD may be appealed to the Director of Classification. In the case of FRD and RD related primarily to the military utilization of nuclear weapons, the Director of Classification shall coordinate with the DoD. If the justification for classification does not satisfy the person making the challenge, a further appeal may be made to the Chief Health, Safety and Security Officer.

(c) Classification challenges concerning documents containing RD and FRD information are not subject to review by the Interagency Security Classification Appeals Panel, unless those documents also contain NSI which is the basis for the challenge. In such cases, the RD and FRD portions of the document shall be deleted and then the NSI and unclassified portions shall be provided to the Interagency Security Classification Appeals Panel for review.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.40 Marking requirements.

(a) RD classifiers shall ensure that each RD and FRD document is clearly marked to convey to the holder that it contains RD or FRD information, the level of classification assigned, and the additional markings in paragraphs (b)(3) and (4) of this section.

(b) *Front Marking*. In addition to the overall classification level of the document, the following notices shall appear on the front of the document, as appropriate:

(1) If the document contains RD:

RESTRICTED DATA

This document contains RESTRICTED DATA as defined in the Atomic Energy Act of 1954. Unauthorized disclosure subject to administrative and criminal sanctions.

(2) If the document contains FRD but does not contain RD:

FORMERLY RESTRICTED DATA

Unauthorized disclosure subject to administrative and criminal sanctions. Handle as RESTRICTED DATA in foreign dissemination. Section 144b, Atomic Energy Act of 1954.

(3) An RD or FRD document shall be marked to identify the classification guide or source document, by title and date, used to classify the document:

Derived from:

_____

(Classification Guide or source document—title and date)

(4) An RD or FRD document shall be marked with the identity of the RD classifier, unless the classifier is the same as the document originator or signer.

RD Classifier:

_____

(Name and position or title)

(c) *Interior Page*. RD classifiers shall ensure that RD and FRD documents are clearly marked at the top and bottom of each interior page with the overall classification level and category of the document or the classification level and category of the page, whichever is preferred. The abbreviations ''RD'' and ''FRD'' may be used in conjunction with the document classification (e.g., SECRET RD or SECRET FRD).

(d) *Declassification Marking*. Declassified RD and FRD documents shall be marked with the identity of the individual authorizing the declassification, the declassification date and the classification guide which served as the basis for the declassification. Individuals authorizing the declassification shall ensure that the following marking is affixed on RD and FRD documents which they declassify:

Declassified on:

_____

(Date)

Authorizing Individual:

_____

(Name and position or title)

Authority:

_____

(Classification Guide—title and date)

§ 1045.41 Use of classified addendums.

(a) In order to maximize the amount of information available to the public and to simplify document handling procedures, document originators should segregate RD or FRD into an addendum whenever practical. When RD or FRD is segregated into an addendum, the originator shall acknowledge the existence of the classified addendum

unless such an acknowledgment would reveal classified information.

(b) When segregation of RD or FRD into an addendum is not practical, document originators are encouraged to prepare separate unclassified versions of documents with significant public interest.

(c) When documents contain environmental, safety or health information and a separate unclassified version cannot be prepared, document originators are encouraged to provide a publicly releasable rationale for the classification of the documents.

§ 1045.42 Mandatory and Freedom of Information Act reviews for declassification of restricted data and formerly restricted data documents.

(a) *General.* (1) Agencies with documents containing RD and FRD shall respond to mandatory review and Freedom of Information Act (FOIA) requests for these documents from the public.

(2) In response to a mandatory review or Freedom of Information Act request, DOE or DoD may refuse to confirm or deny the existence or nonexistence of the requested information whenever the fact of its existence or nonexistence is itself classified as RD or FRD.

(b) *Processing Requests.* (1) Agencies shall forward documents containing RD to DOE for review.

(2) Agencies shall forward documents containing FRD to the DOE or to the DoD for review, depending on which is the originating agency.

(3) The DOE and DoD shall coordinate the review of RD and FRD documents as appropriate.

(4) The review and appeal process is that described in subpart D of this part except for the appeal authority. DOE and DoD shall not forward RD and FRD documents to the Interagency Security Classification Appeals Panel (ISCAP) for appeal review unless those documents also contain NSI. In such cases, the DOE or DoD shall delete the RD and FRD portions prior to forwarding the NSI and unclassified portions to the ISCAP for review.

(5) *Information Declassification Actions resulting from appeal reviews.* (i) Appeal reviews of RD or FRD documents shall be based on existing classification guidance. However, the Director of Classification shall review the RD and FRD information in the appealed document to determine if it may be a candidate for possible declassification.

(ii) If declassification of the information appears appropriate, the Director of Classification shall initiate a formal declassification action and so advise the requester.

(c) *Denying Official.* (1) The denying official for documents containing RD is the Director of Classification.

(2) The denying official for documents containing FRD is either the Director of Classification or an appropriate DoD official.

(d) *Appeal Authority.* (1) The appeal authority for RD documents is the Chief Health, Safety and Security Officer.

(2) The appeal authority for FRD documents is either the Chief Health, Safety and Security Officer, or an appropriate DoD official.

(e) The denying official and appeal authority for Naval Nuclear Propulsion Information is the Director, Office of Naval Reactors.

(f) RD and FRD information contained in documents shall be withheld from public disclosure under exemption 3 of the FOIA (5 U.S.C. 522 (b)(3)) because such information is exempt under the statutory jurisdiction of the Atomic Energy Act.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.43 Systematic review for declassification.

(a) The Secretary shall ensure that RD documents, and the DoD shall ensure that FRD documents, are periodically and systematically reviewed for declassification. The focus of the review shall be based on the degree of public and researcher interest and likelihood of declassification upon review.

(b) Agencies with RD or FRD document holdings shall cooperate with the Director of Classification (and with the DoD for FRD) to ensure the systematic review of RD and FRD documents.

(c) Review of documents in particular areas of public interest shall be considered if sufficient interest is demonstrated. Proposals for systematic document reviews of given collections

or subject areas should be addressed to the Director, Office of Classification, HS–90/Germantown Building, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585–1290.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.44 Classification review prior to public release.

Any person with authorized access to RD or FRD who generates a document intended for public release in an RD or FRD subject area shall ensure that it is reviewed for classification by the appropriate DOE organization (for RD) or the appropriate DOE or DoD organization (for FRD) prior to its release.

§ 1045.45 Review of unmarked documents with potential restricted data or formerly restricted data.

(a) Individuals reviewing NSI records of permanent historical value under the automatic or systematic review provisions of E.O. 12958 may come upon documents that they suspect may contain RD or FRD, but which are not so marked. Such documents are not subject to automatic declassification.

(b) Such documents shall be reviewed by an RD Classifier as soon as possible to determine their classification status. Assistance may be requested from the Director of Classification.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.46 Classification by association or compilation.

(a) If two pieces of unclassified information reveal classified information when associated, then RD classifiers may classify the document.

(b) RD classifiers may classify a document because a number of pieces of unclassified information considered together contain some added value such as completeness or comprehensiveness of the information which warrants classification.

Subpart D—Executive Order 12958: ''Classified National Security Information'' Requirements Affecting the Public

§ 1045.50 Purpose and scope.

This subpart describes the procedures to be used by the public in questioning or appealing DOE decisions regarding the classification of NSI under E.O. 12958 and 32 CFR part 2001.

§ 1045.51 Applicability.

This subpart applies to any person with authorized access to DOE NSI or who desires access to DOE documents containing NSI.

§ 1045.52 Mandatory declassification review requests.

All DOE information classified as NSI is subject to review for declassification by the DOE if:

(a) The request for a review describes the document containing the information with sufficient specificity to enable the agency to locate it with a reasonable amount of effort;

(b) The information is not exempted from search and review under the Central Intelligence Agency Information Act;

(c) The information has not been reviewed for declassification within the past 2 years; and

(d) The request is sent to the Director, Office of Classification, HS–90/Germantown Building, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585–1290.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

§ 1045.53 Appeal of denial of mandatory declassification review requests.

(a) If the Department has reviewed the information within the past 2 years, the request may not be processed. If the information is the subject of pending litigation, the processing of the request may be delayed pending completion of the litigation. The Department shall inform the requester of this fact and of the requester's appeal rights.

(b) When the Director of Classification has denied a request for review of

NSI, the requester may, within 30 calendar days of its receipt, appeal the determination to the Director of Security Affairs.

(c) *Elements of appeal.* The appeal shall be in writing and addressed to the Chief Health, Safety and Security Officer, HS–1/Forrestal Building, Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585. The appeal shall contain a concise statement of grounds upon which it is brought and a description of the relief sought. It should also include a discussion of all relevant authorities which include, but are not limited to DOE (and predecessor agencies) rulings, regulations, interpretations, and decisions on appeals, and any judicial determinations being relied upon to support the appeal. A copy of the letter containing the determination being appealed shall be submitted with the appeal.

(d) *Receipt of appeal.* An appeal shall be considered to be received upon receipt by the Chief Health, Safety and Security Officer.

(e) *Action within 60 working days.* The appeal authority shall act upon the appeal within 60 working days of its receipt. If no determination on the appeal has been issued at the end of the 60-day period, the requester may consider his or her administrative remedies to be exhausted and may seek a review by the Interagency Security Classification Appeals Panel (ISCAP). When no determination can be issued within the applicable time limit, the appeal shall nevertheless continue to be processed. On expiration of the time limit, DOE shall inform the requester of the reason for the delay, of the date on which a determination may be expected to be issued, and of his or her right to seek further review by the ISCAP. Nothing in this subpart shall preclude the appeal authority and the requester from agreeing to an extension of time for the decision on an appeal. The Chief Health, Safety and Security Officer shall confirm any such agreement in writing and shall clearly specify the total time agreed upon for the appeal decision.

(f) *Form of action on appeal.* The Chief Health, Safety and Security Officer's action on an appeal shall be in writing and shall set forth the reason for the decision. The Department may refuse to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence or nonexistence is itself classified under E.O. 12958.

(g) *Right of final appeal.* The requester has the right to appeal a final Department decision or a failure to provide a determination on an appeal within the allotted time to the ISCAP for those appeals dealing with NSI. In cases where NSI documents also contain RD and FRD, the RD and FRD portions of the document shall be deleted prior to forwarding the NSI and unclassified portions to the ISCAP for review.

[62 FR 68509, Dec. 31, 1997, as amended at 71 FR 68737, Nov. 28, 2006]

PART 1046—MEDICAL, PHYSICAL READINESS, TRAINING, AND ACCESS AUTHORIZATION STANDARDS FOR PROTECTIVE FORCE PERSONNEL

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1046.19 Medical and fitness for duty status reporting requirements.
1046.20 Medical records maintenance requirements.

AUTHORITY: 42 U.S.C. 2011, *et seq.;* 42 U.S.C. 7101, *et seq.;* 50 U.S.C. 2401, *et seq.*

SOURCE: 78 FR 55184, Sept. 10, 2013, unless otherwise noted.

Subpart A—General

§ 1046.1 Purpose.

This part establishes the medical, physical readiness, training and performance standards for contractor protective force (PF) personnel who provide security services at Department of Energy (DOE or Department) facilities including the National Nuclear Security Administration (NNSA). DOE and NNSA may choose to incorporate elements of these standards into Federal protective force programs.

§ 1046.2 Scope.

(a) This part applies to DOE, including NNSA, contractor employees and applicants for contractor protective force positions at government-owned or government leased facilities, regardless of whether the facility is privately operated. This part provides for the establishment of physical security programs based on uniform standards for medical, physical performance, training, and access authorizations for PF personnel providing physical security services to the Department.

(b) Use of a single, suitably qualified individual is encouraged when it is operationally, fiscally, or otherwise appropriate to perform multiple roles as required in this part (e.g., Designated Physician and Physical Protection Medical Director (PPMD)). Similarly, when appropriate medical, psychological, or other examinations, evaluations, testing, or reports required by other DOE regulations can be used to satisfy the requirements of multiple parts of this title, nothing in this part is intended to require duplicative examinations, evaluations, testing, or reports as long as the requirements of this part are met.

(c) The Department is authorized to grant such exemptions from the requirements of this part as it determines are authorized by law. Exemptions may not be granted from the requirement to meet any essential function of a position notwithstanding that reasonable accommodation must be granted as required by this part and the Americans with Disabilities Act of 1990 (ADA), as amended by the Americans with Disabilities Act Amendment Act of 2009 (ADAAA), and its implementing regulations. Exemptions from requirements other than the medical certification standards are allowed only on a case-by-case basis for a specific requirement covered under this part. The Department must document that the exemption will not endanger life or property or the common defense and security, and is otherwise in the public interest. Consistent with the exemption process specified by DOE, exemptions must be made from this part in consultation with the Chief Health, Safety and Security Officer and approved by the Secretary, Deputy Secretary, or for the National Nuclear Security Administration, the Administrator. Granting of equivalencies is not authorized. Nothing in this part shall prohibit NNSA from enhancing the requirements set forth in § 1046.16, SPO Physical Readiness Qualification Standards and Procedures, as necessary to further the interests of national security.

(d) Requests for technical clarification of the requirements of this part by organizations or individuals affected by its requirements must be made in writing through the appropriate program or staff offices of the Department. Such requests must be coordinated with the Office of Health, Safety and Security or its successor organization. The Office of Health, Safety and Security is responsible for providing a written response to such requests. Requests for interpretations of the requirements of this part may be made to the General Counsel. The General Counsel is responsible for providing responses to such requests.

(e) This part is effective March 10, 2014. Requirements of this rule that cannot be implemented by March 10, 2014 due to contractual conflicts or within existing resources must be documented by the officially designated federal security authority (ODFSA) and submitted to the relevant program officers: the Under Secretary; the Under Secretary for Science or the Under Secretary for Nuclear Security, NNSA; and the Chief Health, Safety and Security Officer. The documentation must include timelines and resources needed to fully implement this part.

§ 1046.3 Definitions.

The following definitions apply to this part:

Active shooter means an individual actively engaged in the unauthorized killing or attempting to kill a person or persons in a confined and populated area.

Advanced Readiness Standard (ARS) means a qualification standard that includes the requirements of the Fixed Post Readiness Standard (FPRS), but also requires the completion of a one mile run with a maximum qualifying time of 8 minutes 30 seconds, a 40-yard dash from the prone position in 8.0 seconds or less, and any other measure of physical readiness necessary to perform site-specific essential functions as prescribed by site management and approved by the respective program office. This standard applies to SPOs who staff security posts that normally require extensive tactical movement on foot or are assigned Special Response Team duties.

Applicant means a person who has applied for and been conditionally offered a position as a Security Officer (SO) or a Security Police Officer (SPO), but who has not yet begun the active SO or SPO duties for which the person has applied.

Basic Readiness Standard (BRS) means a qualification standard that includes the requirements of the FPRS, but also requires the completion of a one-half mile run with a maximum qualifying time of 4 minutes, 40 seconds, a 40-yard dash from the prone position in 8.5 seconds or less, and any other measure of physical readiness necessary to perform site-specific essential functions as prescribed by site management and approved by the respective program office. This standard applies to SPOs with mobile defensive duties in support of facility protection strategies.

Chief Medical Officer means a Federal employee who is a doctor of medicine (MD) or doctor of osteopathic medicine (DO) who is licensed without restriction and qualified in the full range of occupational medicine services employed by the Department's health, safety, and security programs. This individual provides technical support for these programs and must be identified in writing.

Contractor means a contractor for the Department and includes subcontractors at all tiers.

Corrective device means a device, such as eyeglasses or hearing aid, necessary to enable an examinee to meet medical qualification standards and have been determined to be a reasonable accommodation compatible with the performance of the essential functions of the position. The contractor responsible for the performance of the examinee must determine that the use of the device is compatible with all actions associated with emergency and protective equipment without creating a hardship for the contractor. The Designated Physician and PPMD must determine that the reasonable accommodation is consistent with the medical certification standards without creating a direct threat to the individual or to others.

Designated Physician means an MD or DO, licensed without restriction in the state of practice, who has been approved by the PPMD. The Office of Health, Safety and Security must be consulted regarding an individual's suitability prior to appointment as a Designated Physician.

Direct threat means a significant risk of substantial harm to the health or safety of the individual or others. The risk must be based on an assessment of the individual's present ability to perform safely the essential functions of the job, and it must be determined that the risk cannot be eliminated or reduced by reasonable accommodation.

DOE facility means any facility required by DOE to employ PF personnel and used by DOE, including NNSA, and its contractors for the performance of work under DOE jurisdiction.

Emergency conditions are those conditions that could arise at a DOE facility as a result of a breach of security (e.g., sabotage or terrorism), accident (e.g., fire or explosion), or naturally occurring event (e.g., storm or earthquake) and threaten the security or integrity of DOE facilities, assets, personnel, the environment or the general public. For the purposes of this rule, emergency conditions include PF drills and exercises relating to search, rescue, crowd control, fire suppression and special operations, including response to the

scene of the incident, and all applicable PF functions performed at the scene.

Essential functions of the job are the fundamental job duties of PF members as set out in § 1046.11.

Field element means the management and staff elements of DOE, including NNSA, with delegated responsibility for oversight and program management of major facilities, programs, and site operations.

Final review means the process for an individual disqualified from medical certification to have a second and ultimate review of the individual's case conducted by the DOE Office of Hearings and Appeals.

Fixed Post Readiness Standard (FPRS) means a standard that requires an SPO to demonstrate the ability to assume and maintain the variety of cover positions associated with effective use of firearms at entry portals and similar static environments to include prone, standing, kneeling, and barricade positions; to use site-specific intermediate force weapons and weaponless self-defense techniques; to effect arrest of suspects and place them under restraint, e.g., with handcuffs or other temporary restraint devices; and any other measure of physical readiness necessary to perform site-specific essential functions as prescribed by site management and approved by the respective program office.

Independent Physician means a physician who possesses an MD or DO degree, is licensed without restriction and board certified, and has experience in a relevant field of medicine. The Independent Physician must not have served as the requestor's personal physician in any capacity or have been previously involved in the requestor's case on behalf of the Department or a Department contractor.

Independent review means the process through which a medically disqualified individual may appeal to have an independent review of the individual's case conducted by an Independent Physician.

Job analysis (JA) is a systematic method used to obtain a detailed listing of the tasks of a specific job. JAs must be derived from criteria determined and published by the DOE National Training Center or identified and documented through a site-specific Mission Essential Task List (METL)-based process based on a set of Departmental Nuclear Security Enterprise-wide standards. A METL-based process that identifies and formally documents duties, tasks, and sub-tasks to be trained is commensurate with the process to develop JAs.

Medical approval means a determination by a Designated Physician that an individual is medically cleared to attempt the physical readiness standard qualification test and perform SO or SPO duties.

Medical certification means a determination by a Designated Physician approved by the PPMD that an individual is medically qualified for a particular category of PF positions, including the performance of the essential functions of an SO or SPO, and the required ongoing physical readiness training.

Medical certification disqualification means a determination by a Designated Physician and approved by the PPMD that an individual, with or without reasonable accommodation, is unable to perform the essential functions of an SO or SPO job position, including the required physical readiness training, without creating a direct threat to that individual or others.

Medical evaluation means the analysis of information generated by medical examinations and psychological evaluations and assessments of an individual to determine medical certification.

Medical examination means an examination performed or directed by the Designated Physician that incorporates the components described in § 1046.13.

Mission Essential Task List (METL) means a list of common tasks required for PF assignments based on site-specific protection plans to defend against adversary capabilities as defined by DOE.

Officially Designated Federal Security Authority (ODFSA) means the Departmental Federal authority at the Field or Headquarters (HQ) Element with the primary and delegated responsibility for oversight of a site PF. Also may be referred to as the Department or Federal cognizant security authority.

Pertinent negative means the absence of a sign or symptom that helps substantiate or identify a patient's condition.

Physical Protection Medical Director (PPMD) means the physician programmatically responsible for the overall direction and operation of the site medical program supporting the requirements of this part.

Primary weapon as used in this part means any weapon individually assigned or available at the majority of posts/patrols to which the SPO may be assigned.

Protective Force (PF) personnel means Special Response Team members, SPOs, and SOs employed to protect Department security interests.

Qualification means the documented determination that an individual meets the applicable medical, physical, and as appropriate, firearms training standards, and possesses the knowledge, skills, abilities and access authorizations required for a particular SO or SPO position.

Randomly selected means any process approved by the ODFSA, which ensures each member of the SPO population has an equal chance to be chosen every time the selection process is used.

Reasonable accommodation means an accommodation consistent with the Americans with Disabilities Act Amendment Act (ADAAA) that is documented in writing.

Re-qualification date means the date of expiration of current qualification at which demonstration of knowledge, skills and/or abilities is required to maintain specific job status.

Security interests include any Department asset, resource or property which requires protection from malevolent acts and/or unpermitted access. These interests may include (but are not limited to) Department and contractor personnel; sensitive technology; classified matter; nuclear weapons, components, and assemblies; special nuclear material (SNM) as defined by the Atomic Energy Act of 1954 (as amended) and the Department; other nuclear materials; secure communications centers; sensitive compartmented information facilities; automated data processing centers or facilities storing and transmitting classified information; vital equipment; or other Department property.

Security Officer (SO) means an unarmed uniformed PF member who has no Departmental arrest or detention authority, used to support SPOs and/or to perform duties (e.g., administrative, access control, facility patrol, escort, assessment and reporting of alarms) where an armed presence is not required.

Security Police Officer (SPO) means a uniformed PF member who is authorized under section 161(k) of the Atomic Energy Act of 1954, as amended, section 661 of the DOE Organization Act, or other statutory authority, to carry firearms and to make arrests without warrant for specifically enumerated offenses and who is employed for, and charged with, the protection of Department security interests.

Semi-structured interview means, for the purpose of this part, an interview by a Psychologist who meets standards established by DOE and who has the latitude to vary the focus and content of the questions depending upon the interviewee's responses.

Special Response Team, commonly referred to as SRT, means a PF special operations unit comprised of SPOs whose primary mission is to resolve incidents that require activities and force options that exceed the capability of existing physical security systems (e.g., performance of recapture/recovery operations and augmentation of denial missions).

Special Response Team (SRT) *Member* means SPOs who meet the ARS, with additional training and qualification requirements as necessary, and who are assigned to an SRT that trains and responds as a team to perform recapture and recovery and to augment denial missions, e.g., those missions that require adversaries be denied proximity to the protected property.

Weapons proficiency demonstration means a process based on a predetermined, objective set of criteria approved by the respective program office in consultation with the Office of Health, Safety and Security that results in a grade (e.g., pass/fail). The process must ensure that an individual (or team, for crew-served weapons) demonstrates the ability to perform all

weapons-handling and operational manipulations necessary to load, operate, and discharge a weapon system accurately and safely (to include clearing/returning to safe mode the weapons system at the conclusion of firing), without the necessity for scoring targets during the course of fire. Proficiency courses of fire must include tactically-relevant time constraints. Demonstrations of proficiency are allowed with the actual weapon and assigned duty load, with alternate loads (e.g., frangible or dye-marking rounds), or with authorized weapons system simulators, as defined in this section. Proficiency courses of fire must be tactically relevant.

Weapons qualification is a formal test of weapons proficiency that includes, in addition to all specified elements of proficiency demonstration, the achievement of a prescribed qualification score according to a Departmentally-approved course of fire. Weapons qualification courses of fire must be constrained by time.

Weapons system simulator means a device that closely simulates all major aspects of employing the corresponding actual firearm/weapons system, without firing live ammunition. The simulator should permit all weapons-handling and operational actions required by the actual weapon, and should allow the use of sight settings similar to the corresponding actual weapon with assigned duty loads. Additionally, when weapons or weapons system simulators are used for qualification testing of protective force officers, the operation of the simulated weapon must closely approximate all weapons handling and operational manipulation actions required by the actual weapon. The simulation system must precisely register on-target hits and misses with accuracy comparable to the actual weapon at the same shooting distances. The weight, balance, and sighting systems should closely replicate those of the corresponding actual weapon with assigned duty loads, and noise signatures and felt recoil should be simulated to the extent technically feasible.

Work hardening is discussed by the Department of Labor in their Division of Federal Employees' Compensation Procedure Manual, 2–813–12 (available at *http://www.dol.gov/owcp/dfec/procedure-manual.htm*), as a physical therapy program which will facilitate return-to-work. Work hardening is also known as an Occupational Rehabilitation Program.

§ 1046.4 Physical Protection Medical Director (PPMD).

(a) *General*. The PPMD is the contractor physician programmatically responsible for the overall direction and operation of site medical programs supporting the PF requirements of this part. The PPMD is responsible for the programmatic oversight of all site Designated Physicians, including those who may operate physically separate clinics. Appropriate contractual arrangements must ensure that the PPMD's authority applies to all site contractors.

(1) *Nomination*. The name of each PPMD candidate must be submitted by the contractor to the ODFSA who in turn must consult with the Office of Health, Safety and Security prior to approving the PPMD. For NNSA, PPMD nominations must be made to the NNSA organization responsible for occupational health and safety. At the time of initial nomination for the PPMD designation the nominee shall submit, through the nominee's employer and the ODFSA, the following documents or copies thereof, translated into English if written in another language:

(i) Applicable diplomas;

(ii) Certificate of any postgraduate professional training (e.g., internship, residency, fellowship);

(iii) Current medical license in the state in which duties will be performed;

(iv) Certification of good standing by all medical licensing bodies from which the applicant has held medical licenses, as well as documentation of any restrictions or limitations to practice medicine, past or present (such documentation may be obtained in written form or electronically). The nominee may be requested to instruct the licensing body to send such certifications to the Office of Health, Safety and Security and as applicable to the NNSA organization responsible for occupational health and safety. Under no circumstances will such certifications

of good standing be accepted directly from the applicant. Additionally, notice of certification by any additional American specialty board, if applicable, and/or current curriculum vitae may be requested; and

(v) A curriculum vitae, if requested, must include a discussion of any gaps in employment.

(2) *Updates*. If determined necessary at any time and requested by the Office of Health, Safety and Security, the NNSA organization responsible for occupational health and safety, the ODFSA, or the PPMD's employer, updated information as identified in paragraphs (a)(1)(i) through (v) of this section must be provided.

(3) *Other roles and responsibilities*. Nothing in this part is intended to preclude the PPMD from fulfilling similar or related roles under other parts or this title, including providing occupational medical services under 10 CFR part 851, ''Worker Safety and Health Program.'' Additionally, the PPMD may fulfill the role of Designated Physician. The PPMD's employer must notify the Office of Health, Safety and Security, and if appropriate the NNSA organization responsible for occupational health and safety, through the ODFSA if the PPMD will also be fulfilling the role of the Designated Physician.

(4) *Qualifications*. The PPMD shall possess an MD or DO degree; be board certified or board eligible in occupational medicine; be a professionally qualified physician in good standing in the professional community, to include all medical licensing bodies from which the applicant has held medical licenses; demonstrate past professional performance and personal conduct suitable for a position of responsibility and trust; read, write, speak, and understand the English language proficiently; and possess an unrestricted license to practice medicine in the state in which the designation is sought, or meet the medical licensing requirements of the applicable military or Federal service to which the applicant belongs.

(b) *Nominations*. Except as provided in §1046.5(c), prior to approval of a Designated Physician by the PPMD's employer, the PPMD must nominate in writing, through the local ODFSA, to the Office of Health, Safety and Security, one or more nominees for Designated Physician positions. For NNSA, Designated Physician nominations must be made through the NNSA organization responsible for occupational health and safety.

(1) Each nomination must describe the relevant training and experience of the nominee.

(2) Each nominee must be professionally qualified in good standing in the professional community, to include all medical licensing bodies from which the applicant has held medical licenses; demonstrate past professional performance and personal conduct suitable for a position of responsibility and trust; read, write, speak, and understand the English language proficiently; and possess the applicable unrestricted license to practice in the state in which the designation is sought or meet the medical licensing requirements of the applicable military or Federal service to which the applicant belongs.

(3) To be nominated, a Designated Physician shall possess an MD or DO degree and be board certified or board eligible in occupational medicine.

(c) *Documentation*. At the time of initial nomination, the nominee shall submit to the PPMD the following documents or copies thereof, translated into English if written in another language:

(1) Applicable diplomas;

(2) Certificate of any postgraduate professional training (e.g., internship, residency, fellowship);

(3) Current medical license in the state in which duties will be performed; and

(4) Certification of good standing by all medical licensing bodies from which the applicant has held medical licenses, as well as documentation of any restrictions or limitations to practice medicine, past or present (such documentation may be obtained in written form or electronically). The PPMD may request the nominee to instruct the licensing body to send such certifications to the PPMD. Under no circumstances will such certifications of good standing be accepted directly from the applicant. Additionally, the

PPMD may request notice of certification by any additional American specialty board, if applicable; and

(5) A current curriculum vitae may be requested. The curriculum vitae, if requested, must include a discussion of any gaps in employment.

(6) If determined necessary by the PPMD, updated information, as identified in paragraphs (c)(1) through (5) of this section, may be requested at any time.

(d) *Self reporting*. (1) Each incumbent individual covered under paragraphs (a) or (b) of this section must agree to self-report the following information as a condition of the designation. PPMDs must report to their employer, who must forward the information to the Office of Health, Safety and Security or as appropriate to the NNSA organization responsible for occupational health and safety through the ODFSA. Additionally, Designated Physicians must report to the PPMD the following:

(i) Any change in status or initiation or taking of an adverse action, past or present, by any state medical licensing board or any other professional licensing board against the licenses of the individual (these may be provided in written or electronic form). The incumbent or nominee may be required to request the licensing body to provide such information to the ODFSA or PDMD, as appropriate. Under no circumstances will such information be accepted directly from the incumbent or nominee;

(ii) Initiation of an adverse action by any Federal or state regulatory board;

(iii) Being named a defendant in any criminal proceedings (felony or misdemeanor);

(iv) Being named in a civil suit alleging professional malpractice;

(v) Being evaluated or treated for alcohol use disorder or drug dependency or abuse; and

(vi) Occurrence of a physical disorder, a mental disorder, or any other health condition that might affect the physician's ability to perform professional duties.

(2) All information in paragraphs (d)(1)(i) through (vi) of this section must be submitted to DOE for consideration and possible action and may result in rejection or termination of the applicable designation. Failure to provide such information may also result in the rejection or termination of the applicable designation. For NNSA contractors, in consultation with the Office of Health, Safety and Security, the NNSA organization responsible for occupational health and safety will make the final decision on the appropriate action in light of the information received.

(e) *Annual activity report*. The PPMD must review the current credentials of each Designated Physician annually and make a recommendation to the employer to either retain or replace each incumbent. The Office of Health, Safety and Security and as appropriate, the NNSA organization responsible for occupational health and safety must be notified by the employer through the appropriate field element of any changes.

(f) *Retention or replacement*. For DOE, the PPMD's supervisor of record must send an annual letter to the Office of Health, Safety and Security reporting on the current credentials of the PPMD recommending retention or replacement. Immediate notification must be made to the Office of Health, Safety and Security if a PPMD is relieved of duties or replaced. For NNSA, the PPMD's supervisor of record must send an annual letter to the NNSA organization responsible for occupational health and safety with a courtesy copy to the Office of Health, Safety and Security reporting on the current credentials of the PPMD recommending retention or replacement. For NNSA, immediate notification must be made to the NNSA organization responsible for occupational health and safety with a courtesy copy to the Office of Health, Safety and Security if a PPMD is relieved of duties or replaced.

(g) *Medical activity summary*. The PPMD must submit an annual letter summarizing the medical activity during the previous year conducted under this part to the Chief Health, Safety and Security Officer or designee through the manager of the Field Element. For NNSA the summary must be sent to the NNSA organization responsible for occupational health and safety with a courtesy copy to the Office of

Health, Safety and Security. The PPMD must comply with applicable DOE requirements specifying report content.

§ 1046.5 Designated Physician.

(a) *Responsibilities.* Designated Physicians are responsible for the conduct of medical examinations, evaluations, and medical certification of SOs and SPOs. Additionally, Designated Physicians are responsible for the supervision of physician extenders (e.g., physician's assistants, certified occupational health nurses, or nurse practitioners), as required by applicable state or local law. The Designated Physician must:

(1) Annually determine whether to approve an individual's participation in programmed physical readiness training programs required under this rule and determine the individual's ability to perform the physical readiness and PF qualification tests without undue risk. Medical approval must be obtained within thirty days prior to the individual's beginning such training or attempting the qualifying tests;

(2) With the assistance of a psychologist or psychiatrist meeting standards established by DOE, determine:

(i) An individual's medical capability, with or without reasonable accommodation, to perform the essential functions of PF job duties without creating a direct threat to the individual or others; and

(ii) Whether to certify that the individual meets the applicable medical and physical readiness standards as set forth herein for their position.

(3) Determine whether any portion of any medical examination may be performed by other qualified personnel, such as another physician or physician extenders;

(4) Be responsible for case management, including supervising, interpreting, and documenting PF personnel medical conditions; and

(5) Be familiar with the required essential functions of the job duties for PF personnel, as set forth in § 1046.11, and the physical readiness requirements as identified in § 1046.16.

(b) *Nominations.* The requirements of § 1046.4(b) and (c) must be followed by the individuals nominated for Designated Physician positions.

(c) *Approval in lieu of nomination.* Designated Physicians approved under the provisions of 10 CFR part 712, ''Human Reliability Program,'' will also satisfy the requirement for nomination to, and approval by, DOE/NNSA under this part. The employer must notify the Office of Health, Safety and Security through the ODFSA if the physician will be fulfilling the role of Designated Physician for this part in addition to fulfilling a role for another part (e.g., 10 CFR part 712). For NNSA the notification must be sent to the NNSA organization responsible for occupational health and safety with a courtesy copy to the Office of Health, Safety and Security.

(d) *Self reporting.* The self-reporting requirements of § 1046.4(d) must be followed by incumbent Designated Physicians.

Subpart B—Protective Force (PF) Personnel

§ 1046.11 Essential functions of PF positions.

Nothing in this part is intended to preclude emergency use of any available protective force personnel by an on-scene commander to successfully resolve a national security emergency.

(a) *Essential functions.* The essential functions described in paragraphs (b) through (g) of this section and other site-specific essential functions must be communicated in writing by the manager of the Field Element to the PPMD and the Designated Physician. The Designated Physician is required to ensure applicant and incumbent PF members are aware that these essential physical and mental functions in paragraphs (b) through (g) of this section and other site-specific essential functions, as appropriate, and the medical certification standards provided in section 1046.13 if this part are the elements against which the initial and annual evaluations for PF personnel will be conducted.

(b) *SO essential functions.* (1) The control of voluntary motor functions, strength, range of motion, neuromuscular coordination, stamina, and

dexterity needed to meet physical demands associated with routine and emergency situations of the job;

(2) The ability to maintain the mental alertness necessary to perform all essential functions without posing a direct threat to self or others; and

(3) The ability to understand and share essential, accurate communication by written, spoken, audible, visible, or other signals while using required protective equipment.

(c) *Additional SO essential functions.* SOs may be required to support SPOs and assist in the routine physical protection of DOE facilities, personnel, classified information, and property, as warranted by DOE facility operations, staff security posts used in controlling access to DOE facilities, conduct routine foot and vehicular patrols, escort visitors, check rooms and facilities, assess and report alarms, and perform basic first aid. Therefore, all SOs must also be able to:

(1) Understand and implement departmental and site policies and procedures governing post and patrol operations and access control systems;

(2) Understand and implement departmental and site policies and procedures governing the SO's role in site protection;

(3) Understand and implement inspection techniques for persons, packages and vehicles, as well as detect and identify prohibited articles and site-specific security interests;

(4) Work in locations where assistance may not be available;

(5) Spend extensive time outside exposed to the elements and working in wet, icy, hot, or muddy areas;

(6) Make frequent transitions from hot to cold, cold to hot, dry to humid, and from humid to dry atmospheres;

(7) Walk, climb stairs and ladders, and stand for prolonged periods of time;

(8) Safely operate motor vehicles when their use is required by local missions and duty assignments;

(9) Use clear and audible speech and radio communications in other than quiet environments;

(10) Read and understand policies, procedures, posted notices, and badges;

(11) Rely on the senses of smell, sight, hearing and touch to: detect the odor of products of combustion and of tracer and marker gases to detect prohibited articles; inspect persons, packages and vehicles; and in general determine the nature of emergencies; maintain personal safety; and report the nature of emergencies;

(12) Employ weaponless self-defense; and

(13) Be fitted with and use respirators other than self-contained breathing apparatus when the use of such equipment is required by local assignment.

(d) *FPRS SPO essential functions.* FPRS SPO personnel may be assigned only to fixed posts where there is no planned requirement for response away from that post. In addition to the SO essential functions listed in paragraphs (b) and (c) of this section, FPRS SPOs must be able to:

(1) Apply basic tactics (to include use of intermediate force weapons) necessary to engage and neutralize armed adversaries and determine probable capabilities and motivations of potential adversaries;

(2) Use site-specific hand tools and weapons required for the performance of duties;

(3) While armed and authorized to use deadly force, perform complex tasks, make life or death and other critical decisions, and take appropriate actions under confusing, stressful conditions including potentially life-threatening environments throughout the duration of emergency situations, e.g., active shooter scenarios;

(4) Perform physically demanding work under adverse weather and temperature conditions (extreme heat and extreme cold) on slippery or hazardous surfaces with the prolonged use of protective equipment and garments such as respirators, air supply hoods, or bullet-resistant garments, as required by site protection strategies;

(5) Be fitted for and properly utilize personal duty equipment;

(6) Work for long periods of time in conditions requiring sustained physical activity and intense concentration in environments of high noise, poor visibility, limited mobility, at heights, and in enclosed or confined spaces;

(7) Accommodate to changing work and meal schedules or to a delay in

meals without potential or actual incapacity; and

(8) Have no known significant abnormal intolerance to chemical, mechanical (e.g., heat, light or water), and other physical agent exposures to the skin that may be encountered during routine and emergency duties, as specified at the site.

(e) *BRS SPO essential functions.* In addition to the FPRS SPO essential functions listed above, BRS SPOs must be able to:

(1) Read placards and street signs while driving or to see and respond to imminently hazardous situations in both daylight and reduced light conditions;

(2) Be capable of operating armored vehicles with an expectation of employing the capabilities of the vehicle;

(3) Staff security posts which normally require movement on foot, by vehicle, watercraft, or aircraft in response to alarms and any breach of security; and to support site protection strategies;

(4) Provide interdiction, interruption, neutralization, and support the recapture, pursuit and/or recovery of a DOE asset/site/facility/location;

(5) Make rapid transitions from rest to near maximal exertion without warm-up; and

(6) Otherwise act as needed to protect Department sites, personnel, classified information, and nuclear weapons, nuclear weapons components, and SNM, to apprehend suspects, and to participate in the armed defense of a Department site against a violent assault by adversaries.

(f) *ARS SPO essential functions.* The essential functions of an ARS SPO include those of a BRS SPO. Security posts which normally, or are expected to, require extensive tactical movement on foot must be staffed by ARS SPOs. In addition, an ARS SPO must be able to support the pursuit/recovery of a Department security interest.

(g) *SRT member essential functions.* The essential functions of an SRT member include those of an ARS SPO. The primary role of SRTs is the recapture, pursuit, and/or recovery of Department security interests. In addition, an SRT member must be trained to resolve incidents that require activities and force options that exceed the capabilities of other site PF members, as determined by site-specific analysis. An SRT SPO also must:

(1) Successfully complete a Departmental advanced tactical qualification course designed to provide the minimum level of skills and knowledge needed to completely perform all tasks associated with SRT job responsibilities;

(2) Have knowledge and skills to provide additional protection capability as demanded by the particular targets, threats, and vulnerabilities existing at their assigned Departmental facility;

(3) Be able to operate special weapons, tactical vehicles, and other equipment necessary to protect a particular facility or to effectively engage an adversary with advanced capabilities; and

(4) Possess the ability to act successfully as a member of an aggressive and readily mobile response team as dictated by site-specific vulnerability assessments, using force options and tactical response team techniques necessary for recapture and recovery operations directed against an adversary and to support site-specific protection strategies.

§ 1046.12 Medical, physical readiness, and training requirements for PF personnel.

Department PF personnel must be individuals who:

(a) Are medically certified by the PPMD pursuant to the procedures set out in § 1046.13 to perform all of the applicable essential functions of the job, as set forth in § 1046.11;

(b) Meet the physical readiness qualification standards set forth in § 1046.16; and

(c) Are determined to be qualified as having the knowledge, skills, abilities and completed the requirements of a formal training program as set out in § 1046.16.

§ 1046.13 Medical certification standards and procedures.

(a) *PF medical certification standards.* All applicant and incumbent PF personnel must satisfy the applicable Medical Certification Standards set forth in this section.

(b) *Requirements of the medical evaluation to determine medical certification.* (1) The medical evaluation must be made by the Designated Physician without delegation (e.g., to a physician's assistant or nurse practitioner).

(2) Evaluations of incumbent security police officers must include a medical history, the results of the examination, and a formal written determination.

(3) A site standard form approved by the Chief Medical Officer must be used, and pertinent negatives must be documented on the form.

(4) The Medical Certification Standards are the minimum medical standards to be used in determining whether applicants and incumbent PF personnel can effectively perform, with or without reasonable accommodation, all essential functions of normal and emergency duties without imposing an undue hardship on the employer or posing a direct threat to the PF member or others, the facility, or the general public. All reasonable accommodations as defined in this part must be approved in writing by the PF contractor with a determination that the use of the device is compatible with all actions associated with emergency and protective equipment without creating a hardship for the contractor. The Designated Physician and PPMD must determine that the reasonable accommodation is consistent with the medical standard without creating a direct threat to the individual or to others.

(c) *General medical standards for PF personnel.* The examinee must possess the mental, sensorial, and motor skills to perform, safely and efficiently, all applicable essential job functions described in §1046.11 and those designated in the current job analysis submitted by PF management to the Designated Physician/PPMD. Specific qualifications for SOs and SPOs are set forth in paragraphs (d) and (e), respectively, of this section. Reasonable accommodations shall be provided pursuant to the requirements of the ADAAA.

(d) *Specific medical standards for SOs*—(1) *Head, face, neck, and scalp.* Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is required by assigned normal or emergency job duties.

(2) *Sense of smell.* Ability to detect the odor of combustion products and of tracer or marker gases.

(3) *Speech.* Capacity for clear and audible speech as required for effective communications of the job.

(4) *Hearing.* Hearing loss with or without aids not to exceed 30 decibels (db) average at 500, 1000, and 2000 Hertz (Hz), with no loss greater than 40 db at any one of these frequencies and the ability to localize sounds with a difference of not more than 15 db average loss between the two ears. If hearing aids are necessary, suitable testing procedures shall be used to ensure auditory acuity equivalent to the above requirement.

(5) *Vision.* Near and distant visual acuity, with or without correction, of at least 20/25 in one eye and no worse than 20/40 in the other eye.

(6) *Color vision.* Ability to distinguish red, green, and yellow. Acceptable measures of color discrimination include the Ishihara; Hardy, Rand, & Rittler; and Dvorine pseudoisochromatic plates (PIP) when administered and scored according to the manufacturer's instructions. Tinted lenses such as the X-Chrom contact lenses or tinted spectacle lenses effectively alter the standard illumination required for all color vision tests, thereby invalidating the results and are not permitted during color vision testing.

(7) *Cardiorespiratory.* Capacity to use a respirator other than self-contained breathing apparatus (SCBA) when required by local assignment.

(8) *Nutritional/metabolic.* Ability to accommodate to changing work and meal schedules without potential or actual incapacity. Status adequate to meet the stresses and demands of assigned normal and emergency job duties.

(e) *Specific medical standards for SPOs.* In addition to the criteria identified in §1046.16(f), the following standards must be applied.

(1) *Head, face, neck and scalp.* Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is required by assigned normal or emergency job duties.

(2) *Sense of Smell*. The ability to detect the odor of combustion products and of tracer or marker gases.

(3) *Speech*. Capacity for clear and audible speech as required for effective communications on the job.

(4) *Hearing*. Hearing loss without aids not to exceed 30 db average at 500, 1000, 2000 Hz, with no loss greater than 40 db at any of these frequencies and the ability to localize sounds with a difference of not more than 15 db average loss between the two ears. Hearing loss beyond indicated level would interfere with ability to function and respond to commands in emergency situations. Use of a hearing aid is allowed for one ear only with the remaining ear qualifying for no more than an average of 30 db loss at frequencies of 500, 1000 and 2000 Hz. If a hearing aid is necessary, suitable testing procedures must be used to assure auditory acuity equivalent to the above requirement for the difference between two ears.

(5) *Vision*. (i) Near and distant vision. Near and distant visual acuity sufficient to effectively perform emergency-related essential functions:

(A) With or without correction, vision of 20/25 or better in the better eye and 20/40 or better in the other eye.

(B) If uncorrected, distant vision in the better eye is at least 20/25, and if the SPO wears corrective lenses, the SPO must carry an extra pair of corrective lenses.

(ii) *Color vision*. Ability to distinguish red, green, and yellow. Acceptable measures of color discrimination include the Ishihara; Hardy, Rand, & Rittler; and Dvorine pseudoisochromatic plates (PIP) when administered and scored according to the manufacturer's instructions. Tinted lenses such as the X-Chrom contact lenses or tinted spectacle lenses effectively alter the standard illumination required for all color vision tests, thereby invalidating the results and are not permitted during color vision testing.

(iii) *Field of vision*. Field of vision in the horizontal meridian at least a total of 140 degrees, contributed to by at least 70 degrees from each eye.

(iv) *Depth perception*. Ability to judge the distance of objects and the spatial relationship of objects at different distances.

(6) *Cardiorespiratory*. (i) *Respiratory*. Capacity and reserve to perform physical exertion in emergencies at least equal to the demands of the job assignment. This must be measured by annual pulmonary function test, with no less than a 90 percent predicted forced vital capacity and forced expiratory volume. There must be no diagnosis of respiratory impairment requiring ongoing use of medications such as bronchodilators or beta agonists. A full review and approval by the PPMD is required whenever there is a past history of sleep apnea (with an established index of suspicion), with or without treatment.

(ii) *Cardiovascular*. (A) Capacity for tolerating physical exertion during emergencies. The results of the two semiannual assessments as identified in §1046.16(b)(4) must be considered. Normal configuration and function, normal resting pulse, regular pulse without arrhythmia, full symmetrical pulses in extremities, and normotensive, with tolerance for rapid postural changes on rapid change from lying to standing position. The use of hypertensive medications is acceptable if there are no side effects present that would preclude adequate functions as herein specified.

(B) If an examination reveals significant evidence of cardiovascular abnormality or significantly increased risk for coronary artery disease (CAD) as determined by the examining physician (e.g., by using the Framingham Point System), an evaluation by a specialist in internal medicine or cardiology may be required and evaluated by the Designated Physician. An electrocardiogram is required at entry, at age 40, and annually thereafter, which must be free from significant abnormality. If such abnormalities are detected, then a stress electrocardiogram with nonischemic results must be provided, or the individual must be referred to a cardiologist for a fitness for duty examination. A stress electrocardiogram must be performed every other year beginning at age 50 with the results reviewed by the Designated Physician.

(7) *Neurological, mental, and emotional.* Absence of central and peripheral nervous system conditions that could adversely affect ability to perform normal and emergency duties or to handle firearms safely. A test for peripheral neuropathy at fingers and toes is required annually. Absence of neurotic or psychotic conditions which would adversely affect the ability to handle firearms safely or to act safely and efficiently under normal and emergency conditions. Psychologists and psychiatrists identified to conduct evaluations, assessments, testing, and/or diagnoses associated with medical qualifications of this part must meet standards established by DOE.

(8) *Musculoskeletal.* Absence of conditions that could reasonably be expected to interfere with the safe and effective performance of essential physical activities such as running, walking, crawling, climbing stairs, and standing for prolonged periods of time. All major joint range of motion limits must have no significant impairments in the performance of essential functions. This includes full range of motion to include overhead reaching and squatting. No history of spine surgery, a documented diagnosis of herniated disc, or mechanical back pain that has not been certified to have normal functional recovery with no activity limitations precluding the ability to perform SPO essential functions.

(9) *Skin.* Have no known significant abnormal intolerance to chemical, mechanical, and other physical agent exposures to the skin that may be encountered during routine and emergency duties, as specified at the site. Capability to tolerate use of personal protective covering and decontamination procedures when required by assigned job duties. Facial hair cannot be allowed to interfere with respirator fitting, and any such growth or a skin condition which could preclude respirator fit is not acceptable and must be documented.

(10) *Endocrine/nutritional/metabolic.* Ability to accommodate to changing work and meal schedules without potential or actual incapacity. Status adequate to meet the stresses and demands of assigned normal and emergency job duties. A full evaluation and approval of reasonable accommodation by the PPMD is required for hiring and retention when metabolic syndrome is identified and/or when diabetes is controlled by other than diet.

(f) *Additional medical or physical tests.* For those facilities where it is necessary to determine the medical qualification of SPOs or SPO applicants to perform special assignment duties which might require exposure to unusually high levels of stress or physical exertion, Field Elements may develop more stringent medical qualification requirements or additional medical or physical tests, in collaboration with the PPMD, as necessary for such determinations. All such additional qualification requirements must be coordinated with the Office of Health, Safety and Security prior to application.

(g) *Medical examination procedures and requirements.* (1) The medical examinations required for certification must be performed at the following intervals:

(i) Applicants for PF member positions must undergo a comprehensive medical examination, as specified herein. The Chief Health, Safety and Security Officer or designee, the Chief, Defense Nuclear Security in the case of NNSA, and/or the PPMD may require additional evaluations.

(ii) After initial certification, each SO must be medically examined and recertified at least every two years or more often if the PPMD so requires. This initial certification date becomes the SO's anniversary date. Medical certification remains valid through 30 days beyond the anniversary date or for the period indicated by the PPMD if less than twenty-four months.

(iii) After initial certification, each SPO must be medically examined and recertified every twelve months or more often (pursuant to §1046.14 or otherwise if the PPMD so requires). This initial certification date becomes the SPO's anniversary date. Medical certification remains valid through 30 days from the anniversary date or for the time indicated by the PPMD if less than twelve months.

(2) The medical examination must include a review of the essential functions of the job to which the individual is assigned. Medical examinations of SPO and SO applicants and incumbents

must include the following evaluations to determine whether the individual meets the Medical Certification Standards for the applicable position:

(i) An up to date medical and occupational history, complete physical examination, vision testing, audiometry, and spirometry. In addition, laboratory testing must be performed, including a complete blood count (CBC), basic blood chemistry, a fasting blood glucose, and a fasting lipid panel (the examination and testing is to identify baseline abnormalities, as well as trends); and

(ii)(A) A psychologist or, as appropriate, a psychiatrist who meets standards established by DOE must be used to fulfill the requirements of this part. A personal, semi-structured interview at the time of the pre-placement medical evaluation and during the biennial (for SOs) or annual (for SPOs) examination must be conducted by a psychologist or, as appropriate, a psychiatrist. At the pre-placement medical examination and every third year for SPOs and every fourth year for SOs thereafter, a Minnesota Multi-Phasic Personality Inventory (MMPI) (available only to appropriate medical professionals at, e.g., *http://psychcorp.pearsonassessments.com*) or its revised form must be administered in order to:

(*1*) Establish a baseline psychological profile;

(*2*) Monitor for the development of abnormalities; and

(*3*) Qualify and quantify abnormalities.

(B) The information gathered from paragraph (g)(2)(i) of this section, together with the results of the semi-structured interview of this paragraph, psychiatric evaluations (if required), and reviews of job performance may indicate disqualifying medical or psychological conditions. Additional generally-accepted psychological testing may be performed as required to substantiate findings of the MMPI. If medically indicated and approved by the PPMD, an additional evaluation by a psychiatrist who meets standards established by DOE may be conducted. Additional or more frequent psychological evaluations as determined by the psychologist, psychiatrist, Designated Physician, or the PPMD may be required. Unless otherwise indicated, a psychological evaluation performed in accordance with the other DOE requirements (e.g., pursuant to 10 CFR part 712) may satisfy the requirements of this part.

(C) The Designated Physician may request any additional medical examination, test, consultation or evaluation deemed necessary to evaluate a candidate or an incumbent SO's or SPO's ability to perform essential job duties or for incumbents, the need for temporary work restrictions.

(3) When an examinee needs the use of corrective devices, such as eyeglasses or hearing aids, to enable the examinee to successfully meet medical qualification requirements, the contractor responsible for the examinee's performance must make a determination that the use of any such device is compatible with all required emergency and protective equipment that the examinee may be required to wear or use while performing assigned job duties. The Designated Physician and the PPMD must determine that the reasonable accommodation is consistent with the medical standard and will not result in a direct threat to the individual or to others. This determination must be made before such corrective devices may be used by the examinee to meet the medical, physical readiness, or training requirements for a particular position.

(4) Contractor management must provide reasonable accommodations to a qualified individual by taking reasonable steps to modify required emergency and protective equipment to be compatible with corrective devices or by providing equally effective, alternate equipment, if available.

(5) The Designated Physician must discuss the results of the medical and physical readiness examinations with the individual. The results of the medical examinations also must be communicated in writing to PF management and to the individual and must include:

(i) A statement of the certification status of the individual, including any essential functions for which the individual is not qualified, with or without

reasonable accommodations, and an assessment of whether the individual would present a direct threat to self or others in the position at issue;

(ii) If another medical appointment is required, the date of the next medical appointment; and

(iii) Recommended remedial programs or other measures that may restore the individual's ability to perform the essential functions or may negate the direct threat concern, if the individual is not approved for physical training, testing, or the relevant position.

(6) The PF contractor must offer a health status exit review for all employees leaving PF service. If the employee desires the review, it must be conducted by the PPMD or Designated Physician. The review, which may be conducted in conjunction with the requirements of other parts, must include all of the medical standards for the PF position being vacated. The reason(s) for any health status exit review not being performed must be documented (e.g., employee declined to have the review conducted).

§ 1046.14 Medical certification disqualification.

(a) *Removal.* An incumbent SO or SPO is disqualified from medical certification by the PPMD if one or more of the medical certification standards contained in § 1046.13 are not met. An incumbent SO or SPO temporarily or permanently disqualified from medical certification by the PPMD must be removed from those protective force duties by the employer when the employer is notified by the PPMD of such a determination.

(b) *Medical removal protection.* The employer of a disqualified SPO must offer the SPO medical removal protection if the PPMD determines in a written medical opinion that the disqualifying condition occurred as a result of site-approved training for or attempting to meet a physical readiness standard qualification, or site-approved training for security and emergency response (e.g., participating in force-on-force exercises for training, inspection, or validation purposes). The PPMD's determination must be based on an examining physician's recommendation or any other signs or symptoms that the Designated Physician deems medically sufficient to medically disqualify an SPO. The employee pay benefits specified in this section for combined temporary and permanent medical removal shall not be provided for more than one year from the date of the initial PPMD written determination regarding the same basis for disqualification.

(1) *Temporary removal pending final medical determination.* (i) The employer of a disqualified SPO must offer the SPO temporary medical removal from PF duties on each occasion that the PPMD determines in a written medical opinion that the worker should be temporarily removed from such duties pending a final medical determination of whether the SPO should be removed permanently, if appropriate. ''Final medical determination'' means the outcome of the Independent Review provided for in § 1046.15(c) or, if one is held, the Final Review provided for in § 1046.15(d).

(ii) If an SPO is temporarily removed from PF duties pursuant to this section, the SPO's employer must not remove the employee from the payroll unless available alternative duties for which the worker is qualified or can be trained in a short period of time are refused or performed unsatisfactorily.

(iii) While the SPO remains on the payroll pursuant to paragraph (b)(1)(i) of this section, the SPO's employer must maintain the SPO's total base pay (overtime not included), seniority, and other site-specific worker rights and benefits (e.g., corporate benefit package and collective bargaining agreement benefits) as if the worker had not been removed. Funds reimbursable by the DOE which are provided to a SPO under medical removal protection must be reduced dollar for dollar for any other PF related pay or monetary benefit for associated lost earnings, including those negotiated through collective bargaining and from workers compensation. Medical removal protection in conjunction with these other benefits must not exceed the SPO's total base pay.

(iv) If there are no suitable alternative duties available as described in paragraph (b)(1)(ii) of this section, the

SPO's employer must provide to the SPO the medical removal protection benefits specified in paragraph (c)(1) of this section until alternative duties become available, the SPO has recovered, or one year has elapsed from the date of the PPMD's determination that the SPO should be temporarily removed from duties, whichever comes first. During this period the SPO may be placed on administrative leave when alternative duties are not available.

(2) *Permanent medical removal resulting from injuries.* (i) If the PPMD determines in a written medical opinion that the worker should be permanently removed from PF duties as a result of injuries sustained while engaging in required physical readiness activities (i.e., site approved training for or attempting to meet a physical readiness standard qualification or site approved training for security or emergency response), employer Human Resources policies, disability insurance, and/or collective bargaining agreements will dictate employment status and compensation beyond the requirements of paragraphs (b) and (c) of this section.

(ii) If an SPO has been permanently removed from duty pursuant to paragraph (b)(2)(i) of this section, the SPO's employer must provide the SPO the opportunity to transfer to another available position, or one which later becomes available, for which the SPO is qualified (or for which the SPO can be trained in a short period), subject to collective bargaining agreements, as applicable.

(3) *Worker consultation before temporary or permanent medical removal.* If the PPMD determines that an SPO should be temporarily or permanently removed from PF duties, the PPMD must:

(i) Advise the SPO of the determination that medical removal is necessary to protect the SPO's health and well-being or prevent the SPO from being a hazard to self or others;

(ii) Provide the SPO the opportunity to have any medical questions concerning medical removal answered; and

(iii) Obtain the SPO's signature or document that the SPO has been advised on the provisions of medical removal as provided in this section and the risks of continued participation in physically demanding positions.

(4) *Return to work after medical removal.* (i) Except as provided in paragraph (b)(4)(ii) of this section, the SPO's employer must not return an SPO, who has been granted medical removal protection under this section, to the SPO's former job status.

(ii) If, in the PPMD's opinion, continued participation in PF duties will not pose an increased risk to the SPO's health and well-being or an increased risk (beyond those normally associated with SPO duties) of the SPO being a direct threat to self or others, the PPMD must fully discuss these matters with the SPO and then, in a written determination, may authorize the SPO's employer to return the SPO to former job status. Within one year from the PPMD's original decision to remove the individual from SPO status and subject to the SPO's ability to meet all other position related requirements (e.g., weapons qualifications, physical readiness standard, human reliability program, and refresher training), the employer must return the SPO to duty status given PPMD authorization to return to work. For durations beyond one year from the original decision given PPMD authorization to return to work, return to SPO status will be at the employer's discretion.

(c) *Medical removal protection benefits.* (1) If required by this section to provide medical removal protection benefits, the SPO's employer must maintain for not more than one year, as specified in paragraphs (b)(1) and (b)(2) of this section, the removed worker's total base pay, and seniority, as though the SPO had not been removed. The total base pay provision in this section must be reduced by any compensation for lost earnings provided by any other benefit or those negotiated through collective bargaining for both temporary and permanent removal protection as provided by this section.

(2) If a removed SPO files a claim for workers' compensation payments for a physical disability, then the SPO's employer must continue to provide medical removal protection benefits until disposition of the claim, recovery of the claimant, or one year from the date

the removal protection began, whichever comes first. If workers' compensation benefits are provided retroactively then the SPO must reimburse the employer to the extent the SPO is compensated for lost earnings for the same period that the medical removal protection benefits are received for both temporary and permanent removal protection as provided by this section. Expenses for medical/rehabilitation treatments related to the basis for medical removal protection are not covered under this part.

(3) The SPO's employer's obligation to provide medical removal protection benefits to an SPO is reduced to the extent that the worker receives compensation for earnings lost during the period of removal either from a publicly or site employer-funded compensation program.

(d) *Collective bargaining agreements.* For the purposes of this section, the requirement that the SPO's employer provide medical removal protection benefits is not intended to expand upon, restrict, or change any rights to a specific job classification or position under the terms of an applicable existing collective bargaining agreement.

§ 1046.15 Review of medical certification disqualification.

(a) *Temporary medical and physical conditions.* Should the PPMD determine that an individual is disqualified from medical certification because of a temporary medical or physical condition which results in the individual not being able to perform any of the essential functions of the job classification, the employer may assign the individual to alternate, limited duty, if available, until the individual is again medically certified by the PPMD. However, this limited duty may only include assignment to duties in a job classification where all essential functions for that job classification can be safely and efficiently performed. Medical certification is required to remain in armed status. A temporary medical certification disqualification may not exceed a period of twelve months regardless of whether medical removal protection is authorized. Before the end of the twelve-month period, the PPMD must determine whether the individual is permanently disqualified from medical certification because of a continuing medical or physical condition which results in the individual not being able to perform all essential functions of the job classification. The individual may request an Independent Review of the disqualification at any time the twelve-month period.

(b) *Permanent medical and physical conditions.* If the PPMD determines that an individual is disqualified from medical certification because of a permanent medical or physical condition which results in the individual not being able to perform all essential functions of the job classification, and the individual requests an Independent Review, the employer may assign the individual to alternate, limited duty, if available. This limited duty may include assignment to duties in any job classification where all essential functions can be safely and efficiently performed. Subject to the one year limit as identified in § 1046.14, assignment to alternate, limited duty, may remain in effect until an Independent Review determination, and if applicable, the Final Review determination by the DOE Office of Hearings and Appeals.

(c) *Independent review.* An individual PF member disqualified from medical certification, temporarily or permanently, by the PPMD may request an Independent Review of the case. The individual initiating such a review must submit the request for an Independent Review in writing to the Office of Health, Safety and Security within ten working days of the date of notification (date of written correspondence) of disqualification. A copy of the request must be sent to the individual's employer and to the local ODFSA: for DOE HQ sites, to the Director, Office of Security Operations; for NNSA sites, to the cognizant NNSA Security Director; and for any other DOE sites, to the cognizant DOE Security Director.

(1) The Office of Health, Safety and Security, in coordination with the respective PPMD, must provide for the Independent Review. The Independent Review must be conducted within sixty calendar days of the receipt of the request for an Independent Review. The Independent Review must include a

complete review of the record of the case.

(2) The disqualified individual may select a representative during the Independent Review process. The individual or representative may provide additional evidence relating solely to the medical or physical readiness of the individual. The individual must execute a consent document authorizing the release of relevant medical information to the Office of Health, Safety and Security.

(3) The disqualified individual must provide a copy of the request for Independent Review and the signed consent document for the release of medical information to the respective PPMD and the individual's employer within ten working days of the submission of the request to the Office of Health, Safety and Security.

(4) Within ten working days of receipt of a copy of the request for an Independent Review, the disqualified individual's employer must provide the Office of Health, Safety and Security with the following:

(i) A copy of the job analysis (JA)/mission essential task list (METL) available to the respective Designated Physician at the time of the individual's medical evaluation;

(ii) A listing of the essential functions for the individual's PF job classification; and

(iii) Any additional information relating to the medical or physical readiness of the requestor that the Office of Health, Safety and Security may request.

(5) The Office of Health, Safety and Security must provide the information in paragraph (c)(4) of this section to the Independent Physician for use in the independent review.

(6) A medical examination of the disqualified individual must be conducted by an Independent Physician approved by the Office of Health, Safety and Security. The Independent Physician must not have served as the requestor's personal physician in any capacity or have been previously involved in the requestor's case on behalf of the Department or a Department contractor. The Independent Review must confirm or disagree with the medical certification disqualification and must consider:

(i) The validity of the stated physical requirements and essential function(s) for the applicable job classification;

(ii) The PPMD's medical determination of the individual's inability to perform essential functions or to undertake training or the physical readiness qualification test without undue medical risk to the health and safety of the individual;

(iii) The completeness of the medical information available to the PPMD; and

(iv) If applicable, the determination by the PPMD that the performance of the individual poses a direct threat to self or others.

(7) The results of the Independent Physician's medical examination of the individual must be provided to the Office of Health, Safety and Security for review. The Office of Health, Safety and Security must then recommend a final determination confirming or reversing the medical certification disqualification. The recommendation of the Office of Health, Safety and Security must be forwarded to the applicable local ODFSA (for DOE HQ sites, the Director, Office of Security Operations; for NNSA sites, the cognizant local NNSA Security Director; and for any other DOE sites, the cognizant local DOE Security Director) and the respective PPMD. This individual will either adopt or reject the recommendation of the Office of Health, Safety and Security.

(8) The Office of Health, Safety and Security must provide the results of the Independent Review and the final determination regarding the individual's medical disqualification to the requestor, the respective PPMD, the respective local ODFSA, and the requestor's employer.

(9) If the Independent Review determination confirms the individual is disqualified from medical certification, the individual must be removed from the PF job classification by the individual's employer. If the Independent Review disagrees with the medical certification disqualification, the individual must be reinstated to the PF job

classification by the individual's employer, subject to successful completion of any required qualifications or training requirements that were due during the temporary disqualification, and subject to subsequent annual medical examinations and the ability to meet applicable physical readiness requirements.

(d) *Final review.* An individual receiving an unfavorable Independent Review Determination may request a Final Review of the Independent Review Determination by the Office of Hearings and Appeals. The individual must submit a request for a Final Review to the Office of Hearings and Appeals, in writing, within 30 days of receiving an unfavorable determination, and notify the Office of Health, Safety and Security of the request for appeal. In the request for a Final Review, the individual must state with specificity the basis for disagreement with the Independent Review confirming the medical certification disqualification. The Office of Health, Safety and Security must transmit the complete record in the case to the Office of Hearings and Appeals within five business days of receiving notice from the individual that the SPO has filed an appeal of the Independent Review Determination. The Office of Hearings and Appeals may request additional information, if necessary, to clarify any issue on appeal. Within 45 days of the closing of the record, the Office of Hearings and Appeals must issue a Decision and Order setting forth its findings on appeal and its conclusions based on the record before it. Upon receipt of an unfavorable Final Review decision by the Office of Hearings and Appeals, the individual must be permanently removed from that PF job classification, SO or SPO (FPRS, BRS, ARS, or SRT member) by the employer. However, nothing in the Final Review decision shall prevent the employee from being allowed to qualify for a less strenuous physical readiness job classification given the availability of said position, subject to successful completion of any other required qualifications or training requirements. Upon receipt of a favorable Final Review decision from the Office of Hearings and Appeals, the individual must be reinstated to the PF job classification by the employer, subject to successful completion of any required qualifications or training requirements due during the temporary disqualification, and future ability to be medically certified for the PF job classification and to meet applicable physical readiness standards.

§ 1046.16 SPO physical readiness qualification standards and procedures.

(a) *General.* Employers must ensure SPOs have access to their applicable physical readiness standard and the provisions of this part. Employers must also inform SPOs of their rights associated with the physical readiness requirements.

(1) All SPO applicants must satisfy the applicable physical readiness standard for their assigned position and must physically demonstrate the physical training and knowledge, skills, and abilities set out in paragraph (g) of this section, as required for their assigned position before beginning active duty in that position.

(2) All incumbent SPOs must re-qualify every year according to their applicable readiness standard, pursuant to paragraphs (d)(1), (f), or (g) of this section. Re-qualification must occur no earlier than 30 days prior to and no later than 30 days following the SPOs anniversary date. The actual date of re-qualification does not affect the anniversary date under this section.

(3) All qualification and re-qualification activities must be conducted under the supervision of personnel knowledgeable of DOE physical readiness program requirements as approved by the local ODFSA.

(b) *Physical readiness training program.* SPOs must maintain physical readiness standards on a continuing basis. Each SPO must engage in a year-round physical readiness training program consistent with paragraph (c)(2) and (3) of this section to:

(1) Achieve and maintain the cardiorespiratory and musculoskeletal fitness necessary to safely perform, without posing a direct threat to self or others, all essential functions of normal and emergency PF duties at any time; and

(2) Enable the individual SPO to pass (on an annual basis) the applicable SPO

physical readiness standard without any undue risk of physical injury.

(c) *Training program requirements.* (1) The training program must include the following elements:

(i) Activities with appropriate durations specific to the physical readiness standard, which appropriately address aerobic, agility, flexibility, and strength conditioning.

(ii) Instruction on techniques and exercises designed to ensure SPOs can safely rise quickly from the prone position, and if required by qualification standard, transition into a run.

(iii) Appropriate warm-up and cool down activities designed by exercise physiologists to support injury free workouts and physical readiness testing.

(2) An SPO physical readiness training and maintenance program must be developed by the employing organization in consultation with the PPMD and the local ODFSA.

(3) After initial training and qualification, each SPO must participate in the physical readiness training and maintenance program on a continuing basis. The physical readiness maintenance program must be based on assessment of the individual SPO's physical readiness levels and be tailored to the individual SPO's physical readiness maintenance requirements and improvement needs. Whether training is conducted on or off site, the SPO's participation must be documented.

(4) Assessments of an SPO's level of physical readiness must be conducted at least semiannually by personnel knowledgeable of DOE requirements. The results of the assessments must be provided to the Designated Physician. The assessments must include recognized assessment standard values for aerobic capacity (e.g., American College of Sports Medicine [*http://www.acsm.org/*], Cooper Fitness Institute [*http://www.cooperinstitute.org/*], or Rockport Walk Protocol [available online from a variety of Web sites]). Though not a qualification, the assessment report must include an evaluation of the SPO's level of physical readiness and provide recommendations for maintenance requirements and improvement needs, if any. Ability to summon appropriate medical emergency response with the capability of responding within a reasonable time must be available at the assessment site. An individual trained in cardiopulmonary resuscitation and automatic external defibrillator equipment must be present.

(5) No additional training or time extension to meet the standards is permitted except for unusual circumstances based on a temporary medical or physical condition as certified by the PPMD that causes the SPO to be unable to satisfy the physical readiness standards within the required time period without suffering undue physical harm. An SPO who fails to requalify must be removed from armed SPO status and must participate in a remedial physical readiness training program, as specified in paragraphs (g)(8) and (9) of this section.

(6) An SPO may be required to demonstrate the ability to meet the applicable physical readiness qualification standard during a Headquarters or field audit/inspection/survey or other similar activity, as directed by the local ODFSA. Failure to meet the physical readiness standard must be treated as if the SPO failed the first attempt during routine qualification, and the procedures of paragraphs (g)(5) and (8) of this section apply. An SPO who fails to demonstrate the standard must be removed from armed status.

(7) Employees must notify the employer when the requirements of the training program cannot be successfully completed on a recurring basis (e.g., exercises cannot be completed and/or completed within time limits several times in a row due to injury and/or conditioning issues).

(8) When a physical readiness deficiency is first identified, the employer must provide the SPO access to remedial training or, based upon PPMD evaluation validating the medical need, to a work hardening or rehabilitation program.

(d) *Physical readiness standards for SPOs.* Any failure, at any time, by an SPO to physically demonstrate ability to meet the required physical readiness standard, must result in temporary removal from being authorized to perform the functions of that standard.

The physical readiness standards for SPOs are as follows:

(1) *Fixed Post Readiness Standard (FPRS)*. This qualification standard applies to all SPOs. Regardless of an SPO's physical readiness category, the FPRS must be physically demonstrated every year by all SPOs.

(i) The standard requires sufficient agility and range of motion to: Assume, maintain, and recover from the variety of cover positions associated with effective use of firearms at entry portals and similar static environments to include prone, standing, kneeling, and barricade positions; use site-specific deadly and intermediate force weapons and employ weaponless self-defense techniques; effect arrests of suspects and place them under restraint, e.g., with handcuffs or other physical restraint devices; and meet any other measure of physical readiness necessary to perform site-specific essential functions as prescribed by site management and approved by the respective program office.

(ii) A stand-alone qualification test which requires the demonstration of all of the required elements (both general and site-specific, if applicable) must be developed and maintained by each site and approved by the ODFSA. This qualification test can be used for annual qualification, or sites may choose to document an SPO's ability to meet specific elements of the standard during annual refresher training sessions and/or during weapons qualification activities. All elements of this standard must be demonstrated annually in the aggregate.

(iii) The results must be provided to the Designated Physician prior to the annual medical examination. Inability to physically demonstrate the FPRS requirements must result in temporary loss of SPO status. Remedial training must be provided pursuant to the requirements of paragraph (g)(8) of this section.

(2) *Basic Readiness Standard (BRS)*. In addition to demonstrating the FPRS requirements as stated in paragraph (d)(1) of this section, the BRS qualification consists of a one-half mile run with a maximum qualifying time of 4 minutes 40 seconds and a 40-yard dash from the prone position in 8.5 seconds or less, and any other site-specific measure of physical readiness necessary to perform essential functions as prescribed by site management and approved by the respective program office. The running elements and other site-specific measures of the BRS must be demonstrated on the same day.

(3) *Advanced Readiness Standard (ARS)*. In addition to demonstrating the FPRS requirements as stated in paragraph (d)(1) of this section, the ARS qualification consists of a one mile run with a maximum qualifying time of 8 minutes 30 seconds, and a 40-yard dash from the prone position in 8.0 seconds or less, and any other site-specific measure of physical readiness necessary to perform site-specific essential functions as prescribed by site management and approved by the respective program office. The running elements and other site-specific measures of the ARS must be demonstrated on the same day.

(e) *Revisions to Physical Readiness Standards*. The Department may revise the physical readiness standards or establish new standards consistent with the Administrative Procedure Act and other applicable law.

(f) *Evaluation and documentation for BRS and ARS SPOs*. Two distinct determinations must be made by the Designated Physician for BRS and ARS SPOs. First, a medical examination that meets the requirements of §1046.13(g) must be conducted. A written determination must be made whether the SPO is medically certified for SPO duties without being a danger to self or others. This includes being able to attempt to physically demonstrate the applicable physical readiness standard. Given a favorable medical clearance determination, the second determination assesses the SPO's physical readiness capability by comparing the SPO's current examination results, medical history, normative data, past qualifying times, and the results of physical assessments. The Designated Physician's evaluation and documentation that an incumbent BRS or ARS SPO has reasonable expectation of meeting the appropriate physical readiness standard is deemed to have met the annual physical readiness

qualification requirement without having to take the appropriate BRS or ARS test unless the SPO is randomly selected pursuant to paragraph (f)(7) of this section. Physician extenders (e.g., physician's assistants, certified occupational health nurses, or nurse practitioners) and exercise physiologists may perform appropriate elements of the physical examination and the physical assessments required in paragraph (b)(4) of this section. However, both the medical clearance determination and the formal physical readiness capability evaluation must be made by the Designated Physician without delegation. A site standard form must be used, and pertinent negatives must be documented on the form. The following procedures apply regarding the Designated Physician's evaluation and documentation that an incumbent BRS or ARS SPO has a reasonable expectation of meeting the appropriate physical readiness standard.

(1) Evaluation of BRS and ARS SPOs must include consideration of past medical history and normative data when available for individuals deemed to be physically capable. The following criteria must be evaluated: Cardiac function to include resting pulse rate and pulse recovery after exertion; neuromuscular function to include assessments of strength, range/freedom of motion, and movement without pain. While they are not required to be used or intended to be the sole determining criterion, for Designated Physicians using metabolic equivalents (METS) data the following values may be included in the overall process to determine if an individual SPO has a reasonable expectation of being able to physically demonstrate the appropriate physical readiness standard.

(i) For BRS SPOs a METS value of seven or greater would be a positive indicator of sufficient aerobic capacity to successfully demonstrate the half mile run associated with the BRS.

(ii) For ARS SPOs a METS value of 12 or greater would be a positive indicator of sufficient aerobic capacity to successfully demonstrate the mile run associated with the ARS.

(2) The designated physician may medically certify the BRS or ARS SPO for SPO duties and document that the SPO has a reasonable expectation of meeting the appropriate physical readiness standard. In this case, the SPO is deemed to have met the annual physical readiness qualification requirement without having to take the appropriate BRS or ARS test, unless the SPO is randomly selected pursuant to paragraph (f)(7) of this section.

(3) The designated physician may indicate the BRS or ARS SPO meets medical standards for SPO duties, but also indicate that the SPO does not appear to have the physical capability to pass the appropriate physical readiness test. In this case, the file must be immediately forwarded to the PPMD for review.

(4) If the PPMD concurs with the Designated Physician that the SPO does not have a reasonable expectation of being able to meet the readiness standard, the SPO may request to attempt to demonstrate the appropriate physical readiness test, which must be accomplished successfully within 30 days of the date of the medical certification for the SPO to remain in status. If the SPO chooses not to attempt to demonstrate the readiness standard, then the SPO must be removed immediately from duties associated with that physical readiness standard. Should the SPO fail to meet the standard, the retesting process described below in paragraph (g) of this section must be followed. Ultimate return to duties associated with that standard would require following the new hire process of medical clearance for SPO duties and then physically demonstrating the readiness standard which had not been met.

(5) Should the PPMD determine that the SPO does appear to have a reasonable expectation of meeting the appropriate physical readiness standard, the SPO is deemed to have met the annual qualification requirement for the appropriate physical readiness standard.

(6) The Designated Physician may find that the SPO cannot be medically certified for SPO duties. In this case, the SPO must be removed from armed status with appropriate PPMD review and medical intervention recommendations.

(7) Each year, 10 percent of the BRS and ARS SPO populations (supervisors

included) at each site must be randomly selected by the employer and physically tested pursuant to paragraph (g) of this section. At the beginning of the testing year as established by each site, the site must ensure that a sufficient number of individuals and alternates are selected in one drawing to ensure that the 10 percent testing requirement can be achieved even though some SPOs selected may not receive a reasonable expectation determination for the Designated Physician as identified in paragraph (f)(2) of this section. Once 10 percent of the SPOs successfully demonstrating the standard has been achieved, the remaining alternates are not required to be physically tested unless they do not receive a reasonable expectation determination. The identity of an individual as a selectee for testing shall be kept confidential by the employer in a manner that ensures this information does not become known to the selected individual, the PPMD, and the Designated Physician until after the individual SPO has been deemed to have a reasonable expectation of meeting the appropriate physical readiness standard pursuant to paragraphs (f)(2) or (5) of this section. The selected individuals must successfully complete the applicable physical readiness standard to retain SPO status. During a given year's testing, at least 90 percent of those tested in each physical readiness category must meet the requirements.

(8)(i) Should the passing percentage of those randomly selected and attempting to physically demonstrate the standard in a particular physical readiness category at a particular site drop below 90 percent (on the first attempt) then all SPOs in that category at that site must be tested on their ability to physically demonstrate the standard. The following parameters apply.

(A) All percentages are based upon first attempts.

(B) The total population of SPOs (supervisors included) in that physical readiness category at the beginning of that testing year at that site must be used to determine the percentage thresholds.

(C) The 100 percent testing of SPOs in that category must commence immediately upon the failure that renders achievement of a 90 percent success rate mathematically impossible for that readiness category during that testing year. The date of this failure will establish the anniversary date of the new testing year.

(D) An insufficient number of randomly selected individuals and alternates available to constitute the 10 percent selection criterion represents a failure to achieve the 90 percent threshold. Identification of additional randomly selected individuals for that testing year is not authorized.

(ii) The 100 percent testing described in paragraph (f)(8)(i) of this section must continue for a minimum of 365 days. With a 95 percent successful demonstration rate of the standard over the year, 10 percent testing may return at the beginning of the new testing year.

(iii) Should 95 percent successful demonstration not be achieved in the 365 days of 100 percent testing, the 100 percent testing described in paragraph (f)(8)(i) of this section must continue for the next 365 days under the conditions specified in paragraphs (f)(8)(i)(A) through (D) of this section. This process must be repeated until 95 percent successful demonstration is achieved.

(g) *Physical testing for BRS and ARS SPOs.* The following procedures apply to an individual physically demonstrating the physical readiness standards for applicants and incumbent SPOs.

(1) Incumbent BRS and ARS SPOs randomly selected for physical testing pursuant to paragraph (f) of this section in any given year shall physically meet the applicable physical readiness standard within 30 days of their anniversary date.

(2) Incumbent SPOs shall physically meet the applicable physical readiness standard prior to their assignment to duties which require a more stringent standard.

(3) All newly hired SPOs must physically meet the most stringent standard required at the site.

(4) SPOs returning after an absence from protective force duties which encompasses their anniversary date must physically meet at least the standard they were required to meet when they

left SPO duties, should such a position requiring that standard be available.

(5) Each applicant and incumbent SPO must be medically approved by the Designated Physician within thirty days prior to initial participation in any physical readiness training program and prior to attempting the applicable standard to determine whether the individual can undertake the standard without undue medical risk to the health and safety of the individual. Incumbents also must have successfully completed a physical readiness assessment within thirty days prior to their annual physical examination by the Designated Physician.

(6) Incumbent SPOs must qualify on the applicable standard annually by physically passing the required test if they have not received a reasonable expectation determination as described in paragraph (f) of this section. The testing protocol shall include mandated participation by the SPO being tested in pre-test warm-up and post-test cool-down activities as described in paragraph (c) of this section. The responsible person in charge of the qualification activity must inform the SPO that the attempt will be for qualification. Once this has been communicated by the person in charge, the attempt will constitute a qualification attempt. Ability to summon appropriate medical emergency response with the capability of responding within a reasonable time must be available at the testing site. An individual trained in cardio pulmonary resuscitation and automatic external defibrillator equipment must be present.

(7) Physical readiness re-qualification for randomly selected incumbent SPOs must occur not more than 30 days from the anniversary date. Failure to qualify within 30 days past the anniversary date must result in removal from SPO status for that physical readiness category. Not more than five attempts may be allowed during the 30-day period. All attempts must be made within 30 days of the medical approval required in paragraph (g)(5) of this section.

(8) Remedial training program: If an SPO fails all attempts pursuant to paragraph (g)(7) of this section for reasons other than injury or illness, the PF contractor must offer the SPO the opportunity to participate in a supervised physical readiness remedial training program developed by an exercise physiologist.

(i) Supervision of the physical readiness remedial training program may be accomplished by direct observation of the SPO during the training program by personnel knowledgeable of Department physical readiness program requirements, or by these personnel monitoring the SPO's progress on a weekly basis.

(ii) The remedial training program must be based upon an assessment of the SPO's individual physical readiness deficiencies and improvement needs which precluded the SPO from successfully completing the applicable physical readiness standard.

(iii) The remedial training program must not exceed a period of 30 days.

(9) Re-testing of incumbent SPOs after completion of remedial training program.

(i) Once an SPO has begun a remedial training program, it must be completed before the SPO may attempt the applicable standard.

(ii) Upon completion of the remedial training the ARS/BRS SPO must be offered an assessment using the same process that is used for the required semiannual assessment as required in paragraph (c)(4) of this section. Any deficiencies and improvement needs must be identified to the SPO.

(iii) The SPO has seven days from the completion date of the remedial training program to meet the applicable physical readiness qualification standard. Only one attempt during this seven-day period may be made unless circumstances beyond the testing organization or participant's control (e.g., severe weather, equipment failure, or injury as determined by the employer) interrupt the attempt. When the attempt is interrupted, the employer may reschedule it within seven days.

(iv) If the SPO meets the standard on the attempt specified in paragraph (f)(9)(iii) of this section, the original anniversary qualification date remains the same.

(v) Failure to meet the standard must result in the SPO being permanently removed from duties requiring

ability to meet that physical readiness standard.

(vi) If an SPO requires remedial training during three consecutive annual qualification periods, then a fourth remediation shall not be offered for subsequent failures to achieve the physical readiness standard. The SPO must be permanently removed from duties requiring ability to meet that physical readiness standard.

(10) The physical readiness standards set forth in this part may not be waived or exempted. Additional time, not to exceed six months, may be granted on a case-by-case basis for those individuals who, because of a temporary medical condition or physical injury certified by the Designated Physician, are unable to satisfy the physical readiness standards within the required period without suffering injury. Additional time totaling more than one year may not be granted. When additional time is granted:

(i) The granting of such time does not eliminate the requirement for the incumbent SPO to be removed from that SPO physical readiness standard status during the time extension.

(ii) When additional time is granted because of an inability to qualify without a certified medical condition or injury, the PF member is not entitled to temporary removal protection benefits. Granting additional time due to deconditioning is not authorized.

(iii) Upon completion of the additional time period and requisite physical readiness training, as applicable, the incumbent SPO must be assessed using the same process that is used for the semiannual assessment as required in paragraph (c)(4) of this section if the results indicate the SPO is ready to take the test. The test must be taken within 30 days of medical clearance as described in § 1046.13(g).

(iv) For a duration exceeding three months, the SPO's original anniversary qualification date may be revised at the discretion of the employer to reflect the most recent date that the SPO qualified under the applicable standard, which will become the new anniversary qualification date.

§ 1046.17 Training standards and procedures.

(a) Department contractors responsible for the management of PF personnel must establish training programs and procedures for PF members to develop and maintain the knowledge, skills and abilities required to perform assigned tasks. The site-specific qualification and training programs must be based upon criteria approved by the ODFSA.

(b) Department contractors responsible for training PF personnel must prepare and annually review mission essential tasks from which a JA or mission essential task list (METL) is developed. The JAs or METLs must be prepared detailing the required actions or functions for each specific PF job assignment. When a generic Department JA or METL does not exist for a site-specific PF assignment (e.g., dog handler, investigator, flight crew, pilot, etc.) the site must develop a site-specific JA or METL. The JA or METL must be used as the basis for local site-specific training programs.

(c) The Designated Physician must approve in advance the participation by individuals in training and examinations of training prior to an individual's beginning employment as a PF member and annually thereafter.

(d) The formal PF training program must:

(1) Be based on identified essential functions and job tasks, with identified levels of knowledge, skills and abilities needed to perform the tasks required by a specific position;

(2) Be aimed at achieving at least a well-defined, minimum level of competency required to perform each essential function and task acceptably, with or without reasonable accommodations;

(3) Employ standardized instructional guidelines, based on approved curricula, with clear performance objectives as the basis for instruction;

(4) Include valid performance-based testing to determine and certify job readiness;

(5) Be documented so that individual and overall training status is easily accessible. Individual training records and certifications must be retained for at least one year after termination of

the employee from employment as a member of the PF;

(6) Incorporate the initial and maintenance training and training exercise requirements expressly set forth in this part and as otherwise required by DOE;

(7) Be reviewed and revised, as applicable, by PF management on an annual basis; and

(8) Be reviewed and approved by the local ODFSA on an annual basis.

(e) *SOs*—(1) *SO initial training requirements*. (i) Prior to initial assignment to duty, unless they previously have been employed as an SPO at the same DOE facility, each SO must successfully complete a basic SO training course, approved by the local ODFSA, designed to provide the knowledge, skills, and ability needed to competently perform all essential functions and tasks associated with SO job responsibilities.

(ii) The essential functions and minimum competency levels must be determined by a site-specific JA or METL. The essential functions and minimum competency levels must include, but are not limited to, the knowledge, skills, and abilities required to perform the essential functions set forth in this part; task areas as specified by DOE; and any other site-specific task areas that will ensure the SO's ability to perform all aspects of the assigned position under normal and emergency conditions without posing a direct threat to the SO or to others.

(2) *SO maintenance training*. Each SO must successfully complete an annual course of maintenance training to maintain the minimum level of competency required for the successful performance of tasks and essential functions associated with SO job responsibilities. The type and intensity of training must be based on a site-specific JA or METL. Failure to achieve a minimum level of competency must result in the SO's placement in a remedial training program. The remedial training program must be tailored to provide the SO with the necessary training to afford a reasonable opportunity to meet the level of competency required by the job analysis. Failure to demonstrate competency at the completion of the remedial program must result in loss of SO status.

(3) *SO knowledge, skills, and abilities*. Each SO must possess the knowledge, skills, and abilities necessary to protect Department security interests from the theft, sabotage, and other acts that may harm national security, the facility, its employees, or the health and safety of the public. The requirements for each SO to demonstrate proficiency in, and familiarity with, the knowledge, skills, and abilities and the responsibilities necessary to perform the essential functions of the job must be based on the JA or METL.

(f) *SPOs*—(1) *SPO initial training requirements*. Prior to initial assignment to duty, in addition to meeting SO training requirements described above in paragraph (e)(1) of this section, each SPO must successfully complete the approved Department basic SPO training course. SPOs who are rehired at the same DOE facility or who have worked as an SPO at another DOE facility are not required to retake the basic training course as determined by a site-specific assessment of the individual. In addition to the basic SPO training course, SPO initial training must include successful completion of site-specific training objectives derived from a site-specific JA or METL, task areas as specified by DOE, and any other site-specific task areas that will ensure the SPO's ability to perform all aspects of the assigned position under normal and emergency conditions without posing a direct threat to the SPO or to others.

(2) *SPO maintenance training*. In addition to meeting the SO maintenance training requirements described in paragraph (e)(2) of this section, each SPO must successfully complete an annual course of maintenance training to maintain the minimum level of competency required for the successful performance of essential functions and tasks associated with SPO job responsibilities. The type and intensity of training must be determined by a site-specific JA or METL. Failure to achieve a minimum level of competency must result in the SPO being placed in a remedial training program. The remedial training program must be tailored to provide the SPO with necessary training to afford a reasonable opportunity to meet the level of competency required by the JA or METL

within clearly established time frames. Failure to demonstrate competency at the completion of the remedial program must result in loss of SPO status.

(3) *SPO knowledge, skills and abilities.* In addition to meeting the SO knowledge, skills and ability requirements described in paragraph (e)(3) of this section, the requirements for each SPO to demonstrate proficiency in, and familiarity with, the responsibilities identified in the applicable JA or METL and proficiency in the individual and collective knowledge, skills, and abilities necessary to perform the essential functions and the job tasks must be based on their applicable JA or METL.

(g) *SRT Members.* In addition to satisfying the initial and maintenance training requirements for SPOs and meeting the SPO knowledge, skill, and ability requirements, SRT members must meet the following requirements.

(1) *SRT initial training requirements.* Prior to initial assignment to duty, each SRT-qualified SPO must successfully complete the current Department-approved SRT basic qualification course designed to provide at least the minimum level of knowledge, skills, and ability needed to competently perform all the identified essential functions of the job and tasks associated with SRT job responsibilities. SPOs who have previously successfully completed the SRT basic qualification course to work at another DOE facility do not have to retake the SRT basic qualification as determined by a site-specific assessment of the individual. After completion of the SRT basic qualification course, the SRT-qualified SPO must participate in a site-specific training program designed to provide the minimum level of knowledge and skills needed to competently perform all the identified essential functions of the job and tasks associated with site-specific SRT job responsibilities. The site-specific essential functions and minimum levels of competency must be based on a site-specific JA or METL, task areas as specified by DOE, and any other site-specific task areas that will ensure the SRT-qualified SPO's ability to perform all aspects of the assigned position under normal and emergency conditions without posing a direct threat to the SPO or to others.

(2) *SRT maintenance training.* After assignment to duties as a member of an SRT, an SRT-qualified SPO must receive maintenance training annually on each area required by a site-specific JA or METL. The annual maintenance training program must be completed over two or more sessions appropriately spaced throughout the year. Failure to achieve a minimum level of competency must result in the SRT-qualified SPO being placed in a remedial training program or removal from SRT qualification status, as determined by contractor management. The remedial training program must be tailored to provide the SRT-qualified SPO with necessary training to afford a reasonable opportunity to meet the level of competency required by the JA or METL. Failure to demonstrate competency at the completion of the remedial program must result in loss of SRT-qualification status.

(3) *SRT knowledge, skills, and abilities.* The requirements for each SRT-qualified SPO to demonstrate proficiency in, and familiarity with, the responsibilities identified in the applicable JA or METL and proficiency in the individual and collective knowledge, skills, and abilities necessary to perform the job tasks must include, but are not limited to, those identified for SPOs and based on their applicable JA or METL.

(h) *Specialized requirements.* PF personnel who are assigned specialized PF responsibilities outside the scope of normal duties must successfully complete the appropriate basic and maintenance training, as required by DOE and other applicable governing regulating authorities (e.g., Federal Aviation Administration). This training must enable the individual to achieve and maintain at least the minimum level of knowledge, skills, ability needed to competently perform the tasks associated with the specialized job responsibilities, as well as maintain mandated certification, when applicable. Such personnel may include, but are not limited to, flight crews, instructors, armorers, central alarm system

operators, crisis negotiators, investigators, canine handlers, and law enforcement specialists. The assignment of such specialists and scope of such duties must be based on site-specific needs and approved by the local ODFSA.

(i) *Supervisors*—(1) *Supervisor training requirements*. Prior to initial assignment to supervisory duty, each PF supervisor must successfully complete a supervisor training program designed to provide at least the minimum level of knowledge, skills, ability needed to competently perform all essential functions of the job and tasks associated with supervisory job responsibilities. Appropriate annual refresher training must be provided. The essential functions and minimum levels of competency must be based on a site-specific JA or METL and must include the essential functions and task areas identified for the level of PF personnel to be supervised. Armed supervisors of SPOs must be trained and qualified as SPOs. SPO supervisors must meet applicable medical and physical readiness qualification and certification standards for assigned response duties.

(2) *Supervisor knowledge, skills, and abilities*. Each PF supervisor must possess the skills necessary to effectively direct the actions of assigned personnel. Each supervisor must demonstrate proficiency in, and familiarity with, the responsibilities identified in the applicable JA or METL and proficiency in the skills and abilities necessary to perform those jobs.

(j) *PF training exercises*. Exercises of various types must be included in the training and performance testing process for the purposes of achieving and maintaining skills and assessing individual, leader and collective competency levels. The types and frequency of training exercises must be determined by the training needs analysis conducted as part of the training program, and approved by the local ODFSA. These exercises must be planned and conducted to provide site-specific training to the PF in the prevention of the successful completion of potential adversarial acts as specified by DOE.

(k) *Firearms qualification standards*. (1) No person may be authorized to carry a firearm as an SPO until the responsible local ODFSA is assured that the individual who is to be armed with individually issued/primary weapons is qualified in accordance with firearms standards or that, in the case of post-specific crew-served and special weapons, a determination of proficiency and ability to operate the weapon safely has been made.

(2) As a minimum, each SPO must meet the applicable firearms qualification or proficiency standards every six months under daylight and reduced lighting conditions. Requalification or proficiency demonstration must occur no earlier than 30 days prior to, and no later than 30 days after, six months from the previous qualification. In the case of individually assigned/primary weapons, if the SPO does not re-qualify during the re-qualification period, the individual's authority to be armed and to make arrests must be suspended following the unsuccessful qualification attempts as provided in paragraph (k)(11) of this section. For post-specific and crew-served weapons, if the SPO does not demonstrate proficiency during the re-qualification period, the individual's eligibility for assignment to posts having those post-specific or crew-served weapons must be suspended until such time as proficiency can be demonstrated. To facilitate training programs, employers may adjust qualification and proficiency demonstration schedules as long as the maximum durations as noted in this section are not exceeded.

(3) PF personnel must maintain firearms proficiency on a continuing basis. Therefore, an SPO may be required to demonstrate an ability to meet the applicable firearms qualification or proficiency standard(s) during a Headquarters or field audit, survey, inspection, or other situation directed by the local ODFSA. Failure to meet the standard must be treated as if the individual failed the first attempt during routine semiannual qualification or proficiency demonstration. See paragraph (k)(10) of this section. In the event the SPO fails both attempts, the requirements of paragraphs (k)(11) through (14) of this section apply.

(4) Each SPO must qualify with primary/individually-issued weapons required by duty assignment (to include: specialty weapons, long gun and/or handgun, if so armed). Qualification is the semiannual act of achieving a set score while demonstrating the ability to load, operate, and discharge a firearm or weapon system accurately and safely (to include clearing the weapon at the conclusion of firing) according to a Departmentally-approved course of fire. At least one of the two semiannual qualifications must be accomplished with the same type of firearm or weapon system and ammunition equivalent in trajectory and recoil as that authorized for duty use. All qualification courses must: be constrained by time, identify the maximum amount of available ammunition, and include minimum scoring percentages required to qualify.

(5) For the purposes of this part, weapons system simulator means a device that closely simulates all major aspects of employing the corresponding actual firearm/weapons system, without firing live ammunition. The simulator should permit all weapons-handling and operational actions required by the actual weapon, and should allow the use of sight settings similar to the corresponding actual weapon with assigned duty loads. Additionally, when weapons or weapons system simulators are used for qualification testing of protective force officers, the operation of the simulated weapon must closely approximate all weapons handling and operational manipulation actions required by the actual weapon. The simulation system must precisely register on-target hits and misses with accuracy comparable to the actual weapon at the same shooting distances. The weight, balance, and sighting systems should closely replicate those of the corresponding actual weapon with assigned duty loads, and noise signatures and felt recoil should be simulated to the extent technically feasible.

(6) SPOs assigned to posts which require the operation of post-specific specialized or crew-served weapons must be trained and must demonstrate proficiency in the safe use of such weapons in a tactical environment. These proficiency courses must provide for the demonstration of skills required to support the site security plan. Ammunition equivalent in both trajectory and recoil to that used for duty must be used during an initial demonstration of proficiency. A weapons proficiency demonstration means a process based on a predetermined, objective set of criteria approved by the respective program office in consultation with the Office of Health, Safety and Security that results in a grade (e.g., pass/fail). The process must ensure that an individual (or team, for crew-served weapons) demonstrates the ability to perform all weapons-handling and operational manipulations necessary to load, operate, and discharge a weapon system accurately and safely (to include clearing/returning to safe mode the weapon system at the conclusion of firing), without the necessity for scoring targets during the course of fire. Proficiency courses of fire must include tactically-relevant time constraints. Demonstrations of proficiency are allowed with the actual weapon and assigned duty load, with alternate loads (e.g., frangible or dye-marking rounds), or with authorized weapons system simulators, as defined in this section. Proficiency courses of fire must be tactically relevant.

(7) Weapon system simulators may be used for training, familiarization, and semiannual proficiency verifications (e.g., engaging moving vehicles and/or aircraft). Demonstrations of proficiency must include all weapons-handling and operational manipulations necessary to load, operate, and discharge a weapon system accurately and safely (to include clearing the weapon at the conclusion of firing) according to a Departmentally-approved course of proficiency demonstration. Weapon demonstrations of proficiency are allowed with the same type of firearm or weapon system and ammunition equivalent in trajectory and recoil as that authorized for duty use, or with firearms simulators that have the features and capabilities as described in paragraph (k)(5) of this section.

(8) Each SPO must be given a presentation on the basic principles of weapons safety prior to any range activity. This does not require that a weapons safety presentation be given for each

course of fire, but does require that, prior to the start of range training or qualification for a given period (e.g., initial qualification, semiannual qualification, training, familiarization, proficiency testing, or range practice), each SPO must be given a range and weapon safety presentation.

(9) Standardized Departmentally-approved firearm/weapon qualification courses must be used for qualification. Site-specific conditions and deployment of specialized firearms/weapons may justify requirements for developing and implementing supplementary special training and proficiency courses. Proficiency courses or demonstrations must be constrained by time limits. Where standardized Department firearms/weapons courses do not exist for a weapons system that is required to address site-specific concerns, both daylight and reduced lighting site-specific qualification or proficiency courses (as applicable) must be developed. After approval by the local ODFSA, the developed courses must be submitted to the respective program office for review and approval.

(10) When qualification or demonstration of proficiency is prescribed, SPOs must be allowed two attempts to qualify with assigned firearms/weapons semiannually. A designated firearms instructor or other person in charge of the range must ensure the shooter understands that the attempt will be for qualification. Once this has been communicated by the firearms instructor or person in charge, the attempt must constitute an attempt to qualify or demonstrate proficiency. The SPO must qualify or demonstrate proficiency during one of these attempts.

(11) Upon suspension of an SPO's authority to carry firearms, in order to return to status, the SPO must enter a standardized, remedial firearms/weapons training program developed by the respective site PF contractor firearms training staff. The remedial training program must be a combination of basic weapon manipulation skills, firearms safety, and an additional segment of time individually designed to provide the SPO with the necessary individual training to afford a reasonable opportunity to meet the firearms/weapons qualification or proficiency standards by addressing specific areas of performance.

(12) When qualification is required following the completion of the remedial training course, any SPO who fails to qualify after two subsequent attempts must lose SPO status and the authority to carry firearms/weapons and to make arrests. When weapons-specific safety or proficiency cannot be demonstrated, the SPO must not be assigned to posts that require the operation of that weapon until such safety or proficiency standards can be met.

(13) Any SPO who requires remedial training on three consecutive semiannual qualification periods with the same type of firearm/weapon (caliber, make, and model, but not necessarily the exact same weapon) must be removed from duties that require the issuance of that weapon. If the weapon is considered a primary duty weapon; e.g., rifle or handgun, the officer must be removed from SPO status based on recurring inability to maintain qualification status. If an SPO requires remedial training for the same firearm during three consecutive semiannual qualification periods, then a fourth remediation shall not be offered for subsequent failures to achieve that firearms qualification standard. The employer may reinstate an individual removed from SPO status if the individual can demonstrate the ability to pass the current Department qualification course for that firearm. Prior to being given the opportunity to obtain reinstatement, the SPO must provide the employer written validation from a certified firearms instructor that the SPO has demonstrated the ability to meet applicable DOE standards. All such training and validation expenses are solely the responsibility of the SPO. If reinstatement under these circumstances occurs, the employer must provide all other training for returning protective force members according to the requirements of this part and as otherwise specified by DOE.

(14) An appropriate Department record must be maintained for each SPO who qualifies or who attempts to qualify or to demonstrate proficiency. Records must be retained for one year after separation of a PF member from SPO duties, unless a longer retention

period is specified by other requirements. A supervisor or a training officer must be designated, in writing, as the individual authorized to certify the validity of the scores.

§ 1046.18 Access authorization.

PF personnel must have the access authorization for the highest level of classified matter to which they have access or SNM which they protect. The specific level of access authorization required for each duty assignment must be determined by the site security organization and approved by the local ODFSA. At sites where access authorizations are not required, SPOs must have at least a background investigation based upon a national agency check with local agency and credit check with maximum duration between reinvestigations not to exceed 10 years. This background investigation must be favorably adjudicated by the applicable Departmental field element. Those SPOs who have access to Category I or Category II quantities of SNM as defined by DOE or with access to credible roll-up potential to Category I according to site-specific determination must have and maintain a DOE ''Q'' access authorization.

§ 1046.19 Medical and fitness for duty status reporting requirements.

(a) SPOs and SOs must report immediately to their supervisor that they have a known or suspected change in health status that might impair their capacity for duty. To protect their medical confidentiality, they are required only to identify that they need to see the Designated Physician. SOs and SPOs must provide to the Designated Physician detailed information on any known or suspected change in health status that might impair their capacity for duty or the safe and effective performance of assigned duties.

(b) SPOs and SOs must report to their supervisor and the Designated Physician for a determination of fitness for duty when prescription medication is started or a dosage is changed, to ensure that such medication or change in dosage does not alter the individual's ability to perform any of the essential functions of the job. SPOs and SOs must report to their supervisor and the Designated Physician for a determination of fitness for duty within 24 hours, and prior to assuming duty, after any medication capable of affecting the mind, emotions, and behavior is started, to ensure that such medication does not alter the individual's ability to perform any of the essential functions of the job. Where a written reasonable accommodation determination already has been made, any additional change to an SO's or SPO's health status affecting that accommodation must be reported to their supervisor and the Designated Physician for a determination of fitness for duty.

(c) Supervisory personnel must document and report to the Designated Physician any observed physical, behavioral, or health changes or deterioration in work performance in SPOs and SOs under their supervision.

(d)(1) PF contractor management must inform the Designated Physician of all anticipated job transfers or re-categorizations including:

(i) From SO to FPRS, BRS, ARS, or SRT Member;

(ii) From FPRS, to BRS, ARS or SRT Member;

(iii) From BRS to ARS or SRT Member;

(iv) From ARS to SRT Member;

(v) From SRT Member to ARS, BRS, FPRS or SO;

(vi) From ARS to BRS, FPRS, or SO;

(vii) From BRS to FPRS or SO;

(viii) From FPRS to SO; and

(ix) From PF to other assignments.

(2) For downward re-categorizations in paragraphs (d)(1)(v) through (ix) of this section, the anticipated transfer notification must include appropriate additional information such as the apparent inability of the employee to perform essential functions, meet physical readiness standards, or to serve without posing a direct threat to self or others.

(e) The Designated Physician must notify the PPMD to ensure appropriate medical review can be made regarding any recommended or required changes to the PF member's status.

§ 1046.20 Medical records maintenance requirements.

(a) The Designated Physician must maintain all medical information for each employee or applicant as a confidential medical record, with the exception of the psychological record. The psychological record is part of the medical record but must be stored separately, in a secure location in the custody of the evaluating psychologist. These records must be kept in accordance with the appropriate DOE Privacy Act System of Records, available at *http://energy.gov/sites/prod/files/maprod/documents/FinalPASORNCompilation.1.8.09.pdf*.

(b) Nothing in this part is intended to preclude access to these records according to the requirements of other parts of this or other titles. Medical records maintained under this section may not be released except as permitted or required by law.

(c) Medical records must be retained according to the appropriate DOE Administrative Records Schedule, available at: *http://energy.gov/sites/prod/files/cioprod/documents/ADM__1%281%29.pdf* (paragraph 21.1)

(d) When an individual has been examined by a Designated Physician, all available history and test results must be maintained by the Designated Physician under the supervision of the PPMD in the medical record, regardless of whether:

(1) The individual completes the examination;

(2) It is determined that the individual cannot engage in physical training or testing and cannot perform the essential functions of the job; or

(3) It is determined that the individual poses a direct threat to self or others.

(e) The Designated Physician must provide written work restrictions to the affected SPO/SO and PF management. PF management must develop, approve, implement, and operate according to site-specific plans based upon the PF contractor's operational and contract structure to ensure confidentiality of PF medical information. This plan must permit access only to those with a need to know specific information, and must identify those individuals by organizational position or responsibility. The plan must adhere to all applicable laws and regulations, including but not limited to the Privacy Act of 1974, the Health Insurance Portability and Accountability Act of 1996, the Family and Medical Leave Act of 1993, and the ADA, as amended by the ADAAA.

PART 1047—LIMITED ARREST AUTHORITY AND USE OF FORCE BY PROTECTIVE FORCE OFFICERS

GENERAL PROVISIONS

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AUTHORITY: Sec. 2201, Pub. L. 83–703, 68 Stat. 919 (42 U.S.C. 2011 *et seq.*); Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 *et seq.*).

SOURCE: 50 FR 30929, July 31, 1985, unless otherwise noted.

GENERAL PROVISIONS

§ 1047.1 Purpose.

The purpose of this part is to set forth Department of Energy (hereinafter ''DOE'') policy and procedures on the exercise of arrest authority and use of force by protective force personnel.

§ 1047.2 Scope.

This part applies to DOE and DOE contractor protective force personnel armed pursuant to section 161.k. of the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*) to protect nuclear weapons, special nuclear material, clasified matter, nuclear facilities, and related property.

§ 1047.3 Definitions.

(a) *Act* means section 161.k. of the Atomic Energy Act of 1954, as amended, (42 U.S.C. 2201.k.).

(b) *Arrest* means any act, including taking, seizing or detaining of a person, that indicates an intention to take a person into custody and that subjects

the person to the control of the person making the arrest.

(c) *Citizen's Arrest* means that type of arrest which can be made by citizens in general and which is defined in the statutory and case law of each state.

(d) *Contractor* means contractors and subcontractors at all tiers.

(e) *LLEA* means local law enforcement agencies: city, county; and state.

(f) *Offender* means the person to be arrested.

(g) *Protective Force Officer* means any person authorized by DOE to carry firearms under section 161.k. of the Atomic Energy Act of 1954.

(h) *Special Nuclear Material* (SNM) means: (1) Plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which DOE, pursuant to the provisions of Section 51 of the Atomic Energy Act of 1954, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

§ 1047.4 Arrest authority.

(a) Under the Act, the authority of a DOE protective force officer to arrest without warrant is limited to the performance of official duties and should be exercised only in the enforcement of:

(1) The following laws only if property of the United States which is in the custody of the DOE or its contractors is involved:

(i) *Felonies:* (A) Arson—18 U.S.C. 81—(only applicable to ''special maritime and territorial jurisdiction of the United States'' as defined by 18 U.S.C. 7).

(B) Building or property within special maritime and territorial jurisdiction—18 U.S.C. 1363—(only applicable to ''special maritime and territorial jurisdiction of United States'' as defined by 18 U.S.C. 7).

(C) Civil disorder—18 U.S.C. 231.

(D) Communication lines, stations or systems—18 U.S.C. 1362.

(E) Concealment, removal or mutilation generally—18 U.S.C. 2071.

(F) Conspiracy—18 U.S.C. 371—(violation of this section is a felony if the offense which is the object of the conspiracy is a felony).

(G) Destruction of motor vehicles or motor vehicle facilities—18 U.S.C. 33.

(H) Explosives—18 U.S.C. 844(f).

(I) Government property or contracts—18 U.S.C. 1361—(violation of section is a felony if property damage exceeds $100).

(J) Military, naval or official passes—18 U.S.C. 499—(pertains to forging or altering official passes).

(K) Personal property of the United States—18 U.S.C. 2112.

(L) Public money, property, or records—18 U.S.C. 641—(violation of section is a felony if the property value exceeds $100).

(M) Sabotage—18 U.S.C. 2151, 2153–2156.

(N) Violation under Physical Security Convention—18 U.S.C. 831.

(ii) *Misdemeanors:* (A) Conspiracy—18 U.S.C. 371—(violation of section is a misdemeanor if the offense which is the object of the conspiracy is a misdemeanor).

(B) Explosives—18 U.S.C. 844(g).

(C) Government property or contracts—18 U.S.C. 1361—(violation of section is a misdemeanor if the property damage does not exceed $100).

(D) Official badges, identification cards, other insignia—18 U.S.C. 701—(pertains to the manufacture, sale, and possession of official insignia).

(E) Public money, property or records—18 U.S.C. 641—(violation of section is a misdemeanor if the property value does not exceed $100).

(2) The following criminal provisions of the Atomic Energy Act:

(i) *Felonies:* (A) Section 222. Violation of Specific Sections—42 U.S.C. 2272.

(B) Section 223. Violation of Sections Generally. 42 U.S.C. 2273.

(C) Section 224. Communication of Restricted Data—42 U.S.C. 2274.

(D) Section 225. Receipt of Restricted Data—42 U.S.C. 2275.

(E) Section 226. Tampering with Restricted Data—42 U.S.C. 2276.

(ii) *Misdemeanors:* (A) Section 227. Disclosure of Restricted Data—42 U.S.C. 2277.

(B) Section 229. Trespass Upon Commission (DOE) Installations—42 U.S.C. 2278.

(C) Section 230. Photographing, etc., of Commission (DOE) Installations—42 U.S.C. 2278.b.

(b) *Felony Arrests.* A protective force officer is authorized to make an arrest for any felony listed in paragraph (a)(1)(i) or (a)(2)(i) of this section if the offense is committed *in the presence* of the protective force officer or if he or she has *reasonable grounds to believe* that the individual to be arrested has committed or is committing the felony.

(1) *In the presence of* means that the criminal act must have taken place in the physical presence of (under the observation of) the protective force officer. Knowledge of the existence of a criminal violation obtained in any other way (e.g., information from other persons) is not sufficient to permit an arrest under this part of the Act.

(2) *Reasonable grounds to believe* means that, at the moment of arrest, either the facts and circumstances within the knowledge of the protective force officer, or of which the protective force officer had reasonably trustworthy information, were sufficient to cause a prudent person to believe that the suspect had committed or was committing the offense.

(c) *Misdemeanor Arrest.* A protective force officer is authorized to make an arrest for any misdemeanor listed in paragraph (a)(1)(ii) or (a)(2)(ii) of this section if the offense is committed in the presence of the protective force officer.

(d) *Other Authority.* The Act does not provide authority to arrest for violations of state criminal statutes or for violations of federal criminal statutes other than those listed in paragraph (a) of this section. Therefore, arrests for violations of such other criminal statutes shall be made by other peace officers (e.g., U.S. Marshals or Federal Bureau of Investigation (FBI) agents for federal offenses; LLEA officers for state or local offenses) unless:

(1) The protective force officer can make a citizen's arrest for the criminal offense under the law of the state,

(2) The protective force officer is an authorized state peace officer or otherwise deputized by the particular state to make arrests for state criminal offenses, or

(3) The protective force officer has been deputized by the U.S. Marshals Service or other federal law enforcement agency to make arrests for the criminal offense.

(e) In those locations which are within the ''special maritime and territorial jurisdiction of the United States,'' as defined in 18 U.S.C. 7, the Assimilative Crimes Act (18 U.S.C. 13) adopts the law of the state for any crime under state law not specifically prohibited by Federal statute and provides for federal enforcement of that state law. The local DOE Office of Chief Counsel, in coordination with contractor legal counsel, as appropriate, shall provide guidance in this matter.

§ 1047.5 Exercise of arrest authority—general guidelines.

(a) In making an arrest, the protective force officer should announce his or her authority (e.g., ''Security Officer'') and that the person is under arrest prior to taking the person into custody. If the circumstances are such that making such announcements would be useless or dangerous to the officer or others, the protective force officer may dispense with these announcements.

(b) The protective force officer at the time and place of arrest may search any arrested person for weapons and criminal evidence and the area into which the arrested person might reach for a weapon or to destroy evidence. Guidance on the proper conduct and limitations in scope of search and seizure of evidence shall be obtained from the local DOE Office of Chief Counsel, in coordination with contractor legal counsel, as appropriate.

(c) After the arrest is effected, the arrested person shall be advised of his or her constitutional right against self-incrimination (Miranda warnings). If the circumstances are such that making such advisement is dangerous to the officer or others, this requirement may be postponed until the immediate danger has passed.

(d) Custody of the person arrested should be transferred to other federal law enforcement personnel (i.e., U.S. Marshals or FBI agents) or to LLEA personnel, as appropriate, as soon as practicable. The arrested person should not be questioned or required to sign written statements unless:

(1) Questioning is necessary for security or safety reasons (e.g., questioning to locate a bomb), or

(2) Questioning is authorized by other federal law enforcement personnel or LLEA officers responsible for investigating the crime.

§ 1047.6 Use of physical force when making an arrest.

(a) When a protective force officer has the right to make an arrest as discussed above, the protective force officer may use only that physical force which is reasonable and necessary to apprehend and arrest the offender; to prevent the escape of the offender; or to defend himself or herself or a third person from what the protective force officer believes to be the use or threat of imminent use of physical force by the offender. It should be noted that verbal abuse alone by the offender cannot be the basis under any circumstances for use of physical force by a protective force officer.

(b) Protective force officers shall consult the local DOE Office of Chief Counsel and contractor legal counsel, as appropriate, for additional guidance on use of physical force in making arrests.

§ 1047.7 Use of deadly force.

(a) Deadly force means that force which a reasonable person would consider likely to cause death or serious bodily harm. Its use may be justified only under conditions of extreme necessity, when all lesser means have failed or cannot reasonably be employed. A protective force officer is authorized to use deadly force only when one or more of the following circumstances exists:

(1) *Self-Defense*. When deadly force reasonably appears to be necessary to protect a protective force officer who reasonably believes himself or herself to be in imminent danger of death or serious bodily harm.

(2) *Serious offenses against persons*. When deadly force reasonably appears to be necessary to prevent the commission of a serious offense against a person(s) in circumstances presenting an imminent danger of death or serious bodily harm (e.g. sabotage of an occupied facility by explosives).

(3) *Nuclear weapons or nuclear explosive devices*. When deadly force reasonably appears to be necessary to prevent the theft, sabotage, or unauthorized control of a nuclear weapon or nuclear explosive device.

(4) *Special nuclear material*. When deadly force reasonably appears to be necessary to prevent the theft, sabotage, or unauthorized control of special nuclear material from an area of a fixed site or from a shipment where Category II or greater quantities are known or reasonably believed to be present.

(5) *Apprehension*. When deadly force reasonably appears to be necessary to apprehend or prevent the escape of a person reasonably believed to: (i) have committed an offense of the nature specified in paragraphs (a)(1) through (a)(4)[1] of this section; or (ii) be escaping by use of a weapon or explosive or who otherwise indicates that he or she poses a significant threat of death or serious bodily harm to the protective force officer or others unless apprehended without delay.

(b) *Additional Considerations Involving Firearms*. If it becomes necessary to use a firearm, the following precautions shall be observed:

(1) A warning, e.g. an order to halt, shall be given, if feasible, before a shot is fired.

(2) Warning shots shall not be fired.

PART 1048—TRESPASSING ON STRATEGIC PETROLEUM RESERVE FACILITIES AND OTHER PROPERTY

Sec.

1048.1 Purpose.
1048.2 Scope.
1048.3 Unauthorized entry.
1048.4 Unauthorized introduction of weapons or dangerous materials.
1048.5 Violations.
1048.6 Posting.
1048.7 Applicability of other laws.

AUTHORITY: Sec. 662, Pub. L. No. 100–531, 102 Stat. 2652 (42 U.S.C. 7270b); section 6, Pub. L. No. 100–185, 101 Stat. 1280 (18 U.S.C. 3571(b)(5).

[1] These offenses are considered by the Department of Energy to pose a significant threat of death or serious bodily harm.

SOURCE: 56 FR 1910, Jan. 17, 1991, unless otherwise noted.

§ 1048.1 Purpose.

The regulations in this part are issued for the protection and security of: (a) The Strategic Petroleum Reserve (SPR), its storage or related facilities, and real property subject to the jurisdiction or administration, or in the custody of DOE under part B, title I of the Energy Policy and Conservation Act, *as amended* (42 U.S.C. 6231–6247) (EPCA); and (b) persons upon the SPR or other property subject to DOE jurisdiction under part B, title I of the EPCA.

§ 1048.2 Scope.

The regulations in this part apply to entry into or upon all SPR storage or related facilities, and real property subject to DOE jurisdiction or administration, or in its custody under part B, title I of the EPCA, which have been posted with a notice of the prohibitions and penalties contained in this part.

§ 1048.3 Unauthorized entry.

Unauthorized entry into or upon an SPR facility or real property subject to this part, without authorization, is prohibited.

§ 1048.4 Unauthorized introduction of weapons or dangerous materials.

Unauthorized carrying, transporting, introducing or causing to be introduced into or upon an SPR facility or real property subject to this part, of a dangerous weapon, explosive or other dangerous material likely to produce substantial injury or damage to persons or property, is prohibited.

§ 1048.5 Violations.

Willful unauthorized entry, or willful unauthorized introduction of weapons or dangerous materials into or upon real property subject to this part, constitutes a violation of these regulations. Violation of these regulations is a misdemeanor, and a person convicted of violating these regulations is subject to the maximum fine permitted by law, imprisonment for not more than one year, or both.

§ 1048.6 Posting.

Notices stating the pertinent prohibitions of §§ 1048.3 and 1048.4 and the penalties of § 1048.5 will be conspicuously posted at all entrances of each facility or parcel of real property subject to the regulations in this part, and at such intervals along the perimeters thereof as will provide reasonable assurance of notice to persons about to enter.

§ 1048.7 Applicability of other laws.

Nothing in this part shall be construed to affect the applicability of the provisions of State law or of any other Federal law.

[56 FR 1910, Jan. 17, 1991. Redesignated at 56 FR 48096, Sept. 24, 1991]

PART 1049—LIMITED ARREST AUTHORITY AND USE OF FORCE BY PROTECTIVE FORCE OFFICERS OF THE STRATEGIC PETROLEUM RESERVE

Sec.

1049.1 Purpose.
1049.2 Scope.
1049.3 Definitions.
1049.4 Arrest authority.
1049.5 Exercise of arrest authority—General guidelines.
1049.6 Exercise of arrest authority—Use of non-deadly force.
1049.7 Exercise of arrest authority—Use of deadly force.
1049.8 Training of SPR Protective Force Officers and qualification to carry firearms.
1049.9 Firearms and firearms incidents.
1049.10 Disclaimer.

AUTHORITY: 42 U.S.C. 7101 *et seq.*

SOURCE: 56 FR 58492, Nov. 20, 1991, unless otherwise noted.

§ 1049.1 Purpose.

The purpose of these guidelines is to set forth internal Department of Energy (DOE) security policies and procedures regarding the exercise of arrest authority and the use of force by DOE employees and DOE contractor and subcontractor employees while discharging their official duties pursuant to section 661 of the Department of Energy Organization Act.

§ 1049.2 Scope.

These guidelines apply to the exercise of arrest authority and the use of force, as authorized by section 661 of the Department of Energy Organization Act, as amended, 42 U.S.C. 7101 *et seq.*, by employees of DOE and employees of DOE's SPR security contractor and subcontractor. These policies and procedures apply with respect to the protection of:

(a) The SPR and its storage or related facilities; and

(b) Persons upon the SPR or its storage or related facilities.

§ 1049.3 Definitions.

(a) *Act* means sections 661 of the Department of Energy Organization Act, as amended, (42 U.S.C. 7270a).

(b) *Arrest* means an act resulting in the restriction of a person's movement, other than a brief consensual detention for purposes of questioning about a person's identity and requesting identification, accomplished by means of force or show of authority under circumstances that would lead a reasonable person to believe that he was not free to leave the presence of the officer.

(c) *Contractor* means a contractor or subcontractor at any tier.

(d) *Deadly force* means that force which a reasonable person would consider likely to cause death or serious bodily harm.

(e) *Protective Force Officer* means a person designated by DOE to carry firearms pursuant to section 661 of the Act.

(f) *SPR* means the Strategic Petroleum Reserve, its storage or related facilities, and real property subject to the jurisdiction or administration, or in the custody of the Department of Energy under part B of title I of the Energy Policy and Conservation Act (42 U.S.C. 6231–6247).

(g) *Suspect* means a person who is subject to arrest by a Protective Force Officer as provided in these guidelines.

§ 1049.4 Arrest authority.

(a) Under the Act, the authority of a DOE Protective Force Officer to arrest without warrant is to be exercised only in the performance of official duties of protecting the SPR and persons within or upon the SPR.

(b) A Protective Force Officer is authorized to make an arrest for a felony committed in violation of laws of the United States, or for a misdemeanor committed in violation of laws of the United States if the offense is committed in the officer's presence.

(c) A Protective Force Officer also is authorized to make an arrest for a felony committed in violation of laws of the United States if the Officer has reasonably grounds to believe that the felony has been committed, or that the suspect is committing the felony, and is in the immediate area of the felony or is fleeing the immediate area of the felony. ''Reasonable grounds to believe'' means that the facts and circumstances within the knowledge of the Protective Force Officer at the moment of arrest, and of which the Protective Force Officer has reasonably trustworthy information, would be sufficient to cause a prudent person to believe that the suspect had committed or was committing a felony.

§ 1049.5 Exercise of arrest authority—General guidelines.

(a) In making an arrest, and before taking a person into custody, the Protective Force Officer should:

(1) Announce the Protective Force Officer's authority (*e.g.*, by identifying himself as an SPR Protective Force Officer);

(2) State that the suspect is under arrest; and

(3) Inform the suspect of the crime for which the suspect is being arrested. If the circumstances are such that making these announcements would be useless or dangerous to the Officer or to another person, the Protective Force Officer may dispense with these announcements.

(b) At the time and place of arrest, the Protective Force Officer may search the person arrested for weapons and criminal evidence, and may search the area into which the person arrested might reach to obtain a weapon to destroy evidence.

(c) After the arrest is effected, the person arrested shall be advised of his constitutional right against self-incrimination (''*Miranda* warnings''). If the circumstances are such that immediately advising the person arrested of

this right would result in imminent danger to the Officer or other persons, the Protective Force Officer may postpone this requirement. The person arrested shall be advised of this right as soon as practicable after the imminent danger has passed.

(d) As soon as practicable after the arrest is effected, custody of the person arrested should be transferred to other Federal law enforcement personnel (*e.g.*, U.S. Marshals or FBI agents) or to local law enforcement personnel, as appropriate, in order to ensure that the person is brought before a magistrate without unnecessary delay.

(e) Ordinarily, the person arrested shall not be questioned or required to sign written statements unless such questioning is:

(1) Necessary to establish the identity of the person arrested and the purpose for which such person is within or upon the SPR;

(2) Necessary to avert an immediate threat to security or safety (*e.g.*, to locate a bomb); or

(3) Authorized by other Federal law enforcement personnel or local law enforcement personnel responsible for investigating the alleged crime.

§ 1049.6 Exercise of arrest authority—Use of non-deadly force.

(a) When a Protective Force Officer is authorized to make an arrest as provided in the Act, the Protective Force Officer may use only that degree of non-deadly force that is reasonable and necessary to apprehend and arrest the suspect in order to prevent escape or to defend the Protective Force Officer or other persons from what the Officer reasonably believes to be the use or threat of imminent use of non-deadly force by the suspect. Verbal abuse by the suspect, in itself, is not a basis for the use of non-deadly force by a Protective Force Officer under any circumstances.

(b) Protective Force Officers should consult the local DOE Office of Chief Counsel and contractor legal counsel for additional guidance on the use of non-deadly force in the exercise of arrest authority, as appropriate.

§ 1049.7 Exercise of arrest authority—Use of deadly force.

(a) The use of deadly force is authorized only under exigent circumstances where the Protective Force Officer reasonably believes that such force is necessary to:

(1) Protect himself from an imminent threat of death or from serious bodily harm;

(2) Protect any person or persons in or upon the SPR from an imminent threat of death or serious bodily harm.

(b) If circumstances require the use of a firearm by a Protective Force Officer, the Officer shall give a verbal warning (*e.g.*, an order to halt), if feasible. A Protective Force Officer shall not fire warning shots under any circumstances.

§ 1049.8 Training of SPR Protective Force Officers and qualification to carry firearms.

(a) Protective Force Officers shall successfully complete training required by applicable Department of Energy orders prior to receiving authorization to carry firearms. The Chief Health, Safety and Security Officer shall approve the course.

(b) Prior to initial assignment to duty, Protective Force Officers shall successfully complete a basic qualification training course which equips them with at least the minimum level of competence to perform tasks associated with their responsibilities. The basic course shall include the following subject areas:

(1) Legal authority, including use of deadly force and exercise of limited arrest authority;

(2) Security operations, including policies and procedures;

(3) Security tactics, including tactics for Protective Force Officers acting alone or as a group;

(4) Use of firearms, including firearms safety and proficiency with all types of weapons expected to be used;

(5) Use of non-deadly weapons, weapon-less self-defense, and physical conditioning;

(6) Use of vehicles, including vehicle safety in routine and emergency situations;

(7) Safety, first aid, and elementary firefighting procedures;

(8) Operating in such a manner as to preserve SPR sites and facilities;

(9) Communications, including methods and procedures.

(c) After completing training, and receiving the appropriate security clearance, Protective Force Officers shall be authorized to carry firearms and exercise limited arrest authority. Protective Force Officers shall receive an identification card, which must be carried whenever on duty and whenever armed.

(d) On an annual basis, each Protective Force Officer must successfully complete training sufficient to maintain at least the minimum level of competency required for the successful performance of all assigned tasks identified for Protective Force Officers.

(e) Protective Force Officers shall be qualified in the use of firearms by demonstrating proficiency in the use of firearms on a semiannual basis prior to receiving authorization to carry firearms. Protective Force Officers shall demonstrate proficiency in the use of all types of weapons expected to be used while on duty under both day and night conditions. In demonstrating firearms proficiency, Protective Force Officers shall use firearms of the same type and barrel length as firearms used by Protective Force Officers while on duty, and the same type of ammunition as that used by Protective Force Officers on duty. Before a Protective Force Officer is qualified in the use of firearms, the Officer shall complete a review of the basic principles of firearms safety.

(f) Protective Force Officers shall be allowed two attempts to qualify in the use of firearms. Protective Force Officers shall qualify in the use of firearms within six months of failing to qualify. If an Officer fails to qualify, the Officer shall complete a remedial firearms training program. A Protective Force Officer who fails to qualify in the use of firearms after completion of a remedial program, and after two further attempts to qualify shall not be authorized to carry firearms or to exercise limited arrest authority.

[56 FR 58492, Nov. 20, 1991, as amended at 71 FR 68738, Nov. 28, 2006]

§ 1049.9 Firearms and firearms incidents.

(a) Protective Force Officers shall receive firearms of a type suitable to adequately protect persons and property within or upon the SPR. Firearms and ammunition shall be secured, inventoried, and maintained in accordance with applicable Department of Energy orders, when not in use.

(b) The authority of a Protective Force Officer to carry firearms and to exercise limited arrest authority shall be suspended if the Officer participates in an incident involving the use of firearms. In such circumstances, the Officer shall be assigned to other duties, pending completion of an investigation.

(c) Incidents involving the discharge of firearms shall be reported to the Department of Energy Headquarters Emergency Operations Center immediately, and to the SPR Project Management Office Security Division within 24 hours. The Strategic Petroleum Reserve Project Manager shall appoint a committee to investigate the incident.

§ 1049.10 Disclaimer.

These guidelines are set forth solely for the purpose of internal Department of Energy guidance. These guidelines do not, and are not intended to, and may not be relied upon to, create any substantive or procedural rights enforceable at law by any party in any matter, civil or criminal. These guidelines do not place any limitations on otherwise lawful activities of Protective Force Officers or the Department of Energy.

PART 1050—FOREIGN GIFTS AND DECORATIONS

Subpart A—General

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Subpart D—Gifts to Foreign Individuals

1050.401 Prohibition against use of appropriated funds.

APPENDIX I TO PART 1050—DOE FORM 3735.2—FOREIGN GIFTS STATEMENT

APPENDIX II TO PART 1050—DOE FORM 3735.3—FOREIGN TRAVEL STATEMENT

AUTHORITY: The Constitution of the United States, Article I, Section 9; 5 U.S.C. 7342; 22 U.S.C. 2694; 42 U.S.C. 7254 and 7262; 28 U.S.C. 2461 note.

SOURCE: 45 FR 53972, Aug. 13, 1980, unless otherwise noted.

Subpart A—General

§ 1050.101 Purpose and scope.

These regulations implement the provisions of the Foreign Gifts and Decorations Act (5 U.S.C. 7342), which establishes policies and procedures pertaining to the acceptance, use, and disposition of gifts or decorations from foreign governments. If an employee of Department of Energy (DOE) meets the requirements of these regulations, he or she is deemed to be in compliance with the DOE Conduct of Employees regulations, 10 CFR part 1010.

§ 1050.102 Applicability.

These regulations apply to all DOE employees, including special Government employees, and civilian and military personnel of other Government agencies regularly detailed to DOE, and to spouses and dependents of such personnel. These regulations apply to all employees of the Federal Energy Regulatory Commission (FERC) to the extent the Commission by rule makes these regulations applicable to FERC employees. These regulations do not apply to gifts and bequests accepted by the Department as authorized by section 652 of the Department of Energy Organization Act (42 U.S.C. 7262), except as set forth in § 1050.202(d) of this part. These regulations do not apply to assistance from a foreign government for participation by DOE employees in foreign cultural exchange programs pursuant to the Mutual Educational and Cultural Exchange Act (22 U.S.C. 2458a).

§ 1050.103 Definitions.

(a) *Employee* means—

(1) An employee of DOE or FERC as defined by 5 U.S.C. 2105 (employees of DOE contractors are specifically excluded);

(2) A special Government employee as defined in 18 U.S.C. 202(a), and an expert or consultant who is under contract to the DOE pursuant to 5 U.S.C. 3109, including, in the case of an organization performing services under such section, any individual involved in the performance of such services;

(3) A member of a Uniformed Service or an employee of another Government agency assigned or detailed to the DOE or FERC;

(4) The spouse of an individual described in paragraphs (a)(1) through (a)(3) of this section (unless such individual and his or her spouse are legally separated) or a dependent (within the meaning ot section 152 of the Internal Revenue Code of 1954) of such an individual, other than a spouse or dependent who is an employee under paragraphs (a)(1) through (a)(3).

(b) *Foreign government* means:

(1) Any unit of foreign governmental authority, including any foreign national, State, local, or municipal government;

(2) Any international or multinational organization whose membership is composed of any unit of foreign government described in paragraph (b)(1); and

(3) Any agent or representative of any such unit or such organization, while acting as such.

(c) *Gift* means a tangible or intangible present (other than a decoration) tendered by, or received from, a foreign government.

(d) *Decoration* means an order, device, medal, badge, insignia, emblem, or award tendered by, or received from, a foreign government.

(e) *Minimal value* means that value as defined in regulations prescribed by the Administrator of General Services, in consultation with the Secretary of State, to reflect changes in the consumer price index for the immediately preceding 3-year period in accordance with the definition of ''minimal value'' as set forth in the Federal Property Management Regulations of title 41 of the Code of Federal Regulations as applied to the Utilization, Donation, and Disposal of Foreign Gifts and Decorations.

(f) *The Act* means the Foreign Gifts and Decorations Act, 5 U.S.C. 7342.

(g) *Appropriate General Counsel* means either the DOE General Counsel when the employee involved is an employee of that portion of the DOE which excludes FERC, or the FERC General Counsel when the employee involved is an employee of FERC.

[45 FR 53972, Aug. 13, 1980, as amended at 59 FR 44896, Aug. 31, 1994]

§ 1050.104 Responsibilities and authorities.

(a) The Director of Administration shall:

(1) Assure that all employees are given access to or a copy of the Act and these regulations;

(2) Maintain liaison with the Department of State and prepare Departmental reports to the Department of State consistent with the Act and these regulations;

(3) Provide advice and assistance on implementation of the act and these regulations, in coordination with the Assistant Secretary for International Affairs (IA) and the appropriate General Counsel;

(4) Collect and maintain for public inspection all employee statements submitted pursuant to these regulations;

(5) Arrange for independent appraisal of the value of gifts or decorations, upon the request of the General Services Administration or the Inspector General (or other appropriate DOE official); and

(6) Accept and maintain custody and make all determinations regarding the use and disposition of all gifts and decorations accepted by employees on behalf of the United States, in coordination with IA, the appropriate General Counsel, and, for gifts to the Secretary, Deputy Secretary or Under Secretary, the appropriate official in the Office of the Secretary.

(b) The Assistant Secretary for International Affairs (IA) shall assist the Directorate of Administration, where appropriate, in making determinations concerning the effects of the proposed acceptance, use, or disposition of a foreign gift or decoration on the foreign relations of the United States.

(c) The appropriate General Counsel shall assist the Directorate of Administration in matters relating to the interpretation and application of the Act, and these and any related regulations, and shall provide counseling and interpretation regarding the Act, and these and any related regulations, to employees.

(d) The Inspector General shall investigate suspected violations of these regulations pursuant to § 1050.303 below.

Subpart B—Guidelines for Acceptance of Foreign Gifts or Decorations

§ 1050.201 Policy against accepting foreign gifts or decorations.

(a) The Constitution of the United States, Article I, section 9, clause 8, provides that ''* * * no Person holding any Office of Profit or Trust under * * * [the United States], shall, without the consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any * * * foreign State.'' In the Foreign Gifts and Decorations Act the Congress consented to the acceptance by Federal employees of gifts and decorations with certain constraints and under certain procedures. Acceptance of any gift or decoration not consistent with this Act, the Department of Energy Organization Act, or the regulations in this part is prohibited.

(b) No employee shall request or otherwise encourage the tender of a gift or decoration from a foreign government. No employee shall accept a gift or decoration from a foreign government except as provided in §§ 1050.202 or 1050.203 of this part and in accordance with the additional procedures set

forth in §§ 1050.204 and 1050.301 of this part.

§ 1050.202 Allowable acceptance of gifts.

(a) An employee may accept and retain gifts from foreign governments where the gift is tendered or received as a souvenir or mark of courtesy, and is of minimal value. Initial responsibility for determining the value of a gift lies with the employee.

(b) Subject to the prior approval requirements described in § 1050.204(a) of this part, an employee may accept gifts of more than minimal value, tendered as a souvenir or mark of courtesy, where it appears that refusal of the gift would likely cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States. Otherwise, an employee, when offered a gift of more than minimal value from a foreign government, other than a gift designated in paragraph (c) of this section, should advise the donor that acceptance of such gifts by the employee is contrary to the policy of the United States. If a gift described in this paragraph is accepted by an employee and not immediately returned thereby, it shall be deemed to have been accepted on behalf of the United States. Upon acceptance it becomes the property of the United States. Within 60 days after acceptance by the employee, the gift shall be deposited with the Directorate of Administration for disposal or official Departmental use as determined by the Directorate of Administration, in accordance with § 1050.302 of this part, and an appropriate statement shall be filed by the employee in accordance with § 1050.301(a) of this part.

(c) Subject to the prior approval requirements described in § 1050.204(a) of this part, an employee may accept and retain gifts of more than minimal value:

(1) Where the gift is in the nature of an educational scholarship.

(2) Where the gift is in the form of medical treatment.

An employee accepting a gift pursuant to this paragraph shall file an appropriate statement in accordance with § 1050.301(a) of this part.

(d) An employee may accept gifts (whether or not of minimal value) of travel or expenses for travel (such as transportation, food, lodging, or entertainment) taking place entirely outside of the United States where the provision of such travel or expenses is in accordance with diplomatic custom or treaty and where the Head of the employee's Office grants prior written approval. A spouse or dependent may accept gifts of travel or travel expenses when accompanying the employee, provided this is done with the prior written approval of the Head of the employee's Office. The Head of the employee's Office shall consult with the appropriate General Counsel in connection with granting approval under this paragraph. Travel or expenses for travel may not be accepted merely for the personal benefit, pleasure, enjoyment, or financial enrichment of the individual involved. An appropriate statement shall be filed in accordance with § 1050.301(b) of this part. When *any portion* of the travel (such as the origination or termination of a flight) is within the United States, it may not be paid for by a foreign government, except as set forth in paragraph (e) of this section.

(e) Pursuant to section 652 of the DOE Organization Act, an employee may accept gifts from the International Atomic Energy Agency or other energy-related international organizations (e.g., the Nuclear Energy Agency and the International Energy Agency) covering transportation expenses to or from a foreign country in connection with scientific or technical assistance projects of such agencies for which the Department of Energy has lead U.S. Government agency responsibility. Such gifts may be accepted only with the prior written approval of the Head of the employee's Office, who is hereby delegated authority to accept such gifts in accordance with section 652.

§ 1050.203 Acceptance of decorations.

(a) An employee may accept, retain and wear a decoration tendered by a foreign government in recognition of active field service in time of combat

operations or awarded for other outstanding or unusually meritorious performance.

(b) Acceptance of a decoration in accordance with paragraph (a) of this section shall be reviewed and approved by the Directorate of Administration in accordance with § 1050.204 of this part. Otherwise, it will be deemed to have been accepted on behalf of the United States, shall become the property of the United States, and shall be deposited, within 60 days of acceptance, with the Directorate of Administration for disposal or official Departmental use as determined by the Directorate of Administration in accordance with § 1050.302 of this part.

§ 1050.204 Advance approval for acceptance of gifts or decorations.

(a) If an employee is advised that a gift of more than minimal value as described in § 1050.202 (b) or (c) is to be tendered to him or her, the employee shall, if time permits, request the written advice of the Directorate of Administration regarding the appropriateness of accepting or refusing the gift. A request for approval shall be submitted to the Directorate of Administration in writing, stating the nature of the gift and the reasons for which it is being tendered. The Directorate of Administration shall consult with Assistant Secretary for International Affairs and the appropriate General Counsel in connection with advising the employee. If such advice cannot be obtained and refusal of the gift would likely cause offense or embarrassment or otherwise adversely effect the foreign relations of the United States, the gift may be accepted, but the Directorate of Administration shall be informed as soon as possible. In either event, the employee shall proceed as provided in §§ 1050.202 and 1050.301 of this part.

(b) Where an employee is notified of the intent of a foreign government to award him a decoration for outstanding or unusually meritorious service, approval required under § 1050.203 should be obtained prior to acceptance of the award. A request for approval shall be submitted to the Directorate of Administration in writing, stating the nature of the decoration and the reasons for which it is being awarded. The Directorate of Administration shall consult with the Assistant Secretary for International Affairs and the appropriate General Counsel. If time does not permit the employee to obtain approval for the award of the decoration before its receipt, the employee may accept it, but shall seek such approval immediately thereafter.

Subpart C—Procedures and Enforcement

§ 1050.301 Reports.

(a) Within 60 days of accepting a gift of more than minimal value, other than gifts of travel or travel expenses, which are covered in paragraph (b) of this section, an employee shall, in addition to depositing a tangible gift (e.g. wearing apparel, liquor, etc.) with the Directorate of Administration in accordance with § 1050.202 of this part, file with the Directorate of Administration a statement concerning the gift containing the information identified on the sample form set forth in appendix I. The form set forth in appendix I must also be filed if the aggregate value of gifts accepted by the recipient from all sources over any period of one year exceeds $250.

(b) Within 30 days after accepting travel or travel expenses in accordance with § 1050.202 of this part, an employee shall file with the Directorate of Administration a statement concerning the travel containing the information identified on the sample form set forth in appendix II. Such a statement need not be filed, however, if the travel is in accordance with specific travel arrangements made by the Department in cooperation with the foreign government.

(c) The Directorate of Administration shall:

(1) Maintain the statements filed pursuant to these regulations and make them available for public inspection and copying during regular business hours; and

(2) Not later than January 31 of each year compile and transmit to the Department of State for publication by the Department of State in the FEDERAL REGISTER a list of all statements

filed pursuant to these regulations during the preceding calendar year.

§ 1050.302 Use or disposal of gifts and decorations accepted on behalf of the United States.

(a) The Directorate of Administration shall accept and maintain custody of all tangible gifts and decorations accepted by employees on behalf of the United States pending their final disposition.

(b) Whenever possible, the gift or decoration shall be returned to the original donor. The Directorate of Administration shall examine the circumstances surrounding its donation, and, in consultation with the Assistant Secretary for International Affairs, assess whether any adverse effect upon the United States foreign relations might result from return of the gift or decoration to the donor. The appropriate officials of the Department of State shall be consulted if the question of an adverse effect arises.

(c) The Directorate of Administration may determine that the gift or decoration may be retained for the official use of the Department, if it can be properly displayed in an area at Headquarters or at a field facility accessible to employees or members of the public or if it is otherwise usable in carrying out the mission of the Department. The Assistant Secretary for International Affairs shall be consulted to determine whether failure to accept the gift or decoration for the official use of the Department will have an adverse effect on the foreign relations of the United States. In no case shall a gift or decoration be accepted for the official use of the Department when the enjoyment and beneficial use of the gift will accrue primarily to the benefit of the donee or any other individual employee. Gifts or decorations that are retained for the official use of the Department shall be handled in accordance with the provisions of paragraph (d) of this section when their official use is ended.

(d) If a gift or decoration is not retained for official use of the Department, or if its official use has ended, the Directorate of Administration shall, within 30 days after its deposit or after its official use has ended—

(1) Report the gift or decoration to the General Services Administration (GSA) for transfer, donation, or other disposal in accordance with the provisions of the Federal Property and Administrative Services Act of 1949 and the Federal Property Management Regulations at 41 CFR part 101–49, or

(2) If the gift or decoration is in cash, currency, or monies (except those with possible historic or numismatic value), or is a noncash monetary gift such as a check, money order, bonds, shares of stock, or other negotiable instrument, forward it to the Finance and Accounting Office for deposit with the Department of the Treasury.

(e) The Directorate of Administration shall retain custody of gifts and decorations not returned to the donor or retained for the official use of the Department until GSA directs it concerning their disposition. At the request of GSA, the Directorate of Administration shall arrange for appraisal of specific gifts and decorations.

§ 1050.303 Enforcement.

(a) An employee who violates the provisions of the Act or these regulations may be subject to disciplinary action or civil penalty action as set forth in paragraphs (c) and (d) of this section.

(b) Suspected violations of the Act or these regulations shall be reported promptly to the appropriate General Counsel and the Inspector General.

(c) The Inspector General will be responsible for taking the following actions:

(1) If the results of an investigation by the Inspector General do not provide any support for a determination that a violation of the Act or these regulations has occurred, then no further action shall be taken.

(2) If it is determined that the employee knowingly and through actions within his own control has done any of the following, the matter shall be referred to the Attorney General for appropriate action:

(i) Solicited or accepted a gift from a foreign government in a manner inconsistent with the provisions of the Act and these regulations;

(ii) As the approved recipient of travel expenses failed to follow the procedures set forth in the Act and these regulations; or

(iii) Failed to deposit or report a gift as required by the Act and these regulations.

(3) If it is determined that the employee failed to deposit a tangible gift with the Directorate of Administration within 60 days, or to account properly for acceptance of travel expenses, or to comply with the requirements of these regulations relating to the disposal of gifts and decorations retained for official use, but that the criteria of knowledge and control specified in paragraph (c)(2) of this section for referral to the Attorney General have not been met, then the matter shall be referred by the Inspector General to appropriate Departmental officials for administrative action.

(d) As set forth in section 7342(h) of title 5, United States Code, the Attorney General may bring a civil action in any district court of the United States against any employee who knowingly solicits or accepts a gift from a foreign government not consented to by the Act, or who fails to deposit or report such gift as required by the Act. The court in which such action is brought may assess a civil penalty against such employee in any amount not to exceed the retail value of the gift improperly solicited or received plus $9,000.

[45 FR 53972, Aug. 13, 1980, as amended at 62 FR 46184, Sept. 2, 1997; 74 FR 66034, Dec. 14, 2009; 79 FR 20, Jan. 2, 2014]

Subpart D—Gifts to Foreign Individuals

§ 1050.401 Prohibition against use of appropriated funds.

No appropriated funds other than funds from the ''Emergencies in the Diplomatic and Consular Service'' account of the Department of State may be used to purchase any tangible gift of more than minimal value for any foreign individual unless such gift has been approved by the Congress.

[59 FR 44896, Aug. 31, 1994]

APPENDIX I TO PART 1050—DOE FORM 3735.2—FOREIGN GIFTS STATEMENT

DOE F 3735.2
(8-80)

APPENDIX I

U.S. DEPARTMENT OF ENERGY
FOREIGN GIFTS STATEMENT
(Statement Concerning Gifts
Received from a Foreign Government)

1. Name of Employee	2. Date
3. Division	4. Position
5. Name of Recipient	6. Relationship to Employee
7. Description of Gift	
8. Date of Acceptance	9. Value of Gift
10. Circumstances Justifying Acceptance of the Gift	
11. Foreign Government Donor	
12a. Name of Individual Presenting Gift	12b. Position of Individual Presenting Gift
13. Do you wish to participate in the sale of this item if it is sold by GSA? ☐ Yes ☐ No	
Signature of Recipient	Date

STATEMENT CONCERNING GIFTS RECEIVED FROM A FOREIGN GOVERNMENT

Item 1. This statement is to be filed pursuant to the provisions of the Foreign Gifts and Decorations Act (5 U.S.C. 7342, as amended by Pub. L. 95–105, August 17, 1977) and DOE implementing regulations at 10 CFR part 1050. These provisions apply to foreign gifts tendered to or accepted by Federal employees *and* their spouses and dependents. The name of the employee should always be indicated in item 1; if the employee is the recipient of the gift then items 5 and 6 should be marked N/A-not applicable; if the recipient is a spouse or dependent, then the appropriate information should be included in items 5 and 6.

Item 2. Self explanatory.

Items 3 and 4. The Office or Division and the position of the employee should be indicated here regardless of whether the recipient is the employee or a spouse or dependent.

Items 5 and 6. See above, Item 1.

Item 7. Self explanatory.

Item 8. Self explanatory.

Item 9. Indicate the retail value in the United States at the time of acceptance. If there is any uncertainty as to the value of the gift, it is the recipient's responsibility to make a reasonable effort to determine value. If the value is $100 or under, and if the aggregate value of the gifts accepted by the recipient from all sources over any period of one year does not exceed $250, then the gift may be retained by the recipient and this Statement need not be submitted.

Item 10. Identify in this item whether or not approval to accept the gift was sought or given in advance in accordance with § 1050.204 of the DOE regulations. Also identify those circumstances supporting a determination that refusal of the gift would likely cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States.

Items 11 and 12. Self explanatory.

Item 13. Though there is no assurance that the item will be sold or if it is sold that it will be feasible for the recipient to participate in the sale, GSA regulations provide for participation by the recipient where feasible.

APPENDIX II TO PART 1050—DOE FORM 3735.3—FOREIGN TRAVEL STATEMENT

DOE F 3735.3
(8-80)

APPENDIX II

U.S. DEPARTMENT OF ENERGY
FOREIGN TRAVEL STATEMENT
(Statement Concerning Acceptance of Travel or Travel Expenses from a Foreign Government)

1. Name of Employee	2. Date
3. Division	4. Position
5. Name of Recipient	6. Relationship to Employee
7a. Description of Transportation Provided: Approximate Value	7b. Description of Other Travel Expenses Provided: Approximate Value $
8 .Date of Acceptance	9. Total Value of Transportation and Expenses Provided $
10. Nature of Employee's Official Business Related to Travel:	
11. Circumstances Justifying Acceptance:	
12. Foreign Government Donor	
13a. Name of Individual Responsible for Payment of Travel or Travel Expenses	13b. Position of Individual Responsible
Signature of Recipient	

STATEMENT CONCERNING ACCEPTANCE OF TRAVEL OR TRAVEL EXPENSES FROM A FOREIGN GOVERNMENT

Item 1. This statement is to be filed pursuant to the provisions of the Foreign Gifts and Decorations Act (5 U.S.C. 7342, as amended by Pub. L. 95–105, August 17, 1977) and DOE implementing regulations at 10 CFR part 1050. These provisions apply to travel or travel expenses for travel *entirely outside* of the United States[1] tendered to or accepted by Federal employees and their spouses and dependents. The name of the employee should always be indicated in item 1; if the employee is the recipient of the travel or travel expenses, then items 5 and 6 should be marked N/A-not applicable; if the recipient is a spouse or dependent, then the appropriate information should be included in items 5 and 6.

Item 2. Self explanatory.

Items 3 and 4. The Office or Division of the employee should be indicated here regardless of whether the recipient is the employee or a spouse or dependent.

Items 5 and 6. See above, Item 1.

Item 7a. Indicate the location and mode of transportation and approximate value in U.S. dollars, if possible. Attach itinerary if available.

Item 7b. Indicate nature and location of travel expenses provided and approximate value in U.S. dollars, if possible. Attach itinerary if available.

Item 8. Indicate dates of travel.

Item 9. Self explanatory.

Item 10. Travel and travel expenses may be accepted in accordance with DOE regulations where the travel is official agency business. Spouses and dependents may accept such travel and expenses only when accompanying the employee. Item 10 therefore should be completed to identify the *employee's* official business whether the recipient is an employee or a spouse or dependent.

Item 11. Identify in this item any treaty or diplomatic custom that related to acceptance of the travel or expenses, and any circumstances indicating that acceptance would be consistent with the interests of the U.S. Also provide information regarding any prior approval of the acceptance.

Items 12, 13a, and 13b. Self explanatory.

[1]The Congress has consented in Pub. L. 95–105 only to acceptance of travel or travel expenses that is *entirely outside* of the United States. Travel, *any portion* of which (such as the origination or termination of a flight) is within the United States, may not be paid for by a foreign government. All such travel must be handled within applicable DOE Travel Regulations and Standards of Conduct Regulations.

PART 1060—PAYMENT OF TRAVEL EXPENSES OF PERSONS WHO ARE NOT GOVERNMENT EMPLOYEES

Sec.

1060.101 Persons who may be paid.
1060.201 Relatives, contractors, and assistance award recipients.
1060.301 Government employees.
1060.401 Applicability of internal DOE rules.
1060.501 Definitions.

AUTHORITY: Sec. 644, Pub. L. 95–91, 91 Stat. 599 (42 U.S.C. 7254).

SOURCE: 46 FR 35631, July 10, 1981, unless otherwise noted.

§ 1060.101 Persons who may be paid.

(a) Payment may not be authorized or approved for transportation, lodging, subsistence, or other travel expenses from DOE funds to, or on behalf of, a person who is not a Government employee unless such payment is made—

(1) Pursuant to an invitation received by that person from the Department to confer with a DOE employee on matters essential to the advancement of DOE programs or objectives and (i) in the case of a person invited to confer at the post of duty of the conferring DOE employee, a designated official has approved and stated the reasons for the invitation in writing, or (ii) in the case of a person invited to confer at a place other than the post duty of the conferring DOE employee, a principal departmental official has approved and stated the reasons for the invitation in writing;

(2) Pursuant to an invitation for an interview to a prospective employee of the Department who is an applicant for (i) a position in the Department classified at GS–16 or above of the General

Schedule or the rate of basic pay for which is fixed, other than under the General Schedule, at a rate equal to or greater than the minimum rate of basic pay fixed for GS–16, (ii) a position for which a determination has been made that there is a manpower shortage pursuant to 5 U.S.C. 5723, or (iii) a DOE position for which the Department has the exclusive duties of recruitment and selection;

(3) In accordance with 28 U.S.C. 1821 or other applicable law, to a person who is subpoenaed by the Department to appear and testify or to appear and to produce documents at a designated place;

(4) To a person who serves as a travel attendant for a handicapped individual who is authorized to travel at DOE expense and who cannot travel alone because of the handicap; or

(5) Pursuant to a written determination of a principal departmental officer that it is in the interest of the Government to provide such payment, where the Counselor has determined in writing that the payment is authorized under 5 U.S.C. ch. 57 or other statutory authority.

(b) The authority of a designated official or a principal departmental officer, as the case may be, to provide approval of an invitation to travel under paragraph (a)(1) and of a principal departmental officer to determine that payment of travel expenses is in the interest of the Government under paragraph (a)(5) of this section may not be delegated.

(c) Within 30 days of providing written approval of an invitation under paragraph (a)(1)(i) of this section, a designated official who is an Administrator of a power administration or the head of a Field Organization shall transmit a copy of the written approval to the principal departmental officer to whom the official or the official's organization reports.

(d) Payment of travel expenses may not be made pursuant to an invitation to travel under paragraphs (a)(1) or (a)(5) unless the written approval and statement of reasons required by paragraph (a)(1), or the written determinations required by paragraph (a)(5) of this section, are made before the travel to be authorized by the invitation takes place.

(e) Nothing in this section shall be interpreted to prohibit payment for travel expenses that are reimbursable or allowable by the Department under the terms of a DOE contract or assistance award.

§ 1060.201 Relatives, contractors, and assistance award recipients.

Notwithstanding any other provision in this part, a DOE employee may not authorize or approve, require another person to authorize or approve, or advocate the authorization or approval of, payment from DOE funds of travel expenses of a person who is not a Government employee and who is (a) the DOE employee's relative (except in the case of payment under § 1060.101(a)(4)), or (b) in the case of payment under § 1060.101(a)(1), a DOE contractor or a DOE assistance award recipient or the employee of a DOE contractor or a DOE assistance award recipient unless the travel expenses are incurred with respect to matters outside the scope of the contract or assistance award, as the case may be. (See also § 1060.101(e).)

§ 1060.301 Government employees.

Nothing in this part shall be interpreted as being applicable to authorization or approval of payment of travel expenses of Government employees, including DOE employees.

§ 1060.401 Applicability of internal DOE rules.

Payment of travel expenses under § 1060.101(a) (1) through (5) shall be subject to other Department rules relating to authorization of travel.

§ 1060.501 Definitions.

For purposes of this part—

(a) *Counselor* means the General Counsel of the Department or the General Counsel of the Federal Energy Regulatory Commission or their delegates, as appropriate.

(b) *Designated official* means (1) a principal departmental officer, (2) an individual who is appointed to a position in the Department by the President of the United States with the advice and consent of the Senate, (3) the

Administrator of a power administration, or (4) the head of a Field Organization.

(c) *DOE* or *Department* means the Department of Energy established by the Department of Energy Organization Act, section 201, Pub. L. 95–91 (42 U.S.C. 7131).

(d) *Employee* means—

(1) An employee as defined by 5 U.S.C. 2105;

(2) A special Government employee as defined in 18 U.S.C. 202(a);

(3) A member of a Uniformed Service.

(e) *Handicapped individual* means a person who has a physical or mental disability or health impairment, and includes an individual who is temporarily incapacitated because of illness or injury.

(f) *Principal departmental officer* means the Secretary, Deputy Secretary, or Under Secretary, or, in the case of the Federal Energy Regulatory Commission, the Chairman or Executive Director of the Commission.

(g) *Relative* means, with respect to a DOE employee, an individual who is related to the employee, by blood, marriage, or operation of law, as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandchild, grandparent, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, and shall also include the grandparent of an employee's spouse, an employee's fiance or fiancee, or any person residing in the employee's household.

PARTS 1061–1099 [RESERVED]