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# CODE OF FEDERAL REGULATIONS

# Title 10
## Energy

Part 500 to End

Revised as of January 1, 2017

Containing a codification of documents
of general applicability and future effect

As of January 1, 2017

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*Cite this Code:* CFR

*To cite the regulations in this volume use title, part and section number. Thus,* 10 CFR 500.1 *refers to title 10, part 500, section 1.*

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Title 1 through Title 16.....as of January 1
Title 17 through Title 27.....as of April 1
Title 28 through Title 41.....as of July 1
Title 42 through Title 50.....as of October 1

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An index to the text of ''Title 3—The President'' is carried within that volume.

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OLIVER A. POTTS,
*Director,*
*Office of the Federal Register.*
*January 1, 2017.*

## THIS TITLE

Title 10—ENERGY is composed of four volumes. The parts in these volumes are arranged in the following order: parts 1–50, 51–199, 200–499 and part 500–end. The first and second volumes containing parts 1–199 are comprised of chapter I—Nuclear Regulatory Commission. The third and fourth volumes containing part 200–end are comprised of chapters II, III and X—Department of Energy, chapter XIII—Nuclear Waste Technical Review Board, and chapter XVII—Defense Nuclear Facilities Safety Board. The contents of these volumes represent all current regulations codified under this title of the CFR as of January 1, 2017.

For this volume, Michele Bugenhagen was Chief Editor. The Code of Federal Regulations publication program is under the direction of John Hyrum Martinez, assisted by Stephen J. Frattini.

# Title 10—Energy

(This book contains part 500 to end)


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# SUBCHAPTER E—ALTERNATE FUELS

## PART 500—DEFINITIONS

Sec.
500.1 Purpose and scope.
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500.3 Electric regions—electric region groupings for reliability measurements under the Powerplant and Industrial Fuel Use Act of 1978.

AUTHORITY: Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. §7101 *et seq.*); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3289 (42 U.S.C. 8301 *et seq.*); Energy Security Act, Pub. L.96–294, 94 Stat. 611 (42 U.S.C. 8701 *et seq.*); E.O. 1209, 42 FR 46267, September 15, 1977.

SOURCE: 46 FR 59884, Dec. 7, 1981, unless otherwise noted.

(OMB Control No.: 1903–0075. See 46 FR 63209, Dec. 31, 1981.)

### § 500.1 Purpose and scope.

Unless otherwise expressly provided or the context clearly indicates otherwise, this section defines the terms used in these regulations. The use of the male gender is to include female; the use of singular to include plural.

### § 500.2 General definitions.

For purposes of this part and parts 501–507 term(s):

*Act* means Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. 8301 *et seq.*

*Action* means a prohibition by rule or order, in accordance with sections 301(b) and (c) of FUA; any order granting or denying an exemption in accordance with sections 211, 212, 311 and 312 of FUA; a modification or rescission of any such order, or rule; an interpretation; a notice of violation; a remedial order; an interpretive ruling; or a rulemaking undertaken by DOE.

*Affiliate*, when used in relation to person, means another person who controls, is controlled by, or is under common control, with such person.

*Aggrieved*, for purposes of administrative proceedings, describes and means a person (with an interest sought to be protected under FUA) who is adversely affected by an action proposed or undertaken by DOE.

*Air pollution control agency* means any of the following:

(1) A single State agency designated as the official State air pollution control agency;

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution;

(3) A city, county, or other local government health authority or, in the case of any city, county, or other local unit of government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency; or

(4) An agency or two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

*Alternate fuel* means electricity or any fuel, other than natural gas or petroleum. The term includes, but is not limited to :

(1) Coal;

(2) Solar energy;

(3) Petroleum coke; shale oil; uranium; biomass, tar sands, oil-impregnated diatomaceous earth; municipal, industrial, or agricultural wastes; wood; and renewable and geothermal energy sources (For purposes of this paragraph (3), the term *industrial* does not include refineries.);

(4) Liquid, solid or gaseous waste by-products of refinery or industrial operations which are commercially unmarketable, either by reason of quality or quantity. (For purposes of this paragraph (4), the term *waste by-product* is defined as an unavoidable by-product of the industrial or refinery operation.) A waste by-product of a refinery or industrial operation is commercially unmarketable if it meets the criteria listed in the definition of ''commercial unmarketability,'' set forth below;

(5) Any fuel derived from an alternate fuel; and

(6) Waste gases from industrial operations. (For purposes of this subsection, the term *industrial* does not include refineries.)

*Applicable environmental requirements* includes:

(1) Any standard, limitation, or other requirement established by or pursuant to Federal or State law (including any final order of any Federal or State Court) applicable to emissions of environmental pollutants (including air and water pollutants) or disposal of solid waste residues resulting from the use of coal or other alternate fuels, natural gas, or petroleum as a primary energy source or from the operation of pollution control equipment in connection with such use, taking into account any variance of law granted or issued in accordance with Federal law or in accordance with State law to the extent consistent with Federal law; and

(2) Any other standard, limitation, or other requirement established by, or pursuant to, the Clean Air Act, the Federal Water Pollution Control Act, the Solid Waste Disposal Act, the Resource Conservation and Recovery Act of 1976, or the National Environmental Policy Act of 1969.

*Base load powerplant* means a powerplant, the electrical generation of which in kilowatt hours exceeds, for any 12-calendar-month period, such powerplant's design capacity multiplied by 3,500 hours.

*Boiler* means a closed vessel in which water is heated electrically or by the combustion of a fuel to produce steam of one percent or more quality.

*Btu* means British thermal unit.

*Capability to use alternate fuel*, for the purposes of Title II prohibitions relating to construction of new powerplants, means the powerplant to be constructed:

(1) Has sufficient inherent design characteristics to permit the addition of equipment (including all necessary pollution devices) necessary to render such electric powerplant capable of using coal or another alternate fuel as its primary energy source; and

(2) Is not physically, structurally, or technologically precluded from using coal or another alternate fuel as its primary energy source.

Capability to use coal or another alternate fuel shall not be interpreted to require any such powerplant to be immediately able to use coal or another alternate fuel as its primary energy source on its initial day of operation. In addition, the owner or operator of a baseload powerplant need not have adequate on-site space for either a coal gasifier or any facilities for handling coal or related fuels.

*Certification* means a document, signed by an official of the owner or operator, notarized, and submitted to OFE, which declares that a new powerplant will have the ''capability to use alternate fuel'' (as defined herein).

*Certifying powerplant* means an existing powerplant whose owner or operator seeks to obtain a prohibition order against the use of natural gas or petroleum either totally or in a mixture with coal or an alternate fuel by filing a certification as to both the technical capability and financial feasibility of conversion to coal or another alternate fuel pursuant to section 301 of FUA, as amended.

*Clean Air Act* means the Clean Air Act, 42 U.S.C. 7401 *et seq*. (1970), as amended by Public Law 93–319, 88 Stat. 246, and Public Law 95–91, 91 Stat. 685.

*Coal* means anthracite, bituminous and sub-bituminous coal, lignite, and any fuel derivative thereof.

*Cogeneration facility* means an electric powerplant that produces:

(1) Electric power; and

(2) Any other form of useful energy (such as steam, gas or heat) that is, or will be used, for industrial, commercial, or space heating purposes. In addition, for purposes of this definition, electricity generated by the cogeneration facility must constitute more than five (5) percent and less than ninety (90) percent of the useful energy output of the facility.

NOTE: Any cogeneration facility selling or exchanging less than fifty percent (50%) of the facility's generated electricity is considered an industrial cogenerator and is exempt from the fuel use prohibitions of FUA.

*Combined cycle unit* means an electric power generating unit that consists of a combination of one or more combustion turbine units and one or more steam turbine units with a substantial portion of the required energy input of the steam turbine unit(s) provided by the exhaust gas from the combustion turbine unit(s).

Substantial amounts of supplemental firing for a steam turbine or waste heat

boiler to improve thermal efficiency will not affect a unit's classification as a combined cycle unit.

*Combustion turbine* means a unit that is a rotary engine driven by a gas under pressure that is created by the combustion of any fuel.

*Commercial unmarketability* as used in the definitions of ''alternate fuel,'' ''natural gas'' and ''petroleum'' shall be determined as follows:

(1) A waste by-product of industrial or refinery operations is commercially unmarketable by reason of:

(i) Quality, where the cost of processing (limited to upgrading the waste by-product to commercial quality), storing, and distributing the waste by-product would not be covered by reasonably expected revenues from its sale;

(ii) Quantity, where the cost of aggregating the waste by-product into commercial quantities through storing and distributing the waste by-product would not be covered by reasonably expected revenues from its sale.

(2) A fuel will not be classified as ''natural gas'' when it is commercially unmarketable by reason of:

(i) Quality, where the cost of producing, upgrading to commercial quality, storing, and distributing the fuel would not be covered by reasonably expected revenues from its sale; or

(ii) Quantity, where the quantities of the fuel are so small that the revenues to be reasonably expected from its sale would not cover the cost of its production, distribution or storage.

(3) Costs associated with upgrading, storing, distributing, and aggregating a by-product or other fuel (to determine if such fuel is natural gas) may properly include a reasonable rate of return on any capital investment required to overcome the problems posed by the quality or quantity of a fuel because the return on investment is a normal aspect of any investment decision. A firm may account for this reasonable rate of return by using its customary discount rate for an investment of similar risk.

(4) As part of any consideration of the rate of return on investment, the cost of replacing the Btu's lost if the by-product or other fuel were upgraded and sold instead of used as a fuel may be taken into consideration. The actual expense that would result from burning a replacement fuel in lieu of the by-product or other fuel in question may therefore be considered. The costs associated with using a replacement fuel are indirect costs that result from upgrading and selling the fuel, instead of burning it. These indirect costs as well as the direct costs associated with the upgrading, storing, distributing, and aggregating of by-products or other fuel may be considered in any assessment of commercial unmarketability.

*Conference* means an informal meeting incident to any proceeding, between DOE and any interested person.

*Construction* means substantial physical activity at the unit site and includes more than clearance of a site or installation of foundation pilings.

*Costs* means total costs, both operating and capital, incurred over the estimated remaining useful life of an electric powerplant, discounted to the present, pursuant to rules established in parts 503 and 504 of these regulations.

*DEOA* means the Department of Energy Organization Act (Pub. L. 95–91) (42 U.S.C. 7101 *et seq.*) as implemented by Executive Order 12009 (42 FR 46267, September 15, 1977).

*Design capability* defined in section 103(a)(7) of FUA, shall be determined as follows:

(1) *Boiler and associated generator turbines.* The design fuel heat input rate of a steam-electric generating unit (Btu/hr) shall be the product of the generator's nameplate rating, measured in kilowatts, and 3412 (Btu/kWh), divided by the overall boiler-turbine-generator unit design efficiency (decimal); or if the generator's nameplate does not have a rating measured in kilowatts, the product of the generator's kilovolt-amperes nameplate rating, and the power factor nameplate rating; and 3412 (Btu/kWh), divided by the boiler turbine-generator unit's design efficiency (decimal). (The number 3412 converts kilowatt-hours (absolute) into Btu's (mean).)

(2) *Combustion turbine and associated generator.* The design fuel heat input rate of a combustion turbine (Btu/hr) shall be the product of its nameplate rating, measured in kilowatts, and 3412

(Btu/kWh), divided by the combustion turbine-generator unit's design efficiency (decimal), adjusted for peaking service at an ambient temperature of 59 degrees Fahrenheit (15 degrees Celsius) at the unit's elevation. (The number 3412 converts kilowatt-hours (absolute) into Btu's (mean).)

(3) *Combined cycle unit.* The design fuel heat input rate of a combined cycle unit (Btu/hr) shall be the summation of the product of its generator's nameplate rating, measured in kilowatts, and 3412 (Btu/kWh), divided by the overall combustion turbine-generator unit's efficiency (decimal), adjusted for peaking service at an ambient temperature of 59 degrees Fahrenheit (15 degrees Celsius) and at the unit's evaluation, plus the product of the maximum fuel heat input to any supplemental heat recovery steam generator/boiler in gallons or pounds per hour and the fuel's heat content. If the generator's nameplate does not have a rating measured in kilowatts, the product of the generator's kilowatt-amperes nameplate rating and power factor nameplate rating must be substituted for kilowatts. (The number 3412 converts kilowatt-hours (absolute) into Btu's (mean).)

*Design capacity* of a powerplant pursuant to section 103(a)(18) of FUA, is determined according to 18 CFR 287.101.

*DOE* or *the Department* means the United States Department of Energy, as defined in sections 201 and 301(a) of the DEOA, including the Secretary of Energy or his designee.

*Duly authorized representative* means a person who is authorized to appear before DOE in connection with a proceeding on behalf of a person interested in or aggrieved by that proceeding. Such appearance may include the submission of applications, petitions, requests, statements, memoranda of law, other documents, or of a personal appearance, oral communication, or any other participation in a proceeding.

*Electing powerplant* means an existing powerplant, which (1) has been issued a proposed prohibition order under former section 301 (b) or (c) of FUA prior to August 13, 1981, the date of enactment of the Omnibus Budget Reconciliation Act of 1981, Public Law 97–35 (OBRA); and (2) files an election to continue the current prohibition order proceeding under provisions of the former section 301 of FUA, rather than under amended section 301 of FUA.[1] Under the election provisions, an existing powerplant which has an order pending against it under section 2 of the Energy Supply and Environmental Coordination Act of 1974, as amended, 15 U.S.C. 791 *et seq.* (ESECA), as of August 13, 1981, may also elect to continue the current proceeding under section 2 of ESECA. Electing powerplants under ESECA are not included in the FUA definition of ''electing powerplant''. Relevant regulations governing ESECA proceedings are found at 10 CFR part 303 and 305. These elections must have been filed with DOE by November 30, 1981 in the case of FUA orders and by January 14, 1982 in the case of ESECA orders.

*Electric generating unit* does not include:

(1) Any electric generating unit subject to the licensing jurisdiction of the Nuclear Regulatory Commission (NRC); and

(2) Any cogeneration facility from which less than 50 percent of the net annual electric power generation is sold or exchanged for resale. Excluded from 'sold or exchanged for resale' are sales or exchanges to or with an electric utility for resale by the utility to the cogenerating supplier, and sales or exchanges among owners of the cogeneration facility.

NOTE: For purposes of subparagraph (1) of this definition, OFE will not consider any unit located at a site subject to NRC's licensing authority to be jurisdictional for purposes of FUA.

*Electric powerplant* means any stationary electric generating unit consisting of (a) a boiler, (b) a gas turbine, or (c) a combined cycle unit which employs a generator to produce electric power for purposes of sale or exchange and has the design capabilityf consuming any fuel (or mixture thereof) at a fuel heat input rate of 100 million Btu's per hour or greater. In accordance with section 103(a)(7)(C) of FUA, the Secretary has determined that it is

[1] The election provisions are published at 46 FR 48118 (October 1, 1981) and will not be codified in the Code of Federal Regulations.

appropriate to exclude from this definition any unit which has a design capability to consume any fuel (including any mixture thereof) that does not equal or exceed 100 million Btu's per hour.

*Electric Region* is as defined in § 500.3 of this part.

*Electric utility* means any person, including any affiliate, or Federal agency, which sells electric power.

*Emission offset* means emission reductions as defined by EPA's regulations set forth at 40 CFR part 51, appendix S.

*EPA* means the United States Environmental Protection Agency.

*ESECA* means the Energy Supply and Environmental Coordination Act of 1974, as amended, 15 U.S.C. 791 *et seq.*

*Existing powerplant* means any powerplant other than a new powerplant.

*Federal Water Pollution Control Act* means the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, as amended.

*FERC* means the Federal Energy Regulatory Commission.

*Firm* means a parent company and the consolidated or unconsolidated entities (if any) that it directly or indirectly controls.

*Fluidized bed combustion* means combustion of fuel in connection with a bed of inert material, such as limestone or dolomite, that is held in a fluid-like state by the means of air or other gases being passed through such materials.

*FTC* means the Federal Trade Commission.

*FUA* means the Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. 8301 *et seq.*

*Fuel Use Act* means *FUA*.

*Fuel use order* means a directive issued by OFE pursuant to § 501.167 of these regulations.

*Gas turbine* means ''combustion turbine''.

*High-priority user,* for purposes of subsection 312(j) of FUA, means any residential user of natural gas, or any commercial user whose consumption of natural gas on peak day is less than 50 MCF.

*Internal combustion engine* means a heat engine in which the combustion that generates the heat takes place inside the engine proper.

*Interpretation* means a written statement issued by the DOE General Counsel or his delegate, in response to a written request, that applies the regulations, rulings, and other precedents previously issued by the DOE to the particular facts of a prospective or completed act or transaction.

*Mcf* means 1,000 cubic feet of natural gas.

*Mixture,* when used in relation to fuels used in a unit, means a mixture of petroleum or natural gas and an alternate fuel, or a combination of such fuels, used simultaneously or alternately in such unit.

*Natural gas* means any fuel consisting in whole or in part of natural gas, including components of natural gas such as methane and ethane; liquid petroleum gas; synthetic gas derived from petroleum or natural gas liquids; or any mixture of natural gas and synthetic gas. Natural gas does not include:

(1) Gaseous waste by-products or waste gas specifically designated as an alternate fuel in § 500.2 of these regulations;

(2) Natural gas which is commercially unmarketable, as defined in these rules;

(3) Natural gas produced by the user from a well, the maximum efficient production rate of which is less than 250 million Btu's per day. For purposes of paragraph (3) of this definition:

(i) *Produced by the user* means:

(A) All gas produced by the well, when such gas is delivered for use in the user's facility through a gas delivery, gathering, or transportation system which could not deliver such gas to any other user; or

(B) Only that amount which represents the user's net working (mineral) interest in the gas produced from such well, where such gas is delivered for use in the user's facility through a gas delivery, gathering, or transportation system which could deliver such gas to any other user.

(ii) *Maximum efficient production rate* (MEPR) means that rate at which production of natural gas may be sustained without damage to the reservoir or the rate which may be sustained without damage to the ultimate recovery of oil or gas through the well.

(4) Occluded methane in coal seams within the meaning of section 107(c)(3) of the Natural Gas Policy Act of 1978 (NGPA);

(5) The following gas from wells spudded prior to January 1, 1990:

(i) Gas produced from geopressurized brine, within the meaning of section 107(c)(2) of the NGPA;

(ii) Gas produced from Devonian shale, within the meaning of section 107(c)(4) of the NGPA;

(iii) Gas produced from tight sands, as designated by the FERC in accordance with section 107(c)(5) of the NGPA; and

(iv) Other gases designated by FERC as ''high-cost natural gas'' in accordance with section 107(c)(5) of the NGPA, except as specifically designated as ''natural gas'' by OFE;

(6)(i) Synthetic gas derived from coal or other alternate fuel, the heat content of which is less than 600 Btu's per cubic foot at 14.73 pounds per square inch (absolute) and 60 °F; and

(ii) Commingled natural gas and synthetic gas derived from coal consumed as part of the necessary process of a major fuel burning installation used in the iron and steel industry, so long as the average annual Btu heat content of the commingled stream as consumed within a major fuel burning installation does not exceed 600 Btu's per cubic foot at 14.73 pounds per square inch (absolute) and 60 °F;

(7) Mixtures of natural gas and synthetic gas derived from alternate fuels for which the person proposing to use the gas certifies to OFE that:

(i) He owns, or is entitled to receive at the point of manufacture, synthetic gas derived from alternate fuels;

(ii) He delivers, or arranges for the delivery of such synthetic gas to a pipeline which by transport or displacement is capable of delivering such synthetic gas, mixed with natural gas, to facilities owned by the user;

(iii) The total annual Btu content of the synthetic gas delivered to a pipeline is equal to or greater than the total annual Btu content of the natural gas delivered to the facilities owned by the user, plus the approximate total annual Btu content of any natural gas consumed or lost in transportation; and

(iv) All necessary permits, licenses, or approvals from appropriate Federal, State, and local agencies (including Indian tribes) have been obtained for construction and operation of the facilities for the manufacture of the synthetic gas involved, except that for purposes of the prohibition under section 201(2) of FUA against powerplants being constructed without the capability of using coal or another alternate fuel, only permits, licenses, and approvals for the construction of such synthetic gas facilities shall be required under this subparagraph, to be certified and documented; and

(8) A mixture of natural gas and an alternate fuel when such mixture is deliberately created for purposes of (i) Complying with a prohibition order issued pursuant to section 301(c) of the Act, or (ii) Qualifying for a fuel mixtures exemption under the Act, provided such exemption is granted.

*NEPA* means the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321 *et seq*.

*New electric powerplant* means any electric powerplant: (1) That was not classified as existing under part 515 of this subchapter; (2) That was reconstructed, as defined in these rules under the definition of ''reconstruction''; or (3) For which construction was begun after November 9, 1978.

*NGPA* means the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq*.

*Nonboiler* means any powerplant which is not a boiler and consists of either a combustion turbine unit or combined cycle unit.

*Notice of violation* means a written statement issued to a person by DOE that states one or more alleged violations of the provisions of these regulations, any order issued pursuant thereto, or the Act.

*OBRA* means the Omnibus Budget Reconciliation Act of 1981, Public Law 97–35.

*OFE* means the Office of Fossil Energy of OFE.

*Offset* means ''emission offset''.

*Order* means a final disposition, other than the issuance of a rule, issued by DOE pursuant to these regulations or the Act.

*Person* means any:

(1) Individual, corporation, company, partnership, association, firm, institution, society, trust, joint venture, or joint stock company;

(2) Any State; or

(3) Any Federal, State, or local agency or instrumentality (including any municipality) thereof.

*Petroleum* means crude oil and products derived from crude oil, other than:

(1) Petroleum products specifically designated as alternate fuels pursuant to these regulations;

(2) Synthetic gas derived from crude oil;

(3) Liquid petroleum gas;

(4) Petroleum coke or waste gases from industrial operations; and

(5) A liquid, solid, or gaseous waste by-product of refinery operations which is commercially unmarketable under the definition of ''commercial unmarketability'' in these rules.

NOTE: For the purposes of this subparagraph, waste by-products do not include components (such as butane and propane) that can be extracted from the waste by-product by reasonable further processing of the waste by-product at the refinery, nor do they include final products that use the waste by-product as a blend stock at the refinery.

*Petition* means a formal request for any action including an exemption submitted to DOE under these regulations.

*Powerplant* means ''electric powerplant.''

*Product or process requirements* means that product or process for which the use of an alternate fuel is not technically feasible due to the necessity to maintain satisfactory control of product quality and for which the substitution of steam is not technically feasible due to process requirements.

*Primary energy source* means the fuel or fuels used by any existing or new electric powerplant except:

(1) Minimum amounts of fuel required for unit ignition, startup, testing, flame stabilization, and control uses. OFE has determined that, unless need for a greater amount is demonstrated, twenty-five (25) percent of the total annual Btu heat input of a unit shall be automatically excluded under this paragraph.

(2) Minimum amounts of fuel required to alleviate or prevent:

(i) Unanticipated equipment outages as defined in § 501.191 of these regulations; and

(ii) Emergencies directly affecting the public health, safety, or welfare that would result from electric power outages as defined in § 501.191 of these regulations.

NOTE: (1) Any fuel excluded under the provisions of paragraph (1) of this definition is in addition to any fuel authorized to be used in any order granting a fuel mixtures exemption under parts 503 and 504 of these rules. The exclusion of fuel under paragraph (1), together with the authority for such additive treatment, shall apply to any jurisdictional facility, regardless of whether or not it had received an order granting an exemption as of the date these rules are promulgated.

(2) If an auxiliary unit to an electric powerplant consumes fuel only for the auxiliary functions of unit ignition, startup, testing, flame stabilization, and other control uses, its use of minimum amounts of natural gas or petroleum is not prohibited by FUA. The measurement of such minimum amounts of fuel is discussed in *Associated Electric Cooperative*, et al., Interpretation 1980–42 [45 FR 82572, Dec. 15, 1980].

*Prohibition order* means:

(1) An order issued pursuant to section 301(b) of the Act that prohibits a powerplant from burning natural gas or petroleum as its primary energy source; or

(2) An order issued pursuant to section 301(c) of the Act that prohibits excessive use of natural gas or petroleum in mixtures burned by a powerplant as its primary energy source.

*Rated capacity* for the purpose of determining reduction in the rated capacity of an existing powerplant, means design capacity, or, at the election of the facility owner or operator, the actual maximum sustained energy output per unit of time that could be produced, measured in power output, expressed in kilowatts, per unit of time.

*Reconstruction* means the following:

(1) Except as provided in paragraph (2) of this definition, reconstruction shall be found to have taken place whenever the capital expenditures for refurbishment or modification of an electric powerplant on a cumulative basis for the current calendar year and

preceding calendar year, are equal to or greater than fifty (50) percent of the capital costs of an equivalent replacement unit of the same capacity, capable of burning the same fuels.

(2) Notwithstanding paragraph (1) of this definition, reconstruction shall not be found to have taken place whenever:

(i) The capital expenditures for refurbishment or modification of an electric powerplant, on a cumulative basis for the current calendar year and preceding calendar year, are not greater than eighty (80) percent of the capital costs of an equivalent replacement unit of the same capacity, capable of burning the same fuels and the unit, as refurbished or modified, will not have a greater fuel consumption capability than the unit it replaces;

(ii) The unit being refurbished or modified was destroyed, in whole or substantial part, in a plant accident and the unit, as refurbished or modified, will not have a greater fuel consumption capability than the unit it replaces; or

(iii) Refurbishment or modification of the unit is undertaken primarily for the purpose of increasing fuel burning efficiency of the unit, and will not result in:

(A) Increased remaining useful plant life, or

(B) Increased total annual fuel consumption.

*Resource Conservation and Recovery Act of 1976* means the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq*.

*SIP* means State Implementation Plan pursuant to section 10 of the Clean Air Act.

*Site limitation* means a specific physical limitation associated with a particular site that relates to the use of an alternate fuel as a primary energy source for the powerplant such as:

(1) Inaccessibility to alternate fuels;

(2) Lack of transportation facilities for alternate fuels;

(3) Lack of adequate land for facilities for the handling, use and storage of alternate fuels;

(4) Lack of adequate land or facilities for the control or disposal of wastes from such powerplant, including lack of land for pollution control equipment or devices necessary to assure compliance with applicable environmental requirements; and

(5) Lack of an adequate and reliable supply of water, including water for use in compliance with applicable environmental requirements.

*Solid Waste Disposal Act* means the Solid Waste Disposal Act, 42 U.S.C. 6901 *et seq*., as amended.

*State regulatory authority* means any State agency that acts as ratemaking or power supply authority with respect to the sale of electricity by any State regulated electric utility.

*Synthetic fuel* means any fuel derived from an alternate fuel and does not include any fuels derived from petroleum or natural gas.

*Wetlands areas* means, for purposes of section 103(a)(12) of the Act, those geographical areas designated as wetlands areas by State or local environmental regulatory authorities, or in the absence of any such geographic designation, those areas that are inundated by surface or ground water with frequency sufficient to support, and under normal circumstances does or would support, a prevalence of vegetation or aquatic life that requires saturated, seasonably saturated, or tidally saturated soil conditions for growth or reproduction.

(Department of Energy Organization Act, Pub. L. 95–91, 42 U.S.C. 7101 *et seq.;* Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93–319, as amended by Pub. L. 94–163, Pub. L. 95–70, and Pub. L. 95–620, (15 U.S.C. 719 *et seq.*); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, as amended by Pub. L. 97–35 (42 U.S.C. 8301 *et seq.*); Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35)

[46 FR 59884, Dec. 7, 1981, as amended at 47 FR 15313, 15314, Apr. 9, 1982; 47 FR 17041, Apr. 21, 1982; 47 FR 29210, July 6, 1982; 47 FR 34972, Aug. 12, 1982; 54 FR 52889, Dec. 22, 1989]

### § 500.3 Electric regions—electric region groupings for reliability measurements under the Powerplant and Industrial Fuel Use Act of 1978.

(a) The following is a list of electric regions for use with regard to the Act. The regions are identified by FERC Power Supply Areas (PSA's) as authorized by section 202(a) of the Federal Power Act except where noted. They will be reviewed annually by ERA.

Each grouping meets one or more of the following criteria:

(1) Existing centrally dispatched pools and hourly power brokers;

(2) Systems with joint planning and construction agreements;

(3) Systems with coordination agreements in the areas of:

(i) Generation reserve and system reliability criteria;

(ii) Capacity and energy exchange policies;

(iii) Maintenance scheduling; and

(iv) Emergency procedures for dealing with capacity or fuel shortages; or

(4) Systems within the same National Electric Reliability Council (NERC) region with historical coordination policies.

(b) The PSA's referred to in the definition of electric regions in paragraph (a) of this section were first defined by the Federal Power Commission in 1936. The most recent reference to them is given in the *1970 National Power Survey*, Vol. 1, Pg. 1–3–16. In cases where a petitioner finds an ambiguity in a regional assignment, he shall consult with DOE for an official determination.

Electric Region Groupings and FERC PSA's:

1. Allegheny Power System (APS)—7, except Duquesne Light Company.
2. American Electric Power System (AEP)—entire AEP System.
3. New England Planning Pool (NEPOOL)—1, 2.
4. New York Planning Pool (NYPP)—3, 4.
5. Pennsylvania—New Jersey—Maryland interconnection (PJM)—5, 6.
6. Commonwealth Edison Company—14.
7. Florida Coordination Group (FCG)—24.
8. Middle South Utilities—25.
9. Southern Company—22, 23.
10. Gulf States Group—35.
11. Tennessee Valley Authority (TVA)—20.
12. Virginia—Carolina Group (VACAR)—18, 21.
13. Central Area Power Coordination Group (CAPCO)—Cleveland Electric Illuminating Company, Toledo Edison Company, Ohio Edison Company, Duquesne Light Company.
14. Cincinnati, Columbus, Dayton Group (CCD)—Cincinnati Gas and Electric Company, Columbus and Southern Ohio Electric Company, Dayton Power and Light Company.
15. Kentucky Group—19.
16. Indiana Group—Indiana Utilities except AEP.
17. Illinois—Missouri Group (ILLMO)—15, 40.
18. Michigan Electric Coordinated Systems (MECS)—11.
19. Wisconsin—Upper Michigan Group (WUMS)—13.
20. Mid-Continent Area Power Pool (MAAP)—16, 17, 26, 27, 28.
21. Missouri—Kansas Group (MOKAN)—24, 29.
22. Oklahoma Group—33, 36.
23. Texas Interconnected Systems (TIS)—37, 38.
24. Rocky Mountain Power Pool (RMPP)—31, 32.
25. Northwest Power Pool (NWPP)—30, 42, 43, 44, 45.
26. Arizona—New Mexico Group—39, 48 within Arizona. in Nevada and California.
27. Southern California—Nevada—47, 48.
28. Northern California—Nevada—46.
29. Alaska (non-interconnected systems to be considered separately)—49.
30. Idaho—Utah Group—41.

# PART 501—ADMINISTRATIVE PROCEDURES AND SANCTIONS

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AUTHORITY: 42 U.S.C. 7101 *et seq.;* 42 U.S.C. 8301 *et seq.;* 42 U.S.C. 8701 *et seq.;* E.O. 12009, 42 FR 46267; 28 U.S.C. 2461 note.

SOURCE: 46 FR 59889, Dec. 7, 1981, unless otherwise noted.

(OMB Control No.: 1903–0075. See 46 FR 63209, Dec. 31, 1981.)

## Subpart A—General Provisions

### § 501.1 Purpose and scope.

Part 501 establishes the procedures to be used in proceedings before DOE under parts 500–508 of this chapter except as otherwise provided.

### § 501.2 Prepetition conference.

(a) Owners and operators of powerplants may request a prepetition conference with OFE for the purpose of discussing the applicability of 10 CFR parts 503 and 504 to their situations and the scope of any exemption or other petition that OFE would accept as adequate for filing purposes.

(b) The owner or operator who requests a prepetition conference may personally represent himself or may designate a representative to appear on his behalf. A prepetition conference or a request for a prepetition conference does not commence a proceeding before OFE.

(c) If OFE agrees to waive any filing requirements under § 501.3(d), a memorandum of record stating this fact will

be furnished to the potential petitioner within thirty (30) days after the conference. Copies of all applicable memoranda of record must be attached to any subsequently-filed petition.

(d) A record of all prepetition conferences will be included in the public file. OFE may provide for the taking of a formal transcript of the conference and the transcript will be included in the public file.

[46 FR 59889, Dec. 7, 1981, as amended at 54 FR 52891, Dec. 22, 1989]

### § 501.3 Petitions.

(a) *Filing of petitions.* Petitions for exemptions are to be filed with OFE at the address given in § 501.11.

(b) *Acceptance of petition.* (1) Upon acceptance (as distinguished from filing) of the petition, OFE shall publish in the FEDERAL REGISTER a Notice of Acceptance of Petition or, in the case of an exemption by certification, a Notice of Acceptance and Availability of Certification, signifying that an exemption proceeding has commenced.

(2) OFE will notify each petitioner in writing within thirty (30) days of receipt of the petition that it has been accepted or rejected and, if rejected, the reasons therefor.

(3) A petition, including supporting documents, will be accepted if the information contained appears to be sufficient to support an OFE determination. Additional information may be requested during the course of the proceeding, and failure to respond to such a request may ultimately result in denial of the requested exemption.

(4) Acceptance of petition does not constitute a determination that the requested exemption will be granted.

(c) *Rejection of petition.* (1) OFE will reject a petition if it does not meet the information of certification requirements established for the relevant exemptions under parts 503 and 504 of this chapter. A written explanation of the reasons for rejection will be furnished with notification of the rejection.

(2) A timely-filed petition rejected as inadequate will not be rendered untimely if resubmitted in amended form within ninety (90) days of the date of rejection.

(3) OFE will, within thirty (30) days of receipt of a petition that is found to be incomplete due to minor deficiencies, notify the petitioner of the deficiencies and allow ninety (90) days from the date of notification to cure the specified deficiencies. The failure to cure the deficiencies during this time may result in denial of the requested exemption.

(d) *Waiver of filing requirements.* Upon its own motion or at the request of a petitioner, OFE may waive some or all of the regulatory requirements if the purposes of FUA would be best achieved by doing so.

### §§ 501.4–501.5 [Reserved]

### § 501.6 Service.

(a) DOE will serve all orders, notices interpretations or other documents that it is required to serve, personally or by mail, unless otherwise provided in these regulations.

(b) DOE will consider service upon a petitioner's duly authorized representative to be service upon the petitioner.

(c) Service by mail is effective upon mailing.

[54 FR 52891, Dec. 22, 1989]

### § 501.7 General filing requirements.

Except as indicated otherwise, all documents required or permitted to be filed with OFE or DOE in connection with a proceeding under parts 503 and 504 shall be filed in accordance with the following provisions:

(a) *Filing of documents.* (1) Documents including, but not limited to, applications, requests, complaints, petitions (including petitions for exemption), and other documents submitted in connection therewith, filed with OFE are considered to be filed upon receipt.

(2) Notwithstanding the provisions of paragraph (a)(1) of this section, an application for modification or rescission in accordance with subpart G of this part, a reply to a notice of violation, a response to a denial of a claim of confidentiality, or a comment submitted in connection with any proceeding transmitted by registered or certified mail and addressed to the appropriate office is considered to be filed upon mailing.

(3) *Timeliness.* Documents are to be filed with the appropriate DOE or OFE office listed in § 501.11. Documents that

are to be considered filed upon receipt under paragraph (a)(1) of this section and that are received after regular business hours are deemed filed on the next regular business day. Regular business hours are 8 a.m. to 4:30 p.m.

(4) *Computation of time.* In computing any period of time prescribed or allowed by FUA, these regulations or by an order, 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 neither a Saturday, Sunday, nor a Federal legal holiday.

(5) *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 and the order, notice, interpretation or other document is served by mail, three (3) days shall be added to the prescribed period.

(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 upon good cause shown.

(7) *Signing.* All applications, petitions, requests, comments, and other documents that are required to be signed, shall be signed by the person filing the document or a duly authorized representative. Any application, petition, request, complaint, or other document filed by a duly authorized representative shall contain a statement by such person certifying that he is a duly authorized representative, unless an OFE form otherwise requires. (A false certification is unlawful under the provisions of 18 U.S.C. 1001 (1970).)

(8) *Labeling.* An application, petition, or other request for action by DOE or OFE should be clearly labeled according to the nature of the action involved, e.g., ''Petition for Temporary Exemption;'' ''Petition for Extension (or Renewal) of Temporary Exemption,'' both on the document and on the outside of the envelope in which the document is transmitted.

(9) *Obligation to supply information.* A person who files an application, petition, complaint, or other request for action is under a continuing obligation during the proceeding to provide DOE or OFE 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, complaint, or request for action that is subsequently filed by that person with any DOE office or OFE office.

(10) *The same or related matters.* In filing a petition or other document requesting OFE action, the person must state whether, to the best of his knowledge, the same or a related issue, act or transaction has been or presently is being considered or investigated by a DOE office, other Federal agency, department or instrumentality, or a State or municipal agency.

(11) *Request for confidential treatment.* (i) If any person filing a document with DOE or OFE 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 DOE or OFE not to disclose such information, such person shall make a filing in accordance with paragraph (b)(2) of this section. The person shall indicate in the original document that it is confidential or contains confidential information and may 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 in 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 a document is not so filed, OFE may assume that there is no objection to public disclosure of the document in its entirety, unless the person subsequently files a claim of confidentiality prior to public disclosure of the document.

(ii) DOE or OFE retains the right to make its own determination with regard to any claim of confidentiality.

Notice of the decision by DOE or OFE to deny such claim, in whole or in part, and an opportunity to respond or take other appropriate action to avoid release shall be given to a person claiming confidentiality of information no less than seven (7) days prior to its public disclosure.

(iii) The above provisions in paragraphs (a)(11) (i) and (ii) of this section do not apply to information submitted on OFE forms that contain their own instructions concerning the treatment of confidential information.

(12) *Separate applications, petitions or requests.* Each application, petition, or request for DOE or OFE 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.

(b) *Number of documents to be filed.* (1) A petitioner must file an executed original and fourteen (14) copies of all exemption requests submitted to DOE. For certification requests, an original and three (3) copies shall be submitted.

(2) Where the petitioner requests confidential treatment of some or all of the information submitted, an original and eleven (11) copies of the confidential document and three (3) copies of the document with confidential material deleted must be filed.

[46 FR 59889, Dec. 7, 1981, as amended at 47 FR 15314, Apr. 9, 1982; 54 FR 52891, Dec. 22, 1989]

### § 501.8 [Reserved]

### § 501.9 Effective date of orders or rules.

(a) When OFE issues a rule or order imposing a prohibition or granting an exemption (or permit) under FUA, the rule or order will be effective sixty (60) days after publication in the FEDERAL REGISTER, unless it is stayed, modified, suspended or rescinded.

(b) If the appropriate State regulatory authority has not approved a powerplant for which a petition has been filed, such exemption, to the extent it applies to the prohibition under section 201 of FUA against construction without the capability of using coal or another alternate fuel, shall not take effect until all approvals required by such State regulatory authority which relate to construction have been obtained.

[54 FR 52891, Dec. 22, 1989]

### § 501.10 Order of precedence.

If there is any conflict or inconsistency between the provisions of this part and any other provisions or parts of this chapter, except for general procedures which are unique to part 515 of this chapter, the provisions of this part will control respect to procedure.

[54 FR 52891, Dec. 22, 1989]

### § 501.11 Address for filing documents.

Send all petitions, self-certifications and written communications to the following address: Office of Fossil Energy, Office of Fuels Programs, Coal and Electricity Division, Mail Code FE–52, 1000 Independence Avenue, SW., Washington, DC 20585.

[54 FR 52891, Dec. 22, 1989]

### § 501.12 Public files.

DOE will make available at the Freedom of Information reading room, room 1E190, 1000 Independence Avenue SW., Washington, DC for public inspection and copying any information required by statute and any information that OFE determines should be made available to the public.

[54 FR 52891, Dec. 22, 1989]

### § 501.13 Appeal.

There is no administrative appeal of any final administrative action to which this part applies.

### § 501.14 Notice to Environmental Protection Agency.

A copy of any proposed rule or order that imposes a prohibition, order that imposes a prohibition, or a petition for an exemption or permit, shall be transmitted for comments, if any, to the Administrator and the appropriate Regional Administrator of the Environmental Protection Agency (EPA). The Administrator of EPA shall be given the same opportunity to comment and question as is given other interested persons.

[54 FR 52891, Dec. 22, 1989]

## Subpart B [Reserved]

## Subpart C—Written Comments, Public Hearings and Conferences During Administrative Proceedings

### § 501.30 Purpose and scope.

This subpart establishes the procedures for requests for and the conduct of public hearings; for submission of written comments; and for requests for and conduct of conferences pursuant to an administrative proceeding before OFE. Hearings shall be convened at the request of any interested person, in accordance with section 701(d) of FUA, and shall be held at a time and place to be decided by the Presiding Officer.

### § 501.31 Written comments.

(a) *New facilities*. Except as may be provided elsewhere in these regulations, OFE shall provide a period of at least forty-five (45) days, commencing with publication of the Notice of Acceptance of Petition, of in the case of certification exemptions, Notice of Acceptance and availability of Certification, in the FEDERAL REGISTER in accordance with § 501.63(a), for submission of written comments concerning a petition for an exemption. Written comments shall be made in accordance with § 501.7.

(b) *Existing facilities*. Except as may be provided elsewhere in these regulations, OFE shall provide a period of at least 45 days for submission of written comments concerning a proposed prohibition rule or order or a petition for a permit. In the case of a proposed prohibition rule or order issued to an existing electing powerplant, OFE shall also provide for a period of at least 45 days for submission of written comments concerning a Tentative Staff Analysis. This period shall commence on the day after publication of the Notice of Availability of the Tentative Staff Analysis in the FEDERAL REGISTER. In the case of prohibition order proceedings for certifying powerplants under section 301 of FUA, as amended, OFE shall provide a period of at least 45 days, beginning the day after the Notice of Acceptance of certification is published, for submission of written comments concerning the certification and OFE's proposed prohibition order, and requests for public hearings. Prohibition order proceedings under section 301, as amended by OBRA, will have only one period of 45 days, since no Tentative Staff Analysis will be prepared. The comment period may be extended by OFE in accordance with § 501.7. See § 501.52(b) of this part for further information with respect to the comment period. Written comments shall be filed in accordance with § 501.7.

(Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 *et seq.*); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3289 (42 U.S.C. 8301 *et seq.*); Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97–35); E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[46 FR 59889, Dec. 7, 1981, as amended at 47 FR 50848, Nov. 10, 1982; 54 FR 52892, Dec. 22, 1989]

### § 501.32 Conferences (other than prepetition conferences).

(a) At any time following commencement of a proceeding before OFE, an interested person may request a conference with the staff of OFE to discuss a petition, permit or any other issue pending before OFE. The request for a conference should generally be in writing and should indicate the subjects to be covered and should describe the requester's interest in the proceeding. Conferences held after the commencement of an administrative proceeding before OFE shall be convened at the discretion of OFE or the Presiding Officer.

(b) When OFE convenes a conference in accordance with this section, any person invited may present views as to the issue or issues involved. Documentary evidence may be submitted at the conference and such evidence, to the extent that it is not deemed to be confidential, will be included in the administrative record. OFE will not normally have a transcript of the conference prepared but may do so at its discretion.

(c) Because a conference is solely for the exchange of views incident to a proceeding, there will be no formal report or findings by OFE unless OFE in its discretion determines that the preparation of a report or findings would be

advisable. OFE will, however, place in the public file a record of any conference.

### § 501.33 Request for a public hearing.

(a) *New facilities*. In the case of a petition for an exemption under title II of FUA, any interested person may submit a written request that OFE convene a public hearing in accordance with section 701 of FUA no later than forty-five (45) days after publication of either the Notice of Acceptance of a petition, or in the case of a certification exemption, the publication of the Notice of Acceptance of Certification. This time period may be extended at the discretion of OFE.

(b) *Existing powerplants*. In the case of a petition for an exemption from a prohibition imposed by a final rule or order issued by OFE to an electing powerplant under former sections of title III of FUA or a petition for a permit under § 504.1, any interested person may submit a written request that OFE convene a public hearing in accordance with section 701 of FUA within 45 days after the notice of the filing of a petition is published in the FEDERAL REGISTER. In the case of a proposed prohibition rule or order issued to an electing powerplant under former section 301, the 45 day period in which to request a public hearing shall commence upon the publication of the Notice of Availability of the Tentative Staff Analysis. In the case of a proposed prohibition order to be issued to certifying powerplants under section 301 of FUA, as amended, the 45 day period in which to request a public hearing commences upon publication of the Notice of Acceptance of Certification. This time limit may be extended at the discretion of OFE in accordance with § 501.7.

(c) *Contents of request*. A request for a public hearing must be in writing and must include a description of the requesting party's interest in the proceeding and a statement of the issues involved. The request should, to the extent possible, identify any witnesses that are to be called, summarize the anticipated testimony to be given at the hearing, and outline questions that are to be posed.

(Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 *et seq.*); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3269 (42 U.S.C. 8301 *et seq.*); Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97–35); E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[46 FR 59889, Dec. 7, 1981, as amended at 47 FR 50848, Nov. 10, 1982; 54 FR 52892, Dec. 22, 1989]

### § 501.34 Public hearing.

(a) A public hearing under this subsection is for the purpose of insuring that all issues are fully and properly developed, but is not a formal adjudicatory hearing subject to the provisions of 5 U.S.C. 554 and 556.

(b) *Opportunity to be heard at a public hearing*. (1) Any interested person, may request, and OFE will provide, an opportunity to present oral or written data, views and arguments at a public hearing on any proposed prohibition rule or order, or on any petition for an exemption or permit. An interested person may file a request to be listed as a party to a hearing on the service list prepared by the Presiding Officer pursuant to § 501.34(d) of this part.

(2) Participants at the public hearing will have an opportunity to present oral or written data, views and arguments.

(3) A request for a public hearing may be withdrawn by the requestor at any time. If other persons have requested to participate as parties in the public hearing, OFE may cancel the hearing only if all parties agree to cancellation. OFE will give notice, whenever possible, in the FEDERAL REGISTER of the cancellation of any hearings for which there has been prior notice.

(c) *Presiding Officer*. OFE will appoint a Presiding Officer to conduct the public hearing.

(d) *Powers of the Presiding Officer*. The Presiding Officer is responsible for orderly conduct of the hearing and for certification of the record of the public hearing. The Presiding Officer will not prepare any recommended findings, conclusions, or any other recommendations for disposition of a particular

case, except those of a procedural nature. The Presiding Officer has, but is not limited to the following powers:

(1) Administer oaths, affirmations and protective orders;

(2) Issue administrative subpoenas and rule on motions to modify or withdraw subpoenas that he has issued;

(3) Rule on questions as to relevance and materiality of evidence;

(4) Regulate the course of the public hearing;

(5) Hold conferences for the simplification of issues by consent of the parties;

(6) Require submission of evidence in writing where appropriate;

(7) Establish service lists;

(8) Dispose of procedural requests and similar matters; and

(9) Take other actions authorized by these rules.

The Presiding Officer may also limit the number of witnesses to be presented by any party and may impose reasonable time limits for testimony. The Presiding Officer shall establish and maintain a service list that contains the names and addresses of all parties to the OFE proceeding. At the time the Presiding Officer certifies the record, he will provide the staff of OFE with an index of the issues addressed in the record.

(e) *Notice*. OFE will convene a public hearing only after publishing a notice in the FEDERAL REGISTER that states the time, place and nature of the public hearing.

(f) *Opportunity to question at the public hearing*. At any public hearing requested pursuant to paragraph (b) of this section, with respect to disputed issues of material fact, OFE will provide any interested person an opportunity to question:

(1) Other interested persons who make oral presentations;

(2) Employees and contractors of the United States who have made written or oral presentations or who have participated in the development of the proposed rule or order or in the consideration of the petition for an exemption or permit; and

(3) Experts and consultants who have provided information to any person who makes an oral presentation and which is contained in or referred to in such presentation.

(g) OFE encourages persons who wish to question Government witnesses to submit their questions at least ten (10) days in advance of the hearing.

(h) The Presiding Officer will allow questions by any interested person to be asked of those making presentations or submitting information, data, analyses or views at the hearing. The Presiding Officer may restrict questioning if he determines that such questioning is duplicative or is not likely to result in a timely and effective resolution of issues pending in the administrative proceeding for which the hearing is being conducted.

(i) The Presiding Officer or OFE may exercise discretion to control a hearing by denying, temporarily or permanently, the privilege of participating in a particular OFE hearing if OFE finds, for example, that a person:

(1) Has knowingly made false or misleading statements, either orally or in writing;

(2) Has knowingly filed false affidavits or other writings;

(3) Lacks the specific authority to represent the person seeking an OFE action; or

(4) Has disrupted or is disrupting a hearing.

(j) *Evidence*. (1) The Presiding Officer is responsible for orderly submission of information, data, materials, views or other evidence into the record of the public hearing. The Presiding Officer may exclude any evidence that is irrelevant, immaterial or unduly repetitious. Judicial rules of evidence do not apply.

(2) Documentary material must be of a size consistent with ease of handling, transportation and filing, and a reasonable number of copies should be made available at the public hearing for the use of interested persons. An original and fourteen (14) copies shall be furnished to the Presiding Officer and one copy to each party listed on the service list. Large exhibits that are used during the hearing must be provided on no larger than 11½″ × 14″ legal size paper if they are to be submitted into the hearing record.

(k) *Hearing record*. OFE will have a verbatim transcript made of the public

hearing. The hearing record shall remain open for a period of fourteen (14) days following the public hearing, unless extended by OFE, during which time the participants at the hearing may submit additional written statements which will be made part of the administrative record and will be served by the Presiding Officer upon those parties listed on the service list. OFE may also request additional information, data or analysis following the hearing in order to resolve disputed issues in the record. If OFE receives or obtains any relevant information or evidence that is placed in the record after the close of the public hearing or comment period, it will so notify all participants, and allow an additional fourteen (14) days for submission of evidence in rebuttal. In addition, OFE may, in its discretion, re-open the hearing at the request of a party or participant, to permit further rebuttal of evidence or statements submitted to OFE and made part of the hearing record after the close of the hearing. The transcript, together with any written comments submitted in the course of the proceeding, will be made part of the record available for public inspection and copying at the OFE Public Information Office, as provided in § 501.12.

### § 501.35 Public file.

(a) *Contents*. The public file shall consist of the rule, order, or petition, with supporting data and supplemental information, and all data and information submitted by interested persons. Materials which are claimed by any party to be exempt from public disclosure under the Freedom of Information Act (5 U.S.C. 552) shall be excised from the public file provided OFE has made a determination that the material is confidential in accordance with § 501.7(a)(11) of this part.

(b) *Availability*. The public file shall be available for inspection at room 1E190, 1000 Independence Avenue SW., Washington, DC. Photocopies may be made available, on request. The charge for such copies shall be made in accordance with a written schedule.

[46 FR 59889, Dec. 7, 1981, as amended at 54 FR 52892, Dec. 22, 1989]

## Subpart D—Subpoenas, Special Report Orders, Oaths and Witnesses

### § 501.40 Issuance.

(a) *Authority*. As authorized by section 711 of FUA and section 645 of the DEOA, the Administrator, his duly authorized agent or a Presiding Officer may, in accordance with 10 CFR 205.8, sign, issue, and serve subpoenas; issue special report orders (SRO); administer oaths and affirmations; take sworn testimony, compel attendance of and sequester witnesses; control the dissemination of any record of testimony taken pursuant to this section; and subpoena and reproduce books, papers, correspondence, memoranda, contracts, agreements, or other relevant records of tangible evidence including, but not limited to, information retained in computerized or other automated systems in the possession of the subpoenaed person.

(b) *Petition to withdraw or modify*. Prior to the time specified for compliance in the subpoena or SRO, the person to whom the subpoena or SRO is directed may apply for its withdrawal or modification as provided in 10 CFR 205.8, except that if the subpoena or SRO is issued by a duly appointed Presiding Officer, the request to withdraw or modify must be addressed to that Presiding Officer, and its grant or denial will be decided by him.

## Subpart E—Prohibition Rules and Orders

### § 501.50 Policy.

Except in conjunction with a prohibition order requested by the intended recipient, OFE shall not propose to prohibit or prohibit by rule or order the use of petroleum or natural gas either as a primary energy source or in amounts in excess of the minimum amount necessary to maintain reliability of operation consistent with reasonable fuel efficiency in an existing installation unless and until OFE adopts rules establishing regulatory requirements governing the issuance of such orders and rules in accordance

with the applicable procedural and substantive requirements of law.

(Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 *et seq.*); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3269 (42 U.S.C. 8301 *et seq.*); Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97–35); E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[47 FR 50848, Nov. 10, 1982]

### § 501.51 Prohibitions by order—electing powerplants.

(a) OFE may prohibit by order the use of petroleum or natural gas as a primary energy source or in amounts in excess of the minimum amount necessary to maintain reliability of operation consistent with reasonable fuel efficiency in an electing powerplant, if:

(1) That facility has not been identified as a member of a category subject to a final rule at the time of the issuance of such order; and

(2) The requirements of § 504.6 have been met.

(b) *Notice of order and public participation.* (1) OFE may hold a conference with the proposed order recipient prior to issuing the proposed order.

(2) Pursuant to section 701 of FUA, prior to the issuance of a final order to an electing powerplant, OFE shall publish a proposed order in the FEDERAL REGISTER together with a statement of the reasons for the order. In the case of a proposed order that would prohibit the use of petroleum or natural gas as a primary energy source, the finding required by former section 301(b)(1) of the Act shall be published with such proposed order.

(3) OFE shall provide a period for the submission of written comments of at least three months after the date of the proposed order. During this period, the recipient of the proposed order and any other interested person must submit any evidence that they have determined at that time to support their respective positions as to each of the findings that OFE is required to make under section 301(b) of the Act. A proposed order recipient may submit additional new evidence at any time prior to the close of the public comment period which follows publication of the Tentative Staff Analysis or prior to the close of the record of any public hearing, whichever occurs later. A request by the proposed order recipient for an extension of the three-month period may be granted at OFE's discretion.

(4) Subsequent to the end of the comment period, OFE will issue a notice of whether OFE intends to proceed with the prohibition order proceeding.

(5) An owner or operator of a facility that may be subject to an order may demonstrate prior to issuance of a final prohibition order that the facility would qualify for an exemption if the prohibition had been established by rule. OFE will not delay the issuance of a final prohibition order or stay the effective date of such an order for the purpose of determining whether a proposed order recipient qualifies for a particular exemption unless the demonstration or qualification is submitted prior to or during the second three-month comment period, commencing after issuance of a notice of intention to proceed, or unless materials submitted after the period (i) could not have been submitted during the period through the exercise of due diligence, (ii) address material changes in fact or law occurring after the close of the period, or (iii) consist of amplification or rebuttal occasioned by the subsequent course of the proceeding. A request by the proposed order recipient for an extension of this time period may be granted at OFE's discretion.

(6) Subsequent to the end of the second three (3) month period, OFE will, if it intends to issue a final prohibition order, prepare and issue a Notice of Availability of a Tentative Staff Analysis. Interested persons wishing a hearing must request a hearing within forty-five (45) day after issuance of the Notice of Availability of the Tentative Staff Analysis. During this forty-five (45) days period, interested persons may also submit written comments on the Tentative Staff Analysis.

(7) If a hearing has been requested, OFE shall provide interested persons with an opportunity to present oral data, views and arguments at a public hearing held in accordance with subpart C of this part. The hearing will consider the findings which OFE must make in order to issue a final prohibition order and any exemption for which the proposed order recipient submitted

its demonstration in accordance with paragraph (b)(5) of this section.

(8) Upon request by the recipient of the proposed prohibition order, the combined public comment periods provided for in this section may be reduced to a minimum of forty-five (45) days from the time of publication of the proposed order.

(9) OFE may terminate a prohibition order proceeding at any time prior to the date upon which a final order shall become effective. Should OFE terminate the proceeding, it will notify the proposed order recipient, and publish a notice in the FEDERAL REGISTER.

(c) *Decision to issue a final order*. (1) OFE will base its determination to issue an order on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with reliable, probative and substantial evidence.

(2) OFE shall include in the final order a written statement of the pertinent facts, a statement of the basis upon which the final order is issued, a recitation of the conclusions regarding the required findings and qualifications for exemptions. The final order shall state the effective date of the prohibition contained therein. If it is demonstrated that the facility would have been granted a temporary exemption, the effective date of the prohibition contained in the final order shall be delayed until such time as the temporary exemption would have terminated. If it is demonstrated that a facility will need a period of time to comply with the final order, the effective date of the prohibition contained in the final order may be delayed, in OFE's discretion, so as to allow an order recipient to comply with the final order.

(3) OFE will enclose with a copy of the final order, where appropriate, a schedule of steps that should be taken by a stated date (a compliance schedule) to ensure that the affected facility will be able to comply with the prohibitions stated in the order by the effective date of the prohibition contained in the final order. The compliance schedule may require the affected person to take steps with regard to a unit 60 days after service of the final order.

(4) A copy of the final order and a summary of the basis therefore will be published in the FEDERAL REGISTER. The order will become effective 60 days after publication in the FEDERAL REGISTER.

(d) *Request for order*. (1) A proceeding for issuance of a prohibition order to a specific unit may be commenced by OFE, in its sole discretion, in response to a request for an order filed by the owner or operator of a facility.

(2) A petition requesting OFE to commence a prohibition order proceeding should include the following information for all units to be covered by the prohibition order:

(i) A statement of the reasons the owner or operator is seeking the issuance of a prohibition order; and

(ii) Sufficient information for OFE to make the findings required by section 301(b) of FUA.

(3) If OFE determines to accept the request, OFE shall publish a proposed order in the FEDERAL REGISTER together with a statement of the reasons for the order.

(Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 *et seq.*); Energy Supply and Environmental Coordination Act of 1974; Pub. L. 93–319, as amended by Pub. L. 94–163, Pub. L. 95–70, (15 U.S.C. 719 *et seq.*); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3269 (42 U.S.C. 8301 *et seq.*); Omnibus Budget Reconciliation Act of 1981, (Pub. L. 97–35); E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[46 FR 59889, Dec. 7, 1981, as amended at 47 FR 17042, Apr. 21, 1982; 47 FR 50848, Nov. 10, 1982; 54 FR 52892, Dec. 22, 1989]

### § 501.52 Prohibitions by order—certifying powerplants.

(a) OFE may prohibit by order the use of petroleum or natural gas as a primary energy source or in amounts in excess of the minimum amount necessary to maintain reliability of operation consistent with maintaining reasonable fuel efficiency in an existing powerplant if the owner or operator of the powerplant certifies, and OFE concurs in such certification in accordance with the requirements of §§ 504.5, 504.6 and 504.8.

(b) *Notice of order and participation*. (1) OFE may hold a conference with the

proposed order recipient, at the recipient's election, prior to issuing the proposed order. The conference may resolve any questions regarding the certification required by section 301 of the Act, as amended, and §§ 504.5, 504.6, and 504.8, and OFE's review and concurrence therein.

(2) Pursuant to section 701(b) of FUA, prior to the issuance of a final order to a certifying powerplant owner or operator, OFE must publish in the FEDERAL REGISTER, a proposed prohibition order stating the reasons for such order. OFE will review all of the information submitted by a proposed order recipient within 60 days after receipt by OFE. If the certification is complete, OFE will, within 30 days after the end of the 60 day review period, publish in the FEDERAL REGISTER a Notice of Acceptance of certification together with a proposed prohibition order stating therein the reasons for such order. This commences the prohibition order proceeding. If OFE does not believe it is able to concur in the certification, OFE shall notify the proposed order recipient and shall publish a Notice of Proposed Non-Concurrence in the FEDERAL REGISTER within 30 days after the end of the 60 day review period. If OFE finds that the certification with compliance schedule is incomplete, OFE will notify the proposed prohibition order recipient as to the deficiencies, and provide an additional period of 30 days for the certification to be amended and resubmitted. If a complete certification is not submitted within this period, the proceeding shall be terminated in accordance with § 501.52(b)(5). OFE will notify the proposed order recipient and other parties to the proceeding of the termination and publish a notice in the FEDERAL REGISTER. OFE, on its own motion, may extend any period of time by publishing a notice to that effect in the FEDERAL REGISTER.

(3) The publication of the Notice of Acceptance or Notice of Proposed Non-Concurrence commences a period of 45 days during which interested persons may submit written comments or request a public hearing. During this period, the recipient of the proposed order and any other interested person may submit any evidence that they have available relating to the proposed order, the certification or the concurrence that OFE must make. A proposed order recipient may submit additional new evidence at any time prior to the close of the public comment period which follows the commencement of the proceeding or prior to the close of the record of any public hearing, whichever occurs later. A request for an extension of the 45 day period may be granted at OFE's discretion. In the case of a Notice of Acceptance, as set forth in § 504.9, no final prohibition order can be issued until any necessary environmental review pursuant to the National Environmental Policy Act of 1969, 42 U.S.C 4321 *et seq.* (NEPA) has been completed. Upon completion of the NEPA review and unless OFE determines on the basis of the record of the proceeding that the certification fails to meet the requirements of §§ 504.5, 504.6, and 504.8, OFE shall publish a final prohibition order, together with the information required by paragraph (c) of this section. In the case of a Notice of Proposed Non-Concurrence, at the end of the 45 day comment period, OFE will notify the proposed order recipient and parties to the proceeding and publish a final Notice of Non-Concurrence in the FEDERAL REGISTER, if OFE determines it cannot concur in the certification based upon additional information submitted during the proceeding. If, at the end of the 45 day period, OFE believes it can concur in the certification, OFE will notify the proposed order recipient and parties to the proceeding and publish a Notice of Acceptance followed by a new 45 day comment period.

(4) If a hearing has been requested, OFE shall provide interested persons with an opportunity to present oral data, views and arguments at a public hearing held in accordance with subpart C of this part. The hearing may consider, among other matters, the sufficiency of the certification of the owner or operator of the powerplant required by section 301 of FUA, as amended, and §§ 504.5, 504.6, and 504.8 of these regulations.

(5) OFE may terminate a prohibition order proceeding at any time prior to the date upon which a final prohibition order is issued whenever OFE believes,

from any information contained in the record of the proceeding, that the certification does not meet the requirements of section 301 of the Act, as amended, or §§ 504.5, 504.6, and 504.8 of these regulations. If OFE terminates the proceeding or publishes a final Notice of Non-Concurrence, or the proposed order recipient fails to submit a complete certification, OFE will notify the proposed order recipient and other parties to the proceeding and publish a notice in the FEDERAL REGISTER. In such event, the proposed order recipient may submit a new certification under any provision of section 301 of the Act, as amended, at a later date. Specifically, a Notice of Non-Concurrence under either section 301(b) or 301(c) shall not affect a proposed order recipient's ability to make a certification under the other subsection.

(c) *Record and decision to issue a final order*. (1) OFE will base its determination to issue an order on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with reliable, probative and substantial evidence.

(2) OFE shall include in the final order a written statement of the basis upon which the final order is issued, and its concurrence in the required certification. A copy of the final order and a summary of the basis therefor will be published in the FEDERAL REGISTER. While the prohibition order is final for purposes of judicial review under section 702 of FUA, the prohibitions contained in the final order shall not become effective for purposes of amendment under section 301(d) of FUA, as amended, and § 501.52(d) of these regulations until the effective date of the prohibitions stated in the order, or, where the order is subject to one or more conditions subsequent listed in the prohibition order compliance schedule, until all its conditions are met.

(d) *Amendment to certifications under §§ 504.5 and 504.6*. The proposed prohibition order recipient may amend its compliance schedule under § 504.5(d), or its certification under section 301 of FUA, as amended, and §§ 504.5, 504.6 and 504.8 of these regulations in order to take into account changes in relevant facts and circumstances at any time prior to the effective date of the prohibitions contained in the final prohibition order.

(e) *Rescission of prohibition orders*. The rescission or modification of final prohibition orders issued to existing electric powerplants will be governed by the procedure in § 501.101 of these regulations.

(Approved by the Office of Management and Budget under control number 1903–0077)

(Department of Energy Organization Act, Pub. L. 95–91, 42 U.S.C. 7101 *et seq.;* Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93–319, as amended by Pub. L. 94–163, Pub. L. 95–70, and Pub. L. 95–620, 15 U.S.C. 719 *et seq.;* Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, as amended by Pub. L. 97–35, 42 U.S.C. 8301 *et seq.;* Omnibus Budget Reconciliation Act of 1981, (Pub. L. 97–35))

[47 FR 17042, Apr. 21, 1982]

**§§ 501.53–501.56 [Reserved]**

## Subpart F—Exemptions and Certifications

### § 501.60 Purpose and scope.

(a) (1) If the owner or operator plans to construct a new baseload powerplant and the unit will not be in compliance with the prohibition contained in section 201(a) of FUA, this subpart establishes the procedures for filing a petition requesting a temporary or permanent exemption under, respectively, sections 211 and 212 of FUA.

(2) Self-certification alternative. If the owner or operator plans to construct a new baseload powerplant not in compliance with the prohibitions contained in section 201(a) of FUA, this subpart establishes the procedures for the filing of a self-certification under section 201(d) of FUA.

(3) If the petitioner owns, operates or controls a new powerplant, this subpart provides the procedures for filing a petition requesting extension of a temporary exemption granted under sections 211 or 311 of FUA.

(4) If the petitioner owns, operates or controls a new or existing powerplant or MFBI, this subpart provides the procedures for filing a petition requesting extension of a temporary exemption granted under section 211 or section 311 of FUA.

(b) If the petition is for an extension of a temporary exemption, the petitioner must apply for this extension at least (90) days prior to the expiration of the temporary exemption.

(Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 *et seq.*); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3269 (42 U.S.C. 8301 *et seq.*); Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35; E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[46 FR 59889, Dec. 7, 1981, as amended at 47 FR 50849, Nov. 10, 1982; 54 FR 52892, Dec. 22, 1989]

### § 501.61 Certification contents.

(a) A self-certification filed under section 201(d) of FUA should include the following information:

(1) Owner's name and address.

(2) Operator's name and address.

(3) Plant location and address.

(4) Plant configuration (combined cycle, simple cycle, topping cycle, etc.)

(5) Design capacity in megawatts (MW).

(6) Fuel(s) to be used by the new facility.

(7) Name of utility purchasing electricity from the proposed facility and percent of total output to be sold.

(8) Date unit is expected to be placed in service.

(9) Certification by an officer of the company or his designated representative certifying that the proposed facility:

(i) Has sufficient inherent design characteristics to permit the addition of equipment (including all necessary pollution devices) necessary to render such electric powerplant capable of using coal or another alternate fuel as its primary energy source; and

(ii) Is not physically, structurally, or technologically precluded from using coal or another alternate fuel as its primary energy source.

(b) A self-certification filed pursuant to § 501.61(a) shall be effective to establish compliance with the requirement of section 201(a) of FUA as of the date filed.

(c) OFE will publish a notice in the FEDERAL REGISTER within fifteen days reciting that the certification has been filed. Publication of this notice does not serve to commence a public comment period.

(d) OFE will notify the owner or operator within 60 days if supporting documentation is needed to verify the certification.

[54 FR 52892, Dec. 22, 1989]

### § 501.62 Petition contents.

(a) A petition for exemption should include the following information:

(1) The name of the petitioner;

(2) The name and location of the unit for which an exemption is being requested;

(3) The specific exemption(s) being requested; and

(4) The name, address, and telephone number of the person who can supply further information.

(b) *Table of contents.* Include only those sections contained in the petition.

(c) *Introduction.* Include the following:

(1) Description of the facility under consideration;

(2) Description of the unit and fuel the petitioner proposes to burn in that unit, including the purpose of and need for the unit; and

(3) Description of the operational requirements for the unit, including size (capacity, input and output in millions of Btu's per hour), output in terms of product or service to be supplied, fuel capability, and operating mode, including capacity factor, utilization factor, and fluctuations in the load.

(d) *General requirements.* The evidence required under part 503 subpart B for each exemption(s) for which the petitioner is applying:

(1) No alternate power supply (§ 503.8):

(2) Use of mixtures (§ 503.9);

(3) Alternative site (§ 503.11);

(4) Compliance Plan (§ 503.12);

(5) Environmental impact analysis (§ 503.13);

(6) Fuels search (§ 503.14).

(e) *Specific evidence.* Evidence required for each exemption, segregated by exemption (part 503 subparts C and D).

(f) *References.* (1) Specify the reports, documents, experts, and other sources consulted in compiling the petition. Cite these sources in accordance with acceptable documentation standards,

and indicate the part of the petition to which they apply. If the source is unusual or little known, briefly describe its contents.

(2) Identify at the end of each section of the petition any information or any statement based, in whole or in part, on information or principles which, to petitioner's knowledge, represent significant innovations to or departures from generally accepted facts or principles.

(g) *Appendices*. Include in the appendices material which the petitioner believes substantiates any analyses fundamental to the petition, materials prepared in connection with it, and any other documents, studies, or analyses which are believed to be relevant to the decision to be made. Also, include in the appendices copies of any forms submitted as part of the petition.

(h) *List of preparers*. List the names with the qualifications and professional credentials of the principal contributors to the preparation of the petition. Indicate the sections or subject matters for which each principal contributor was responsible.

(i) *Incorporation by reference*. Pertinent information may be incorporated into the petition by reference when this can be done without impeding agency and public review. Referenced materials must be specifically identified and their contents briefly described in the petition. To incorporate by reference, the material must be submitted with the petition, or if previously submitted, the office to which it was submitted must be identified in the petition. The petitioner cannot incorporate by reference material based on proprietary data not available to OFE for review.

(Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 *et seq.*); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3269 (42 U.S.C. 8301 *et seq.*); Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35; E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[46 FR 59889, Dec. 7, 1981, as amended at 47 FR 50849, Nov. 10, 1982]

**§ 501.63 Notice of the commencement of an administrative proceeding on an exemption petition.**

(a)(1) When a petition is accepted, OFE will publish in the FEDERAL REGISTER a Notice of Acceptance, or, in the case of a certification exemption, a Notice of Acceptance and Availability of Certification, signifying that an exemption proceeding has commenced. The notice will include a summary of the exemption petition, and publication will commence a public comment period of no less than forty-five (45) days during which interested parties may file written comments concerning the petition. In the case of a certification exemption, interested persons may request a public hearing during this period, pursuant to § 501.33.

(2) OFE will notify the appropriate State agency having apparent primary authority to permit or regulate the construction or operation of a powerplant that an exemption proceeding has commenced and will consult with this agency to the maximum extent practicable. Copies of all accepted petitions also will be forwarded to EPA, as provided in § 501.14(a).

(b) In processing an exemption petition, OFE shall comply with the requirements of the National Environmental Policy Act of 1969 (NEPA), the Council on Environmental Quality's implementing regulations, and the DOE guidelines implementing those regulations (45 FR 20694, Mar. 28, 1980). Compliance with NEPA may involve the preparation of (1) an environmental impact statement (EIS) evaluating the grant or denial of an exemption petition, (2) an environmental assessment (EA), or (3) a memorandum to the file finding that the grant of the requested petition would not be considered a major federal action significantly affecting the quality of the human environment. If an EIS is required, OFE will publish in the FEDERAL REGISTER a Notice of Intent (NOI) to prepare an EIS as soon as practicable after commencement of the proceeding. A public meeting may be held pursuant to 40 CFR 1501.7 to solicit comments or suggestions on the structure and content of the EIS.

[46 FR 59889, Dec. 7, 1981, as amended at 54 FR 52893, Dec. 22, 1989]

### § 501.64 Publication of notice of availability of tentative staff analysis.

OFE will publish in the FEDERAL REGISTER a Notice of the Availability of Tentative Staff Analysis for the noncertification temporary public interest exemption, for noncertification environmental exemptions, and for a cogeneration exemption based on the public interest. OFE will provide a public comment period of at least fourteen (14) days from the date of publication during which interested persons may make written comments and request a public hearing.

### § 501.65 Publication of notice of availability of draft EIS.

A Notice of Availability of any draft EIS will be published in the FEDERAL REGISTER and comments thereon will also be solicited. Interested persons may request a hearing on any draft EIS. Such hearing must be requested within thirty (30) days of publication of the Notice of Availability of the draft EIS.

[54 FR 52893, Dec. 22, 1989]

### § 501.66 OFE evaluation of the record, decision and order.

(a) The administrative record in a proceeding under this part will consist of the proposed prohibition order and/or petition and related documents, all relevant evidence presented at the public hearing, all written comments, and any other information in the possession of OFE and made a part of the public record of the proceeding. OFE will base its determination to issue a rule or order on consideration of the whole record, or those parts thereof cited by a party and supported by reliable, probative, and substantial evidence.

(b) OFE may investigate and corroborate any statement in any petition, document, or public comments submitted to it. OFE also may use any relevant facts it possesses in its evaluation and may request submissions from third persons relevant to the petition or other documents. OFE also may request additional information, data, or analyses following a public hearing, if any, if this information is necessary to resolve disputed issues in the record. Any relevant information received by OFE following the hearing that is not declared to be confidential under § 501.7(a)(11) shall be made part of the public record with opportunity provided for rebuttal.

(c) OFE will notify all participants if, after the close of any public hearing or comment period, it receives or obtains any relevant information or evidence. Participants may respond to such information or evidence in writing within fourteen (14) days of such notification. If OFE finds that the additional information or evidence relates to material issues of disputed fact and may significantly influence the outcome of the proceeding, OFE shall reopen the hearing on the issue or issues to which the additional information or evidence relates.

### § 501.67 Petition redesignations.

OFE, with the petitioner's approval, will redesignate an exemption petition if the petitioner qualifies for an exemption other than the one originally requested, even though he may not qualify for the specific exemption originally requested, or be entitled to the full exemption period provided by requested exemption. OFE shall give public notice of any redesignation of an exemption petition, and where a public hearing has been requested notice shall be given at least thirty (30) days prior to such hearing.

### § 501.68 Decision and order.

(a)(1) OFE shall issue an order either granting or denying the petition for an exemption or permit within six (6) months after the end of the period for public comment and hearing applicable to any petition.

(2) OFE may extend the six (6) month period for decision to a date certain by publishing notice in the FEDERAL REGISTER, and stating the reasons for such extension.

(3) OFE will publish a final EIS at least thirty (30) days prior to take issuance of the final order in all cases where an EIS is required.

(b)(1) OFE shall serve a copy of the order granting or denying a petition for exemption to the petitioner and all persons on the service list in cases involving a public hearing.

(2) OFE shall publish any order granting or denying a petition under this subpart in the FEDERAL REGISTER together with a statement of the reasons for the grant or denial.

(c)(1) Any order granting or denying a petition for exemption shall be based upon consideration of the whole record or those parts thereof cited by a party and supported by, and in accordance with, reliable, probative and substantive evidence.

(2) The denial of a petition for exemption shall be without prejudice to the petitioner's right to submit an amended petition. OFE may, however, reject the amended petition if it is not materially different from the denied petition.

(d) OFE may design any terms and conditions included in any temporary exemption issued or extended under section 211 of FUA, to ensure, among other things, that upon expiration of the exemption the persons and powerplant covered by the exemption will comply with the applicable prohibitions under FUA. For purposes of the provision, the subsequent grant of a permanent exemption to the subject unit shall be deemed compliance with applicable prohibitions.

(Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 *et seq.*); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3269 (42 U.S.C. 8301 *et seq.*); Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35; E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[46 FR 59889, Dec. 7, 1981, as amended at 47 FR 50849, Nov. 10, 1982; 54 FR 52893, Dec. 22, 1989]

### §501.69 Judicial review.

Any person aggrieved by any order issued by OFE under this subpart, must file, within sixty (60) days of publication of the final order in the FEDERAL REGISTER, a petition for judicial review in the United States Court of Appeals for the Circuit wherein he resides, or has his principal place of business. Exhaustion of administrative remedies for purposes of judicial review does not require filing a petition pursuant to subpart G for modification or rescission of the order to be reviewed.

## Subpart G—Requests for Modification or Rescission of a Rule or Order

### §501.100 Purpose and scope.

(a) Anyone may request that OFE commence a rulemaking proceeding pursuant to 5 U.S.C. 553(e); however, this subpart provides the procedures to be followed by—

(1) An interested person seeking the modification or rescission of a prohibition by rule applicable to a new facility;

(2) An owner or operator of a facility named in a prohibition by rule requesting the modification or rescission of that rule; or

(3) An owner or operator subject to an exemption order or a specific prohibition imposed by order requesting the modification or a rescission of that order.

(b) OFE also may commence a modification or rescission proceeding on its own initiative.

### §501.101 Proceedings to modify or rescind a rule or order.

(a) In response to a request duly filed by an interested person, OFE may commence a proceeding to modify or rescind a rule or order. If OFE determines that a request to modify or rescind a rule or order does not warrant commencement of a proceeding, it will deny the request and issue a brief statement of the reason(s) for the denial.

(b) A request for modification or rescission of a rule or order must comply with the requirements of §501.7 and must be filed at the address set forth in §501.11.

(c) Notice of the request for modification or rescission of an order must be given by the requester to each party to the original proceeding that resulted in the issuance of the original order for which modification or rescission is sought. If the number of parties to the original proceeding is too large to allow actual notice at a reasonable cost or within a reasonable time, a requester may ask that OFE give notice to the parties by publication in the FEDERAL REGISTER; however, this alternate notice does not bind OFE to

commence a proceeding, if it subsequently determines that the request is not warranted.

(d) If OFE determines to grant a request to commence a proceeding to rescind or modify a rule or order, or OFE on its own initiative, commences a proceeding for the modification or rescission of a rule or order, it will give notice, either by service of a written notice or by oral communication (which communication must be promptly confirmed in writing) to each person upon whom the order was served that OFE proposes to modify or rescind, or, alternatively, by publication of notice in the FEDERAL REGISTER. OFE will give a reasonable period of time for each person notified to file a written response.

(e)(1) A copy of any written comments submitted to OFE under this subpart by a party to the original proceeding must also be sent to the requester. The party submitting such comments must certify to OFE that he has sent a copy of such comments to the requester.

(2) OFE may notify other persons participating in the proceeding of the comments and provide an opportunity for those notified to respond.

(f) A request for modification or rescission of a rule or order must contain a complete statement of all facts relevant to the action sought. The request must also include the names and addresses of all reasonably ascertainable persons who will be affected. Pertinent provisions contained in any documents believed to support a request may be briefly described, however, OFE reserves the right to obtain copies of any significant documents that will assist in making a determination on the merits of a request. The request must identify the specific order or rule for which modification or rescission is sought. A request should also indicate whether an informal conference will facilitate OFE's determination to commence, or not to commence a proceeding, or will assist OFE in making any determinations on material issues raised by the request.

(g) A decision by OFE to commence a proceeding under this subpart does not entitle the requester to a public hearing on the request for modification or rescission. A public hearing may be held, however, if, in its discretion, OFE considers that a public hearing will advance its evaluation of the request.

### § 501.102 OFE evaluation of the record, decision and order for modification or rescission of a rule or order.

(a) OFE will consider the entire administrative record in its evaluation of the decision and order for modification or rescission of a rule or order. OFE may investigate and corroborate any statement in the petition or related documents and may utilize in its evaluation any relevant facts obtained by its investigations. OFE may solicit or accept submissions from third persons relevant to any request under this subpart and all interested persons will be afforded an opportunity to respond to these submissions. OFE may, in its discretion and on its own initiative, convene a conference, if it considers that a conference will advance its evaluation of the request.

(b) *Criteria.* Except where modification or rescission of a rule or order is initiated by OFE, OFE's decision to rescind or modify a rule or order will be based on a determination that there are significantly changed circumstances with respect to the applicability of a particular prohibition or exemption to the requester. OFE believes that there may be ''significantly changed circumstances'', if:

(1) Significant material facts are subsequently discovered which were not known and could not have been known to the petitioner or to OFE at the time of the original proceeding;

(2) A law, regulation, interpretation, ruling, order or decision on appeal that was in effect at the time of the proceeding upon which the rule or order is based and which, if it had been made known to OFE, would have been relevant to the proceeding and would have substantially altered the outcome is subsequently discovered; or

(3) There has been a substantial change in the facts or circumstances upon which an outstanding and continuing order was based, which change occurred during the interval between issuance of the order and the date of filing of the request under this subpart,

and was caused by force or circumstances beyond the requester's control.

**§ 501.103 OFE decision.**

(a) OFE shall issue an appropriate rule or order after considering the request for modification or rescission of a rule or order and other relevant information received during the proceeding.

(b) OFE will either grant or deny the request for modification or rescission and will briefly state the pertinent facts and legal basis for the decision.

(c) OFE will serve the rule or order granting or denying the request for modification or rescission upon the requester, or, if the action was initiated by OFE, upon the owner or operator of the affected powerplant or installation. OFE will publish a notice of the issuance of a rule or order modifying or rescinding a rule or order in the FEDERAL REGISTER.

## Subpart H—Requests for Stay

**§ 501.120 Purpose and scope.**

(a) This subpart sets forth the procedures for the request and issuance of a stay of a rule or order or other requirement issued or imposed by OFE or these regulations but does not apply to the mandatory stays provided for in sections 202(b) and 301(a) of FUA. The application for a stay under this subpart will only be considered incidental to a proceeding on a request for modification or rescission of a final prohibition rule or order.

(b) The petitioner must comply with all final and effective OFE orders, regulations, rulings, and generally applicable requirements unless a petition for a stay is granted or is applicable under FUA.

**§ 501.121 Filing and notice of petitions for stays.**

(a)(1) The petition for a stay must be in writing and comply with the general filing requirements stated in § 501.7, in addition to any other requirements set forth in this subpart, and must be filed at the address provided in § 501.11.

(2) A claim for confidential treatment of any information contained in the petition for stay and supporting documents must be in accordance with § 501.7(a)(11), and filed at the address provided in § 501.11.

(b) OFE will publish notice of receipt of a petition for a stay under this subpart in the FEDERAL REGISTER.

**§ 501.122 Contents.**

(a) A petition for a stay shall contain a full and complete statement of all facts believed to be pertinent to the act or transaction for which a stay is sought. The facts shall include, but not be limited to, the criteria listed below in § 501.123(b).

(b) The petitioner may request a conference regarding the application. If the request is not made at the time the application is filed, it must be made as soon thereafter as possible. The request and OFE's determination regarding it will be made in accordance with subpart C of this part.

**§ 501.123 Evaluation of the record.**

(a) The record in a proceeding on a petition for stay shall consist of the petition and any related documents, evidence submitted at any public proceedings and any other information in the possession of OFE and made part of the record. OFE may investigate and corroborate any statement in the petition or any other document submitted to it and may utilize in its evaluation any relevant facts obtained by its investigations. OFE may solicit or accept submissions from third persons relevant to the petition for stay or other document and any interested person will be afforded an opportunity to respond to these submissions. OFE, on its initiative, may convene a conference, if, in its discretion, it considers that the conference will advance its evaluation of the petition.

(b) *Criteria.* (1) OFE may grant a stay incident to a proceeding on a petition for modification of a rule or order if the petitioner shows:

(i) Irreparable injury will result if the stay is denied;

(ii) There is a strong likelihood of success on the merits;

(iii) The denial of a stay will result in a more immediate hardship or inequity to the petitioner than to other persons affected by the proceeding; and

(iv) It would be desirable for reasons of public policy to grant the stay.

### § 501.124 Decision and order.

(a) OFE will issue an order granting or denying the petition for a stay upon consideration of the request and other relevant information received or obtained during the proceeding.

(b) OFE will include in the order a brief written statement setting forth the relevant facts and the basis of the decision, including any appropriate terms and conditions of the stay.

## Subpart I—Requests for Interpretation

### § 501.130 Purpose and scope.

This subpart establishes procedures for filing a formal request for and the issuance of an interpretation of a rule, order or other action by DOE. Any response, whether oral or written, to a general inquiry, or to other than a formal written request for interpretation filed with DOE, is not an interpretation and merely provides general information that may not be relied upon in any proceeding to determine compliance with the applicable requirements of FUA.

### § 501.131 Filing a request for interpretation.

A proceeding to request an interpretation is commenced by the filing of a ''Request for Interpretation (FUA).'' The request must be in writing and must also comply with the general filing requirements stated in § 501.7. Any claims for confidential treatment for any information contained in the request or other related documents must be made pursuant to § 501.7(a)(11). A request for interpretation should be filed with the Assistant General Counsel for Interpretations and Rulings at the address provided in § 501.11.

### § 501.132 Contents of a request for interpretation.

(a) A request for an interpretation must contain a complete statement of all the facts believed to be relevant to the circumstances, acts or transactions that are the subject of the request. The facts must include the names and addresses of all potentially affected persons (if reasonably ascertainable) and a full discussion of the pertinent provisions and relevant facts contained in any documents submitted with the request. Copies of relevant contracts, agreements, leases, instruments, and other documents relating to the request must be submitted if DOE believes they are necessary for determination of any issue pending in the proceeding under this subpart. When the request pertains to only one step in a larger integrated transaction, the requesting party must also submit the facts, circumstances, and other relevant information pertaining to the entire transaction.

(b) The requesting party must include in the request a discussion of all relevant legal authorities, rulings, regulations, interpretations and decisions on appeal relied upon to support the particular interpretation sought.

(c) DOE may refuse to issue an interpretation if it determines that there is insufficient information upon which to base an interpretation.

### § 501.133 DOE evaluation.

(a)(1) The record shall consist of the request for an interpretation and any supporting documents, all relevant evidence presented at any public proceedings, written comments and any information in the possession of DOE that has been made part of the record.

(2) DOE may investigate and corroborate any statement in a request or related documents and may utilize in its evaluation any relevant facts obtained by the investigation. DOE may solicit or accept submissions from third persons relevant to the request for interpretation, or any other document submitted under this subpart, and the person requesting the interpretation will be afforded an opportunity to respond to these submissions.

(3) The General Counsel or his delegate will issue an interpretation on the basis of the information provided in the request, unless that information is supplemented by other information brought to the attention of DOE during the proceeding. DOE's interpretation will, therefore, depend on the accuracy of the factual statements, and the requesting party may rely upon it only

to the extent that the facts of the actual situation correspond to those upon which the interpretation is based.

(b) *Criteria*. (1) DOE will base its FUA interpretations on the DEOA and FUA, as applicable, and the regulations and published rulings of DOE as applied to the specific factual situation presented.

(2) DOE will take into consideration previously issued interpretations dealing with the same or a related issue.

**§ 501.134 Issuance and effect of interpretations.**

(a) DOE may issue an interpretation after consideration of the request for interpretation and other relevant information received or obtained during the proceeding.

(b) The interpretation will contain a written statement of the information upon which it is based and a legal analysis of and conclusions regarding the application of rulings, regulations and other precedent to the situation presented in the request.

(c) Only those persons to whom an interpretation is specifically addressed, and other persons upon whom the DOE serves the interpretation and who are directly involved in the same transaction or act, are entitled to rely upon it. No person entitled to rely upon an interpretation shall be subject to civil or criminal penalties stated in title VII of FUA for any act taken in reliance upon the interpretation, notwithstanding that the interpretation shall thereafter be declared by judicial or other competent authority to be invalid.

(d) DOE may at any time rescind or modify an interpretation on its own initiative. Rescission or modification shall be made by notifying persons entitled to rely on the interpretation that it is rescinded or modified. This notification will include a statement of the reasons for the rescission or modification and, in the case of a modification, a restatement of the interpretation as modified.

(e) An interpretation is modified by a subsequent amendment to the regulations or ruling to the extent that it is inconsistent with the amended regulation or ruling.

(f) Any person who believes he is directly affected by an interpretation issued by DOE, and who believes that he will be aggrieved by its implementation, may submit a petition for reconsideration of that interpretation to the General Counsel. DOE will acknowledge receipt of all requests for reconsideration; however, this acknowledgement in no way binds DOE to commence any proceeding on the request. If within sixty (60) days of DOE's acknowledgement of the receipt of a request for reconsideration, DOE has not issued either a notice of intent to commence a proceeding to reconsider the interpretation or a modification, revision or rescission of the original interpretation, the request for reconsideration will be deemed denied. DOE may, in its discretion, issue a formal denial of a request for reconsideration if:

(1) The request has not been filed in a timely manner, and good cause therefor has not been shown;

(2) The person requesting reconsideration is not aggrieved or otherwise injured substantially by the interpretation; or

(3) The request is defective because it fails to state and to present facts and legal argument that the interpretation was erroneous in fact or in law, or that it was arbitrary or capricious.

## Subpart J—Rulings

**§ 501.140 Purpose and scope.**

DOE may issue rulings in accordance with the provisions of this subpart. DOE will publish each ruling in the FEDERAL REGISTER and in 10 CFR part 518. A person is entitled to rely upon a ruling to the extent provided in this subpart.

**§ 501.141 Criteria for issuance.**

(a) The General Counsel may issue a ruling whenever:

(1) There has been a substantial number of inquiries with regard to similar factual situations or a particular section of the regulations; or

(2) It is determined that a ruling will be of assistance to the public in applying the regulations to a specific situation.

**§ 501.142 Modification or rescission.**

(a) A ruling may be modified or rescinded by—

(1) Publication of the modification or rescission by DOE in the FEDERAL REGISTER and in 10 CFR part 518; or

(2) Adoption of a rule that supersedes or modifies a prior ruling.

(b) A person shall not be subject to the sanctions or penalties stated in these regulations for actions taken in reliance upon a ruling, notwithstanding that the ruling is subsequently declared to be invalid or no longer applicable. A person affected by a ruling may not rely upon it for more than 30 days after it has been rendered invalid pursuant to issuance of a superseding rule by OFE, or after it has been rescinded or modified by DOE.

**§ 501.143 Comments.**

Any interested person may file a written comment on or objection to a published ruling at any time with the Assistant General Counsel for Interpretations and Rulings at the address provided in § 501.11.

## Subpart K—Enforcement

**§ 501.160 Purpose and scope.**

This subpart provides the procedures by which OFE may initiate enforcement proceedings on its own behalf and by which complaints concerning a violation of the Act or any rule or order thereunder may be filed.

**§ 501.161 Filing a complaint.**

(a) A complaint under this subpart must be submitted in writing over the signature of the person making the complaint in accordance with the general filing requirements stated in § 501.7. OFE will accept oral complaints that otherwise satisfy the requirements of this subpart, but OFE may request written verification.

(b) A complaint shall be filed at the address provided in § 501.11.

**§ 501.162 Contents of a complaint.**

A complaint must contain a complete statement of all relevant facts pertaining to the act or transaction that is the subject of the complaint. It must also include the names and addresses of all persons involved (if reasonably ascertainable), a description of the events that led to the complaint, and a statement describing the statutory provision, regulation, ruling, order, rule, or interpretation that allegedly has been violated.

**§ 501.163 OFE evaluation.**

(a) The record shall consist of the complaint and any supporting documents and all other relevant information developed in the course of any investigations or proceedings related to that complaint. OFE may investigate and corroborate any statement in the complaint or related documents submitted, and may utilize in its evaluation any relevant facts obtained by such investigation or from any other source of information. OFE may solicit or accept submissions from third persons relevant to the complaint or other related documents.

(b) *Confidentiality of information.* OFE will treat as confidential information received in any investigation of a complaint, including the identity of the complainant and the identity of any other persons who provide information to the extent such information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552. OFE reserves the right to make disclosures that would be in the public interest.

**§ 501.164 Decision to initiate enforcement proceedings.**

After investigation of a specific complaint or based on any relevant information received or obtained during an investigation, OFE may issue a notice of violation, determine that no violation has occurred, or take such other actions as it deems appropriate. Prior to issuance of a notice of violation, and before commencement of an enforcement proceeding, OFE may transmit a draft of the notice of violation to the potentially affected person in order to promote an informal resolution of the violation.

**§ 501.165 Commencement of enforcement proceedings.**

(a) Whenever, on the basis of any information available, OFE determines that a person is in violation or about

to be in violation of any provision of these regulations, OFE may issue a notice of violation stating, in writing and with reasonable specificity, the nature of the violation. An enforcement proceeding commences with the issuance of a notice of violation.

(b) *Contents of the notice of violation.* OFE will set forth in the notice of violation the nature of the violation, the relevant facts that OFE believes establish the violation and the legal basis for the conclusions reached therein. OFE may also include with the notice of violation a copy of a proposed order. The notice of violation will also state whether or not OFE proposes to assess civil penalties.

(1) If OFE proposes to assess a civil penalty, a notice of violation will be issued to the violator with an opportunity for a hearing before an Administrative Law Judge, as set forth in §501.166(a)(1) of this part, before any final determination on the violation and penalty are made by OFE. The recipient of the notice will also be informed of his right to elect to have the procedures of §501.166(a)(2) apply, in lieu of the hearing, with respect to a final determination on the assessment of any civil penalty.

(2) If OFE does not propose to assess a civil penalty, the violator will be provided the opportunity for a conference, as set forth in §501.166(b), before a final determination on the violation is made by OFE. OFE may, in its discretion, also provide the violator an opportunity for a hearing pursuant to §501.166(a)(1).

(c) *Service.* OFE will serve the notice of violation in accordance with provisions set forth in §501.6.

(d) *Rescission.* If, after issuance of a notice of violation and any related investigation, OFE finds no basis for the belief that a violation has occurred, is continuing to occur, or is about to occur, OFE may rescind the notice of violation by giving written notice to that effect to the recipient.

### §501.166 Hearings and conferences.

(a) *When a civil penalty is proposed—* (1) *Hearing alternative in civil penalty assessment proceedings.* Unless the recipient of a notice of violation elects in writing to have the provisions of paragraph (a)(2) of this section apply, OFE will commence a proceeding to assess a penalty and, prior to a final determination on the violation and assessment of a penalty, provide an opportunity for a hearing pursuant to 5 U.S.C. 554 before an Administrative Law Judge.

(2) *Election alternative in civil penalty assessment proceedings.* The recipient of a notice of violation in which a civil penalty assessment has been proposed may elect, in writing, within thirty (30) days of receipt of the notice, to waive the administrative proceedings described in paragraph (a)(1) of this section. OFE will make a determination on the proposed civil penalty assessment and issue a final order to that effect within forty-five (45) days after receiving notice of the exercise of this election.

(b) *When a civil penalty is not proposed—opportunity to request a conference.* If a person has received a notice of violation in which a civil penalty has not been proposed, he may, within thirty (30) days after receipt of the notice, request a conference with OFE to discuss the notice. In order to request a conference he must comply with the instructions set forth in the notice.

### §501.167 Fuel use order.

(a) *General.* OFE will issue a Fuel Use Order if, after considering all the information received during the proceeding, OFE determines that a person has committed, is committing, or is about to commit a violation of FUA or of an order or rule thereunder.

(b) *Contents.* Any Fuel Use Order issued under this section shall set forth the relevant facts and legal basis for the order and where appropriate, the final penalty assessment and the basis therefor. When an administrative hearing is requested under §501.166(a) of this part, the Fuel Use Order will include the recommended findings and conclusions of the Administrative Law Judge (ALJ) and the basis for the penalty assessment. OFE will make a final determination as to any penalty assessment or other appropriate remedy based upon the recommended findings and conclusions of the ALJ and other information in the record of the enforcement proceeding. The order will

be effective upon service, unless otherwise provided therein, or stayed pursuant to § 501.120.

(c) *Service.* OFE will serve a copy of the Fuel Use Order upon any person who was served a copy of the notice of violation and upon all parties to any public proceeding on the notice of violation. OFE will place a copy of each final order on file in the Public Information Office described in § 501.12.

(d) *Judicial review.* Any person against whom a penalty is assessed pursuant to § 501.167(b) after a hearing before an ALJ may, within sixty (60) calendar days after the date of issuance of the order assessing such penalty, institute an action in the United States Court of Appeals for the appropriate judicial circuit for judicial review of such order in accordance with the provisions of section 723 of FUA.

## Subpart L—Investigations, Violations, Sanctions and Judicial Actions

### § 501.180 Investigations.

(a) *General.* Pursuant to section 711 of FUA, the DEOA, and in accordance with the provisions of 10 CFR 205.201, OFE may initiate and conduct investigations relating to the scope, nature, and extent of compliance by any person with the rules, regulations, and orders issued by OFE under the authority of the Act, or any order or decree of court relating thereto, or any other agency action. When the circumstances warrant, OFE may issue subpoenas as provided in subpart D of this part. OFE may also conduct investigative conferences in conjunction with any investigation.

(b) Any duly authorized representative of OFE has the authority to conduct an investigation and to take such action as he deems necessary and appropriate to the conduct of the investigation.

(c) *Notification.* If any person is required to furnish information or documentary evidence pursuant to a subpoena or special report order, OFE will, upon written request, inform that person as to the general purposes of the investigation.

(d) *Confidentiality.* OFE shall not disclose any information received during an investigation under this section, including the identities of the person investigated and any other person who provides information, to the extent it is exempt from public disclosure pursuant to 5 U.S.C. 552 and 10 CFR part 1004.

### § 501.181 Sanctions.

(a) *General.* (1) A violation of any provision of the Act (other than section 402 of FUA), or any rule or order thereunder shall be subject to the penalties and sanctions provided in subtitle C of title VII of FUA.

(2) Each day that any provision of the Act (other than section 402), or any rule or order thereunder is violated constitutes a separate violation within the meaning of the provisions of this section relating to civil penalties.

(b) *Criminal penalties.* Any person who willfully violates any provision of the Act (other than section 402), or any rule or order thereunder will be subject to a fine of not more than $50,000, or to imprisonment for not more than 1 year, or both, for each violation.

(c) *Civil Penalties.* (1) Any person who violates any provisions of the Act (other than section 402) or any rule or order thereunder will be subject to the following civil penalty, which may not exceed $90,063 for each violation: Any person who operates a powerplant or major fuel burning installation under an exemption, during any 12-calendar-month period, in excess of that authorized in such exemption will be assessed a civil penalty of up to $8 for each MCF of natural gas or up to $36 for each barrel of oil used in excess of that authorized in the exemption.

(2) OFE may compromise and settle, and collect civil penalties whenever it considers it to be appropriate or advisable.

(d) *Corporate personnel.* (1) If a director, officer, or agent of a corporation willfully authorizes, orders, or performs any act or practice constituting in whole or in part a violation of the Act, or any rule or order thereunder, he will be subject to the penalties specified in paragraphs (b) and (c) of this section without regard to any penalties to which the corporation may be subject. He will not, however, be subject to imprisonment under paragraph (b) of

this section unless he knew of noncompliance by the corporation, or had received from OFE notice of noncompliance by the corporation.

(2) Purposes of this paragraph:

(i) *Agent* includes any employee or other person acting on behalf of the corporation on either a temporary or permanent basis; and

(ii) *Notice of noncompliance* is a final Fuel Use Order issued under § 501.167 of this part.

[46 FR 59889, Dec. 7, 1981, as amended at 62 FR 46183, Sept. 2, 1997; 74 FR 66032, Dec. 14, 2009; 81 FR 41794, June 28, 2016; 81 FR 96352, Dec. 30, 2016]

### § 501.182 Injunctions.

Whenever it appears to OFE that any person has committed, is committing, or is about to commit a violation of any provision of the Act, or any rule or order thereunder, OFE may, in accordance with section 724 of FUA, bring a civil action in the appropriate United States District Court to enjoin such acts or practices. The relief sought may include a mandatory injunction commanding any person to comply with any provision of such provision, order or rule, the violation of which is prohibited by section 724 of FUA and may also include interim equitable relief.

### § 501.183 Citizen suits.

(a) *General.* A person who believes he is aggrieved by the failure of OFE to perform any nondiscretionary act of duty under the Act may file a Petition for Action for OFE to take such action as he may feel to be proper. This petition must be filed at the address provided in § 501.11. The petition must specify the action requested and set forth the facts and legal arguments that constitute the basis for the request. The filing of a Petition for Action will serve as notice to OFE under FUA section 725(b) for purposes of any citizens suit that may be subsequently filed.

(b) *OFE decision.* Within sixty (60) days of receiving the Petition for Action, OFE will notify the person giving notice under this section that it has instituted the action requested or that other described action is being taken, or that other described action is being taken, or that no action is being taken and the reasons therefor.

## Subpart M—Use of Natural Gas or Petroleum for Emergency and Unanticipated Equipment Outage Purposes

### § 501.190 Purpose and scope.

(a) If a person operates a powerplant covered by any of the prohibitions of titles II, III, or IV of FUA, § 501.191 of this subpart establishes procedures to be followed for the use of minimum amounts of natural gas or petroleum under FUA section 103(a)(15)(B) in order to alleviate or prevent unanticipated equipment outages and emergencies directly affecting the public health, safety, or welfare that would result from electric power outages.

(b) *Explanatory note:* If a person operates a rental boiler as a powerplant covered by any of the prohibitions of titles II, III, or IV of FUA, he may be able to use the provisions of this subpart for the emergency use of natural gas or petroleum.

[54 FR 52893, Dec. 22, 1989]

### § 501.191 Use of natural gas or petroleum for certain unanticipated equipment outages and emergencies defined in section 103(a)(15)(B) of the act.

(a) In the event of the occurrence or imminent occurrence of an emergency, or of the occurrence or imminent occurrence of an unanticipated equipment outage in the unit, an owner or operator of a powerplant is automatically permitted to use minimum amounts of natural gas or petroleum in the unit or in a substitute unit to prevent or alleviate the outage or to prevent or alleviate the emergency if he complies with procedures contained in paragraph (b) of this section.

(b) If the use of minimum amounts of petroleum or natural gas is required for purposes specified in this section, the owner or operator must notify OFE of such use by telegram or telephone within 24 hours after the commencement of such use. Immediately thereafter a written confirmation must be submitted to OFE, describing, to the best estimate of the owner or operator,

(1) the nature of the emergency and (2) how long petroleum or natural gas use is likely to be required.

(c) For purposes of this section only:

(1) An *emergency* is the occurrence or threat of imminent occurrence of a condition which results or would result from an electric power outage and directly effects or would directly effect the public health, safety or welfare;

(2) *Unanticipated equipment outage* shall mean an unexpected outage due to equipment failure.

(3) *Minimum amounts required to alleviate or prevent* shall mean:

(i) For powerplants, the amounts of natural gas or petroleum required to prevent curtailment of electric supply where the operating utility has, to the maximum extent possible, utilized alternate fuel-fired capacity to prevent such curtailment. Note—A utility operating hydroelectric facilities may take into account seasonal fluctuations in storage capacity and shall be permitted to prevent depletion of stored power-producing capacity as deemed necessary by the utility; and

(ii) For installations, the amounts of natural gas or petroleum required to meet plant protection or human health and safety needs, including services to hospitals, public transportation facilities, sanitation, or water supply and pumping.

[46 FR 59889, Dec. 7, 1981, as amended at 54 FR 52893, Dec. 22, 1989]

### § 501.192 [Reserved]

# PART 503—NEW FACILITIES

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503.2 Prohibition.
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503.39–503.44 [Reserved]

AUTHORITY: Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. § 7101 *et seq.*); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3289 (42 U.S.C. 8301 *et seq.*); Energy Security Act, Pub. L. 96–294, 94 Stat. 611 (42 U.S.C. 8701 *et seq.*); E.O. 1209, 42 FR 46267, September 15, 1977.

SOURCE: 46 FR 59903, Dec. 7, 1981, unless otherwise noted.

(OMB Control No.: 1903–0075. See 46 FR 63209, Dec. 31, 1981.)

## Subpart A—General Prohibition

### § 503.1 Purpose and scope.

This subpart sets forth the statutory prohibition imposed by the Act upon new powerplants. The prohibition in the subpart applies to all new baseload

electric powerplants unless an exemption has been granted by OFE under subparts C and D of this part. Any person who owns, controls, rents, leases or operates a new powerplant that is subject to the prohibition may be subject to sanctions provided by the Act or these regulations.

[54 FR 52893, Dec. 22, 1989]

### § 503.2 Prohibition.

Section 201 of the Act prohibits, unless an exemption has been granted under subpart C or D of this part, any new electric powerplant from being constructed or operated as a baseload powerplant without the capability to use coal or another alternate fuel as a primary energy source.

[54 FR 52893, Dec. 22, 1989]

### § 503.3 [Reserved]

## Subpart B—General Requirements for Exemptions

### § 503.4 Purpose and scope.

This subpart establishes the general requirements necessary to qualify for either a temporary or permanent exemption under this part and sets out the methodology for calculating the cost of using an alternate fuel and the cost of using imported petroleum.

### § 503.5 Contents of petition.

Before OFE will accept a petition for either a temporary or permanent exemption under this part, the petition must include all of the evidence and information required in this part and part 501 of this chapter.

### § 503.6 Cost calculations for new powerplants and installations.

(a) *General.* (1) This calculation compares the cost of using alternate fuel to the cost of using imported petroleum. It must be performed for each alternate fuel and/or alternate site that the petitioner is required to examine.

(2) The cost of using an alternate fuel as a primary energy source will be deemed to substantially exceed the cost of using imported petroleum if the difference between the cost of using alternate fuel and the cost of using imported oil is greater than zero.

(3) There are two comparative cost calculations—a general cost test and a special cost test. Both take into consideration cash outlays for capital investments, annual expenses, and the effect of depreciation and taxes on cash flow. To demonstrate eligibility for a permanent exemption, a petitioner must use the procedures specified in the general cost test (paragraph (b) of this section). To demonstrate eligibility for a temporary exemption, the petitioner may apply the procedures specified in either the general cost test or the special cost test (paragraph (c) of this section).

(b) *Cost calculation—general cost test.* (1) A petitioner may be eligible for a permanent exemption if he can demonstrate that the cost of using an alternate fuel from the first year of operation substantially exceeds the cost of using imported petroleum. Unless the best practicable cost estimates as prescribed below will not materially change during the first ten years of operation of the unit (given the best information available at the time the petition is filed), the petitioner must also demonstrate that the cost of using an alternate fuel beginning at any time within the first ten years of operation and using imported petroleum or natural gas until such time (*i.e.*, delayed use of alternate fuel) would substantially exceed the cost of using only imported petroleum.

(2) The petitioner would only be eligible for a temporary exemption if the computed costs of delayed alternate fuel use, commencing at the start of the second through eleventh years of operation, do not always substantially exceed the cost of using only imported petroleum. The length of the temporary exemption would be the minimum period from the start of operation in which the cost of using alternate fuel substantially exceeds the cost of using imported petroleum.

(3) To conduct the general cost test, calculate the difference (DELTA) between the cost of using an alternate fuel (COST(ALTERNATE)) and the cost of using imported petroleum (COST(OIL)) using Equations 1 through 3 below and the comparison procedures in paragraph (b)(5) of this section.

EQ 1 DELTA = COST (ALTERNATE) - COST (OIL)

where COST(ALTERNATE) and COST(OIL) are determined by:

$$\text{EQ 2} \qquad \text{COST} = I + \sum_{i=1}^{N} \frac{(OM_i + FL_i)(1-t_i)}{(1+k)^i}$$

and I (capital investment) is:

$$\text{EQ 3} \qquad I = \sum_{i=-g}^{N} \frac{I_i - ITC_i - S_i - t_i(DPR_i)\left(\frac{IX_e}{IX_i}\right)}{(1+k)^i}$$

(4) The terms in Equations 2 and 3 are defined as follows:

i = Year. i is a specified year either before year 0 or after year 0. Year 0 is the year before the unit becomes operational. For example, in the third year before the unit becomes operational, i would equal −2, and in the third year following commencement of operations of the unit, i would equal + 3. Years are represented by 52 week periods prior to or following the date on which the unit becomes operational. Outlays before the unit becomes operational are future valued to the year before the unit becomes operational (year 0), and outlays after the unit becomes operational are present valued to the year before the unit becomes operational. Year 0 must be the same for the units being compared.

g = The number of years prior to the year before the unit becomes operational (year 0) that (1) a cash outlay is first made for capital investments, or (2) an investment tax credit is first used—whichever occurs first.

N = The useful life of the unit (see paragraph (d)(5) of this section).

$I_i$ = Yearly cash outlay (in dollars) from the year outlays first occur to the last year of the unit's useful life for capital investments. (See paragraph (d)(2) of this section for the items that must be included.)

$OM_i$ = Annual cash outlay in year i (in dollars) for all operations and maintenance expenses except fuel (*i.e.*, all non-capital and non-fuel cash outlays caused by putting the capital investments (I) into service). This may include labor, materials, insurance, taxes (except income taxes), etc. (See paragraph (d)(3) of this section.)

$S_i$ = Salvage value of capital investment (in dollars) in year i.

$FL_i$ = Annual cash outlay for delivered fuel expenses (in dollars) in year i. (See paragraph (d)(3) of this section for $FL_i$ calculation instructions and appendix II of these regulations for the procedures to determine fuel price.)

k = The discount rate expressed as a fraction (see paragraph (d)(4) of this section).

$ITC_i$ = Federal investment tax credit used in year i resulting from capital investments (see paragraph (d)(6) of this section).

$DPR_i$ = Depreciation in year i resulting from capital investments (see paragraph (d)(6) of this section).

$t_i$ = Marginal income tax rate in year i (see paragraph (d)(6) of this section).

$IX_i$ = Inflation index value for year i (see appendix II to part 504 for method of computation).

$IX_e$ = Inflation index value for the year e, the year before the asset is placed in service.

(5) The step-by-step procedure that follows shows the comparison that the petitioner must make.

(i) Compute the cost of using an alternate fuel (COST(ALTERNATE)) unit throughout the useful life of the unit using Equations 2 and 3.

(ii) Compute the cost of using oil or natural gas (COST(OIL)) throughout the useful life of the unit using Equations 2 and 3.

(iii) Using Equation 1, compute the difference (DELTA) between COST (ALTERNATE) and COST (OIL). If the difference (DELTA) is less than or equal to zero, a petitioner is not eligible for a permanent or temporary exemption using the general cost test and need not complete the remainder of the general cost test calculation. However, he still may be eligible for a temporary exemption using the special cost test (paragraph (c) of this section). If the difference (DELTA) is greater than zero and if the best practicable cost estimates will not materially change during the first ten years of operation (given the best information available at the time the petition is filed), the petitioner has completed the test and is eligible for a permanent exemption. However, if the best practicable cost estimate will materially change during the first ten years, the petitioner must complete the remainder of the general cost test—the delayed use calculations which follow.

(iv) Recompute COST (ALTERNATE) with Equations 2 and 3, assuming that an alternate fuel is not used as the primary energy source until the start of the second year of operation and that imported petroleum or natural gas is used for the first year of operation. All cash outlays should reflect postponed use of alternate fuel.

(v) Successively recompute COST (ALTERNATE) with Equations 2 and 3, assuming that the alternate fuel use is postponed until the start of the third year, fourth year, and so on, through the beginning of the eleventh year of operation (with imported petroleum or natural gas used in the years preceding alternate fuel use).

(vi) Compute the difference (DELTA) between each of the ten COST(ALTERNATE)s calculated in paragraph (b)(5) (iv) and (v) of this section and the COST(OIL) calculated in paragraph (b)(5)(ii) of this section.

(vii) If *all* the DELTAs computed in paragraph (b)(5) (iii) and (vi) of this section are greater than zero, the petitioner is eligible for a permanent exemption. If one or more of the DELTAs is less than or equal to zero, he is eligible for a temporary exemption for the period beginning at the start of the first year of operation and terminating at the beginning of the first year in which a DELTA is zero or less.

(c) *Cost calculations—special cost test.* (1) A petitioner may be eligible for a temporary exemption if he demonstrates that the cost of using an alternate fuel will substantially exceed the cost of using imported petroleum or (natural gas) over the period of the proposed exemption. The period of the proposed temporary exemption may not exceed ten years.

The petitioner must demonstrate that the cost of using an alternate fuel substantially exceeds the cost of using imported petroleum for the first year of operation, the first two years of operation, and so forth, through the period of the proposed exemption. OFE will limit the duration of a temporary exemption to the shortest time possible.

(2) To conduct the test, calculate the difference (DELTA) between the cost of using an alternate fuel (COST (ALTERNATE)) and the cost of using imported petroleum (COST (OIL)) using Equations 4 and 5 below, Equation 3 (paragraph (b)(3) of this section), and the comparison procedures in paragraph (c)(4) of this section.

EQ 4 DELTA = COST (ALTERNATE) - COST (OIL)

where COST(ALTERNATE) and COST(OIL) are determined by:

EQ 5
$$\text{COST} = I \times \frac{\sum_{i=1}^{P} (1+k)^{-i}}{\sum_{i=1}^{N} (1+k)^{-i}} + \sum_{i=1}^{P} \frac{(OM_i+FL_i)(1-t_i)}{(1+k)^i}$$

Capital investment (I) is calculated with Equation 3 (paragraph (b)(3) of this section).

(3) The terms in Equation 5 are the same as those in Equation 2 with the addition of P, the length of the proposed temporary exemption in years. (See paragraph (b)(4) of this section for other terms.)

(4) The step-by-step procedure that follows shows the comparisons which must be made.

(i) Using Equation 5, compute the cost of using an alternate fuel (COST(ALTERNATE)) assuming the length of the proposed exemption is one year.

(ii) Likewise, compute the cost of using imported petroleum or natural gas (COST(OIL)) assuming the length of the proposed exemption is one year.

(iii) Compute the difference (DELTA) between COST (ALTERNATE) and COST (OIL) using Equation 4.

(iv) Repeat the calculations made in (i), (ii), and (iii) above, assuming the length of the proposed exemption is two years, three years, four years, and so on, up through the period of the proposed exemption.

(v) A petitioner is eligible for a temporary exemption for the period beginning at the start of the first year of operation and terminating at the beginning of the first year in which a DELTA is zero or less.

(d) *Information on parameters used in the calculations.* (1) All estimated expenditures, except fuel, shall be expressed in real terms (unadjusted for inflation) by using the prices in effect at the time the petition is submitted. Instructions for fuel price calculations are contained in appendix II.

(2) Capital investment yearly cash outlays ($I_i$) must include all items that are capital investments for Federal income tax purposes. All purchased equipment that has a useful life greater than one year, capitalized engineering costs, land, construction, environmental offsets, fuel inventory, transmission facilities, piping, etc., that are necessary for the operation of the unit must be included. However, an item must only be included if a cash outlay is required after the decision has been made to build the unit; sunk costs must not be included (*e.g.*, if the firm owns the land, its purchase price may not be included).

NOTE: The guidelines for the fuel inventory for powerplants not using natural gas shall be: (a) All powerplants with only steam driven turbines—78 days, (b) all powerplants with only combustion turbines—142 days, (c) all powerplants with combined cycles—both steam driven turbines and combustion turbines—142 days. The guidelines for the fuel inventory for installations not using natural gas shall be the greater of: (1) 21 days fuel supply, or (2) sufficient fuel to fill sixty (60) percent of the storage volume. The guidelines for the fuel inventory for all facilities using natural gas shall be zero unless the gas supply is interruptible in which case an appropriate inventory of back-up fuel must be included. Other inventory levels may be used if they are more appropriate than these guidelines; however, the source or derivation of these levels must be discussed in the evidential summary.

(3)(i) The annual cash outlays for operations and maintenance expense ($OM_i$) and fuel expense ($FL_i$) for a powerplant may be computed by one of the following three methods; however, the one chosen must be consistently applied throughout the analysis.

(A) Assume the energy produced by the powerplant equals seventy (70) percent of design capacity times 8760 hours for each year during the life of the powerplant, and compute cash outlays for operations, maintenance, and fuel expenses for the powerplant.

(B) *Economically dispatch the new powerplant*. The cash outlays for operations, maintenance, and fuel expenses of all powerplants being dispatched (where oil and natural gas are priced according to the procedures of appendix II[1]) are the corresponding expenses for the purpose of the cost calculation. The dispatch analysis area must be that area with which the firm currently dispatches, anticipates dispatching, and will be interconnected. It must also include all anticipated exchanges of energy with other utilities or powerpools. The outlays for operations, maintenance, and fuel may also be estimated using a methodology that incorporates the benefits of economically dispatching units and provides consistent treatment in the alternate fuel and oil or natural gas cases being compared.

(C) Use a dispatch analysis to project the energy produced by the powerplant for a representative (not atypical) year of operation when consuming an alternate fuel. Compute the cash outlays for operations, maintenance, and fuel expenses for the powerplant based upon the level of energy production estimated for the representative year. The dispatch analysis and fuel expenses for the cost calculation must include oil and natural gas priced according to the procedures of appendix II.[1]

(ii) When computing the annual cash outlays for operations and maintenance expense ($OM_i$) and fuel expense ($FL_i$) for an installation, specify the firing rates and the length of time each firing rate will be maintained.

(4) The discount rate (k) for analyses is 2.9 percent or that which is computed as specified in appendix I. The method of computing the inflation index (IX) is shown in appendix II to part 504. OFE will modify these specified rates from time to time as required by changed conditions after public notice and an opportunity to comment. However, the relevant set of specified rates for a specific petition for exemption will be the set in effect at the time the petition is submitted or the set in effect at the time a decision is rendered, whichever set is more favorable to the petitioner.

(5)(i) The guidelines for the useful life (N) of all powerplants except nuclear will be thirty-five (35) years. The guidelines for the useful life of a nuclear powerplant will be forty (40) years. The guidelines for the useful life of major fuel burning installations will be forty (40) years. Other useful life projections may be used if they are more appropriate than these guidelines; however, the source or derivation of these projections must be contained in the evidential summary. The summary should include a discussion of engineering, economic historical or other evidence.

(ii) If the units being compared have different useful lives, the petitioner will have to modify his calculation so that the two cash flows being compared have the length of the shorter useful life. To do this, (A) use the shorter of the two useful lives in Equations 2 and 5 for both units, and (B) multiply capital investment (I) of the unit with the longer life (computed with Equation 3) by the following adjustment factor (A):

$$\text{EQ 6} \quad A = \frac{\sum_{i=1}^{Q}(1+k)^{-i}}{\sum_{i=1}^{R}(1+k)^{-i}}$$

where:

R = The useful life of the facility with the longer life.

Q = The useful life of the facility with the shorter life.

k = The discount rate (see paragraph (d)(4) above).

(6) All Federal investment tax credits ($ITC_i$) and depreciation ($PR_i$) values are those used for Federal income tax purposes and must be applied consistently throughout the analysis and in a manner consistent with the Federal tax

laws. All investment tax credits allowed under Federal tax law must be reflected in the computations. The petitioner must use the method of depreciation which results in the greatest present value of the cash flow due to the tax and depreciation effect. The marginal income tax rate ($t_i$) is the firm's anticipated marginal Federal income tax rate in year i. The relevant investment tax credits, depreciation methodology, and marginal Federal income tax rates for a specific exemption petition will be those prescribed by Federal law in effect (or those tax parameters which are known with certainty will be in effect) at the time a decision is rendered. (However, if an investment tax credit expires in a certain year under the law which is in effect at the time the petition is submitted, the petitioner must assume that it will in fact expire in that year.)

(7) If powerplants are being compared, the design capacities or the maximum sustained energy per unit of time that could be produced must be the same. If installations are being compared, the maximum sustained energy per unit of time that could be produced must be the same.

(8) All estimated cash outlays must be computed in accordance with generally accepted accounting principles consistently applied.

(9) The scope of the estimates of relevant costs (as discussed above) of units being compared must be the same.

(10) All allowances for uncertainty and risk in the cost estimates must be explicit.

(11) All cash outlays must be net of any government subsidies or grants.

(e) *Evidence in support of the cost calculation.* Petitioners for an exemption which requires the use of the cost calculation shall certify that the cost of using alternate fuel substantially exceeds the cost of using oil as primary energy source as calculated in this section. A brief summary of the petitioner's supporting calculations and estimates shall be submitted with the certification. The summary should include the following:

(1) Cash outlays, Investment tax credits, depreciation methodologies, and anticipated salvage for capital investments including a description of all major construction and equipment;

(2) Annual cash outlays for operations and maintenance expenses including the formulas used to compute them; and

(3) Annual cash outlays for delivered fuel expenses including the formulas used to compute them.

[46 FR 59903, Dec. 7, 1981; 46 FR 63033, Dec. 30, 1981; 47 FR 15314, Apr. 9, 1982; 54 FR 52893, Dec. 22, 1989]

### § 503.7 State approval—general requirement for new powerplants.

(a) Where approvals by the appropriate State regulatory authority are required prior to the construction or use of a new powerplant, a petition for an exemption for consideration by OFE may be submitted to OFE prior to obtaining such approvals from the State regulatory authority.

(b) An exemption granted for a powerplant shall not become effective until an adequate demonstration has been made to OFE that all applicable approvals required by the State regulatory authorities have been obtained.

### § 503.8 No alternate power supply—general requirement for certain exemptions for new powerplants.

(a) *Application.* To qualify for an exemption, except in the case of an exemption for cogeneration units, section 213(c) of the Act requires a demonstration that, despite reasonable good faith efforts, there is no alternative supply of electric power available within a reasonable distance at a reasonable cost without impairing short-run or long-run reliability of service. If a petitioner is unable to demonstrate that there is no alternate supply during the first year of operation, OFE will conclude that the absence of the proposed powerplant will not impair short-term reliability of service, and as a result will not grant the exemption. Such action would not impair long-term reliability of service, since a petition may be submitted for a powerplant that would begin operation in a subsequent year.

(b) *Criteria.* To meet the demonstration required under paragraph (a) of this section, a petitioner must certify that:

(1) A diligent effort has been made to purchase firm power for the first year of operation to cover all or part of the projected shortfall at a cost that is less than ten (10) percent above the annualized cost of generating power from the proposed plant (including the capital, operation and maintenance expenses, and fuel prices); and

(2)(i) Despite these efforts, the reserve margin in the petitioner's electric region, normal dispatch area, or service area, in the absence of the proposed plant, would fall below twenty (20) percent during the first year of proposed operation; or

(ii) Despite these efforts, the reserve margin will be greater than twenty (20) percent but reliability of service would be impaired. In such case, the certification must be related to factors not included in the calculation of reserve margin, such as transmission constraints.

(c) *Evidence.* The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certification required under paragraph (b) of this section; and

(2) Exhibits containing the basis for the certification submitted under this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support its certification to this general requirement).

(d) *FERC consultation.* OFE will forward a copy of any petition for which a showing is required under this section to FERC promptly after it is filed with OFE, and OFE will consult with FERC before making the no alternate supply of power finding.

[46 FR 59903, Dec. 7, 1981, as amended at 47 FR 15314, Apr. 9, 1982; 54 FR 52894, Dec. 22, 1989]

### § 503.9 Use of mixtures—general requirement for certain permanent exemptions.

(a) *Criteria.* To qualify for a permanent exemption, except in the case of an exemption for fuel mixtures, section 213(a)(1) of the Act requires a demonstration that the use of a mixture of natural gas and petroleum and an alternate fuel for which an exemption under 10 CFR 503.38 (Fuel mixtures) would be available, would not be economically or technically feasible.

(b) *Evidence.* The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications to the criteria set forth in paragraph (a) of this section; and

(2) Exhibits containing the basis for the certifications submitted under this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support its certifications to this general requirement.)

NOTE: In meeting this general requirement, OFE will require a petitioner to examine only mixtures of oil and coal and natural gas and coal, or, where petitioner wishes to examine an additional or substitute mixture, such other alternate fuels as OFE and the petitioner agree are reasonable to petitioner's circumstances.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52894, Dec. 22, 1989]

### § 503.10 Use of fluidized bed combustion not feasible—general requirement for permanent exemptions.

(a) *OFE finding.* Except in the case of an exemption for fuel mixtures, OFE may deny permanent exemptions authorized under section 212 of the Act if OFE finds on a site-specific or generic basis that use of a method of fluidized bed combustion of an alternate fuel is economically and technically feasible.

(b) *Demonstration.* If OFE has made such a finding, OFE will deny a petitioner's request for exemption unless the petitioner demonstrated that the use of a method of fluidized bed combustion is not economically or technically feasible. The petition or any supplement thereto required by OFE must include the following evidence:

(1) If use of a method of fluidized bed combustion were to be required, evidence that the petitioner would be eligible for a permanent exemption for lack of alternate fuel supply, site limitations, environmental requirements, lack of adequate capital, or State or local requirements; or

(2) Use of a method of fluidized bed combustion is not technically or economically feasible due to design or special circumstances.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52894, Dec. 22, 1989]

### § 503.11 Alternative sites—general requirement for permanent exemptions for new powerplants.

(a) *Criteria*. To qualify for permanent exemption due to lack of alternate fuel supply, site limitations, environmental requirements, or inadequate capital, section 212(a) of the Act requires a demonstration that one of these exemptions would be available for any reasonable alternative site for the facility.

(b) *Evidence*. The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications to the criteria set forth in paragraph (a) of this section; and

(2) Exhibits containing the basis for the certifications submitted under this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support its certifications to this general requirement).

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52894, Dec. 22, 1989]

### § 503.12 Terms and conditions; compliance plans.

(a) *Terms and conditions generally*. A petitioner must comply with any terms and conditions imposed upon the grant of an exemption petition. OFE will limit any such terms and conditions to the unit(s) which is the subject of the petition.

(b) *Compliance plans for temporary exemptions*. (1) Any compliance plan required to accompany a petition for a temporary exemption shall include the following:

(i) A detailed schedule of progressive events and the dates upon which the events are to take place, indicating how compliance with the applicable prohibitions of the Act will occur;

(ii) Evidence of binding contracts for fuel, or for facilities for the production of fuel, which are required for compliance with the applicable prohibitions of the Act;

(iii) A schedule indicating how any necessary permits and approvals required to burn an alternate fuel will be obtained; and

(iv) Any other documentary evidence which indicates an ability to comply with the applicable prohibitions of the Act.

(2) Any exemption for which a compliance plan is required shall not be effective until the compliance plan is approved by DOE.

(3) If the petition is granted, an updated, duly executed plan must be submitted to OFE within one (1) month of an alteration of any milestone in the compliance plan, together with the reasons for the alteration and its impact upon the scheduling of all other milestones in the plan.

### § 503.13 Environmental impact analysis.

In order to enable OFE to comply with NEPA, a petitioner must include the information indicated in this section if a permanent exemption is requested. Material which has been prepared pursuant to any Federal, State or local requirement for environmental information for this unit or site may be incorporated by reference and appended to the petition. Guidelines issued by OFE for environmental reports should be used in preparing this analysis (44 FR 63740, November 5, 1979). These guidelines, which are also available in the OFE public document room, have been designed to insure that environmental reports follow the format prescribed by Council on Environmental Quality final regulations implementing NEPA. The guidelines are subject to discussion at a prepetition conference and to modification according to the facts of a particular case.

(a) All petitions for permanent exemptions must contain the following information:

(1) A description of the facility, including site location, and surroundings, alternative site(s), the facility's current proposed operations, its

fuel capability, and its pollution abatement systems and equipment (including those systems and equipment necessary for all fuel scenarios considered);

(2) A description of the existing environment, including air, water, and land resources;

(3) Direct and indirect environmental impacts of the proposed action including impacts of alternative fuel scenarios, and no build alternatives.

(4) Regulatory requirements governing the facility, including a description of Federal, State and local requirements for air, water, noise and solid waste disposal which must be met for each fuel considered.

(b) For exemptions for cogeneration, the information enumerated below is to be submitted in lieu of the information required by paragraph (a) of this section. However, submission of the following information merely establishes a rebuttable presumption that the grant or denial of the exemption would have no significant environmental impact. OFE may, in individual cases, during the course of the administrative proceeding, determine that additional environmental information is required. In such cases, the petitioner will be required to submit the information described in paragraph (a) of this section.

(1) A certification that the petitioner will, prior to operating the unit under the exemption, secure all applicable environmental permits and approvals pursuant to, but not limited to, the following: Clean Air Act, Rivers and Harbors Act, Coastal Zone Management Act, Safe Drinking Water Act, Resource Conservation and Recovery Act; and

(2) Information required by the following environmental checklist must be provided and certified as accurate:

Environmental Checklist for FUA Certification Exemptions Instructions

All questions are to be answered by placing a check in the appropriate box. N/A represents (not applicable). Although it is not required, the petitioner may elaborate on any question in writing on a separate sheet of paper.

| | Yes | No | N/A |
|---|---|---|---|
| (1) Is your facility located in, or will it affect a wetland (Protection of Wetlands Executive Order No. 11990)?. | | | |
| (2) Is your facility located in, or will it affect, a 100-year floodplain (Floodplain Management Executive Order No. 11988)?. | | | |
| (3) Will your facility affect a designated wild, scenic, or recreation river (Wild and Scenic Rivers Act)?. | | | |
| (4)(A) Is your facility located within a county in which critical habitat for threatened or endangered species are known to exist (Endangered Species Act)?. | | | |
| (4)(B) Has a qualified biologist determined that your facility will not affect any species on the Threatened and Endangered Species list?. | | | |
| (5) Is your facility located on, or will it affect land that has been classified as prime or unique farmland or rangeland by the U.S. Department of Agriculture?. | | | |
| (6) Is your facility located on, or will it affect, historical archaeological, or cultural resources that have been designated pursuant to the National Historic Preservation Act?. | | | |

[46 FR 59903, Dec. 7, 1981, as amended at 47 FR 15315, Apr. 9, 1982; 51 FR 18866, May 22, 1986; 52 FR 658, Jan. 7, 1987; 54 FR 52894, Dec. 22, 1989]

### § 503.14 Fuels search.

Prior to submitting a petition for a permanent exemption for lack of alternate fuel supply, site limitations, inadequate capital, or state or local requirements, a petitioner must examine the use of conventional solid coal as a primary energy source at the site under consideration, and at reasonable alternative sites. Where a petitioner believes that its use of such coal would be infeasible, however, and where OFE and the petitioner can reach accord, it may evaluate use of a different alternate fuel in lieu of solid coal. A petitioner of these exemptions must demonstrate for any fuel examined that he would qualify for an exemption.

[54 FR 52894, Dec. 22, 1989]

## Subpart C—Temporary Exemptions for New Facilities

### § 503.20 Purpose and scope.

(a) This subpart implements the provisions contained in section 211 of the Act with regard to temporary exemptions for new facilities.

(b) This subpart establishes the criteria and standards which owners or operators of new powerplants who petition for a temporary exemption must meet to sustain their burden of proof under the Act.

(c) All petitions for temporary exemptions shall be submitted in accordance with the procedures set out in part 501 of this chapter and the applicable requirements of part 503 of these regulations.

(d) The duration of any temporary exemption granted under this subpart shall be measured from the date that the facility is placed in service using petroleum or natural gas.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52894, Dec. 22, 1989]

### § 503.21 Lack of alternate fuel supply.

(a) *Eligibility*. Section 211(a)(1) of the Act provides for a temporary exemption due to the unavailability of an adequate and reliable supply of an alternate fuel at a cost which does not substantially exceed the cost of using imported petroleum. To qualify, a petitioner must certify that:

(1) A good faith effort has been to obtain an adequate and reliable supply of an alternate fuel of the quality necessary to conform to the design and operational requirements of the unit;

(2) For the period of the proposed exemption, the cost of using such alternate fuel would substantially exceed the cost of using imported petroleum as a primary energy source as defined in § 503.6 (Cost calculation) of these regulations;

(3) The petitioner will be able to comply with the applicable prohibitions of the Act at the end of the proposed exemption period; and

(4) No alternate power supply exists, as required under § 503.8 of these regulations.

(b) *Evidence required in support of a petition*. The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

(3) All data required by § 503.6 (cost calculation) of these regulations necessary for computing the cost calculation formula; and

(4) The anticipated duration of the lack of alternate fuel supply which constitutes the basis for the exemption.

(c) *Duration*. This temporary exemption, taking into account any extensions or renewals, may not exceed 10 years.

[46 FR 59903, Dec. 7, 1981, as amended at 47 FR 15315, Apr. 9, 1982; 54 FR 52894, Dec. 22, 1989]

### § 503.22 Site limitations.

(a) *Eligibility*. Section 211(a)(2) of the Act provides for a temporary exemption due to a site limitation. To qualify for such an exemption, a petitioner must certify that:

(1) One or more specific physical limitations relevant to the location or operation of the proposed facility exist which, despite diligent good faith efforts, cannot be overcome before the end of the proposed exemption period;

(2) The petitioner will be able to comply with the applicable prohibitions of the Act at the end of the proposed exemption period; and

(3) No alternate power supply exists, as required under § 503.8 of these regulations.

NOTE: Examples of the types of site limitations to which a petitioner may certify in order to qualify for this exemption include:

(i) Inaccessability of alternate fuels as a result of a specific physical limitation;

(ii) Unavailability of transportation facilities for alternate fuels;

(iii) Unavailability of adequate land or facilities for handling, using, or storing an alternate fuel;

(iv) Unavailability of adequate land or facilities for controlling and disposing of wastes, including pollution control equipment or devices necessary to assure compliance with applicable environmental requirements;

(v) Unavailability of adequate and reliable supply of water, including water for use in compliance with applicable environmental requirements; or

(vi) Other site limitations exist which will not permit the location or operation of the proposed unit using an alternate fuel.

(b) *Evidence required in support of a petition*. The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption); and

(3) The anticipated duration of the site limitation which constitutes the basis for the exemption.

(c) *Duration*. This temporary exemption, taking into account any extensions and renewals, may not exceed five years.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52894, Dec. 22, 1989]

### § 503.23 Inability to comply with applicable environmental requirements.

(a) *Eligibility*. Section 211(a)(3) of the Act provides for a temporary exemption due to an inability to comply with applicable environmental requirements. To qualify a petitioner must demonstrate that despite diligent good faith efforts:

(1) The petitioner will be unable, as of the projected date of commencement of operation, to comply with the applicable prohibitions of the Act without violating applicable Federal or State environmental requirements; and

(2) The petitioner will be able to comply with the applicable prohibitions of the Act and with applicable environmental requirements by the end of the temporary exemption period.

NOTE: (1) For purposes of considering an exemption under this section, OFE's decision will be based solely on an analysis of the petitioner's capacity to physically achieve applicable environmental requirements. The petition should be directed toward those conditions or circumstances which make it physically impossible to comply during the temporary exemption period. The cost of compliance is not relevant, but cost-related considerations may be presented as part of a demonstration submitted under § 503.21.

(2) Prior to submitting an exemption petition, it is recommended that a meeting be requested with OFE and EPA or the appropriate State or local regulatory agency to discuss options for operating an alternate fuel fired facility in compliance with applicable environmental requirements.

(b) *Evidence required in support of a petition*. The petition must include the following evidence in order to make the demonstration required by this section:

(1) Where the petitioner has applied for a construction permit from EPA or an appropriate State agency prior to petitioning for an exemption under this section, a copy of that application and synopsis of supporting documents filed with or subsequent to that application must be submitted to OFE with the petition or at the time filed with the permitting agency;

(2) To the extent applicable, a copy of the EPA or State denial of the construction permit application;

(3) To the extent applicable, a synopsis of the administrative record of the EPA or State or local permit proceedings;

(4) To the extent applicable, a summary of the technology upon which the denial was based, including a performance comparison between the proposed technology and that technology which would provide the maximum possible reduction of pollution;

(5) An examination of the environmental compliance of the facility, including an analysis of its ability to meet applicable standards and criteria when using both the proposed fuel and the alternate fuel(s) which would provide the basis for exemption. All such analysis must be based on accepted analytical techniques, such as air quality

modeling, and reflect current conditions of the area which would be affected by the facility. The petitioner is responsible for obtaining the necessary data to accurately characterize these conditions. Environmental compliance must be examined in the context of available pollution control equipment which would provide the maximum possible reduction of pollution. The analysis must contain: (i) Requests for bids and other inquiries made and responses received by the petitioner concerning the availability and performance of pollution control equipment; (ii) contracts signed, if any, for an alternate fuel supply and for the purchase and installation of pollution control equipment; or (iii) other comparable evidence such as technical studies documenting the efficacy of equipment to meet applicable requirements;

(6) An examination of any regulatory options available to the petitioner in seeking to achieve environmental compliance (such as offsets, variances, and State Implementation Plan revisions);

(7) Any other documentation which demonstrates an inability to comply with applicable environmental requirements;

(8) No alternate power supply exists, as required under § 503.8 of these regulations.

(c) *Duration*. This temporary exemption, taking into account any extension and renewals, may not exceed 5 years.

(d) *Certification alternative*. (1) To qualify for this exemption, in lieu of meeting the evidentiary requirements of paragraph (b) of this chapter, a petitioner may certify that, for the period of the exemption:

(i) The site for the facility is or will be located in a Class I area or Class II area in which the allowable increment established by law has been consumed, as defined in part C of the Clean Air Act; the use of an alternate fuel will cause or contribute to concentrations of pollutants which would exceed the maximum allowable increases in a Class I or Class II area even with the application of best available control technology; the site for the facility is or will be located in a non-attainment area as defined in part D of the Clean Air Act for any pollutant which would be emitted by the facility; or, even with the application of the lowest achievable emission rate, the use of an alternate fuel will cause or contribute to concentrations in an air quality control region, of a pollutant for which any national ambient air quality standard is or would be exceeded; and

(ii) No alternate power supply exists, as required under § 503.8 of these regulations.

(2) A petition by certification under this paragraph must include:

(i) Duly executed certifications required under paragraph (d)(1) of this section;

(ii) Exhibits containing the basis for the certifications required under paragraph (d)(1) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption); and

(iii) The anticipated duration of the circumstances which constitute the basis for the exemption.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52894, Dec. 22, 1989]

### § 503.24 Future use of synthetic fuels.

(a) *Eligibility*. Section 211(b) of the Act provides for a temporary exemption based upon the future use of synthetic fuels. To qualify, a petitioner must certify that:

(1) The petitioner will be able to comply with the applicable prohibitions imposed by the Act by the use of a synthetic fuel derived from coal or another alternate fuel as a primary energy source in the proposed facility by the end of the proposed exemption period;

(2) The petitioner will not be able to comply with the applicable prohibitions imposed by the Act by use of a synthetic fuel until the end of the proposed exemption period; and

(3) No alternate power supply exists, as required under § 503.8 of these regulations.

(b) *Evidence required in support of a petition*. The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption); and

(3) A preliminary compliance plan, including to the extent available, the information required under § 503.12.

(c) *Final Compliance Plan*. Before an exemption may become effective, the petitioner must submit and OFE must approve a final compliance plan as required by § 503.12.

(d) *Duration*. This temporary exemption may be granted for a period of up to ten (10) years. Unless the petitioner requests otherwise, any temporary exemption from the fuel use prohibitions of the Act for the future use of synthetic fuels will commence on the date of commercial operation of the facility.

NOTE: Contracts based on the anticipated successful demonstration of a development program and/or the anticipated economic feasibility of a synthetic fuels facility, will generally be sufficient to meet the ''binding contract'' requirements for this exemption.

[46 FR 59903, Dec. 7, 1981; 47 FR 15315, Apr. 9, 1982; 54 FR 52894, Dec. 22, 1989]

### § 503.25 Public interest.

(a) *Eligibility*. Section 211(c) of the Act provides for a temporary public interest exemption. To qualify, a petitioner must demonstrate that:

(1) The unit will be capable of complying with the applicable prohibitions at the end of the proposed exemption period;

(2) The granting of the exemption would be in accord with the purposes of the Act and would be in the public interest; and

(3) No alternate power supply exists, as required under § 503.8 of these regulations.

(b) *Evidence required in support of a petition*. The petition must include the following evidence in order to make the demonstration required by this section:

(1) Substantial evidence to corroborate the eligibility requirements identified above; and

(2) The anticipated duration of the circumstances which constitute the basis for the exemption.

(c) *Certification alternative*. If the petitioner requires use of oil or natural gas in a unit, during the construction of an alternate-fuel fired unit, the petitioner may substitute, in lieu of the evidentiary requirements of paragraphs (b)(1) and (2) of this section:

(1) A duly executed certification, including the requested duration of the exemption, that the unit will be operated on oil or natural gas only during the construction of an alternate fuel fired unit to be owned or operated by the petitioner; and

(2) Exhibits containing the basis for the certifications required under paragraph (c)(1) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption).

(d) *Duration*. This temporary exemption, taking into account extension and renewals, may not exceed 5 years.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52894, Dec. 22, 1989]

## Subpart D—Permanent Exemptions for New Facilities

### § 503.30 Purpose and scope.

(a) This subpart implements the provisions contained in section 212 of the Act with regard to permanent exemptions for new facilities.

(b) This subpart establishes the criteria and standards which owners or operators of new powerplants and installations who petition for a permanent exemption must meet to sustain their burden of proof under the Act.

(c) All petitions for permanent exemptions for new facilities shall be submitted in accordance with the procedures set out in part 501 of this chapter and the applicable requirements of part 503 of these regulations.

### § 503.31 Lack of alternate fuel supply for the first 10 years of useful life.

(a) *Eligibility*. Section 212(a)(1)(A)(i) of the Act provides for a permanent exemption due to lack of an adequate and reliable supply of alternate fuel within the first 10 years of useful life of the proposed unit. To qualify, a petitioner must certify that:

(1) A good faith effort has been made to obtain an adequate and reliable supply of an alternate fuel for use as a primary energy source of the quality and quantity necessary to conform with the design and operational requirements of the unit;

(2) Such a supply is not likely to be available within the first 10 years of useful life of the proposed unit;

(3) No alternate power supply exists, as required under § 503.8 of these regulations;

(4) Use of mixtures is not feasible, as required under § 503.9 of these regulations; and

(5) Alternative sites are not available, as required under § 503.11 of these regulations.

(b) *Evidence required in support of a petition*. A petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

(3) Environmental impact analysis, as required under § 503.13 of these regulations; and

(4) Fuels search, as required under § 503.14 of these regulations.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52895, Dec. 22, 1989]

### § 503.32 Lack of alternate fuel supply at a cost which does not substantially exceed the cost of using imported petroleum.

(a) *Eligibility*. Section 212(a)(1) (A)(ii) of the Act provides for a permanent exemption due to lack of an alternate fuel supply at a cost which does not substantially exceed the cost of using imported petroleum. To qualify a petitioner must certify that:

(1) A good faith effort has been made to obtain an adequate and reliable supply of an alternate fuel for use as a primary energy source of the quality and quantity necessary to conform with the design and operational requirements of the proposed unit;

(2) The cost of using such a supply would substantially exceed the cost of using imported petroleum as a primary energy source during the useful life of the proposed unit as defined in § 503.6 (cost calculation) of these regulations;

(3) No alternate power supply exists, as required under § 503.8 of these regulations.

(4) Use of mixtures is not feasible, as required under § 503.9 of these regulations; and

(5) Alternative sites are not available, as required under § 503.11 of these regulations.

(b) *Evidence required in support of a petition*. The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

(3) Environmental impact analysis, as required under § 503.13 of these regulations;

(4) Fuels search, as required under § 503.14 of these regulations; and

(5) All data required by § 503.6 (cost calculation) of these regulations necessary for computing the cost calculation formula.

[46 FR 59903, Dec. 7, 1981, as amended at 47 FR 15315, Apr. 9, 1982; 54 FR 52895, Dec. 22, 1989]

### § 503.33 Site limitations.

(a) *Eligibility*. Section 212(a)(1)(B) of the Act provides for a permanent exemption due to site limitations. To qualify for such an exemption, a petitioner must certify that:

(1) One or more specific physical limitations relevant to the location or operation of the proposed facility exist which, despite good faith efforts, cannot reasonably be expected to be overcome within five years after commencement of operations;

(2) No alternate power supply exists, as required under § 503.8 of these regulations;

(3) Use of mixtures is not feasible, as required under § 503.9 of these regulations; and

(4) Alternative sites are not available, as required under § 503.11 of these regulations.

NOTE: Examples of the types of site limitations to which a petitioner may certify in order to qualify for this exemption include:

(i) Inaccessibility of alternate fuels as a result of a specific physical limitation;

(ii) Unavailability of transportation facilities for alternate fuels;

(iii) Unavailability of adequate land or facilities for handling, using or storing an alternate fuel;

(iv) Unavailability of adequate land or facilities for controlling and disposing of wastes, including pollution control equipment or devices necessary to assure compliance with applicable environmental requirements;

(v) Unavailability of adequate and reliable supply of water, including water for use in compliance with applicable environmental requirements; or

(vi) Other site limitations exist which will not permit the location or operation of the proposed unit using an alternate fuel.

(b) *Evidence required in support of the petition*. A petitioner must include in the petition the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

(3) Environmental impact analysis, as required under § 503.13 of these regulations; and

(4) Fuels search, as required under § 503.14 of these regulations.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52895, Dec. 22, 1989]

### § 503.34 Inability to comply with applicable environmental requirements.

(a) *Eligibility*. Section 212(a)(1)(C) of the Act provides for a permanent exemption due to the inability to comply with applicable environmental requirements. To qualify, a petitioner must demonstrate that despite good faith efforts:

(1) The petitioner will be unable within 5 years after beginning operation, to comply with the applicable prohibitions imposed by the Act without violating applicable Federal or state environmental requirements; and

(2) Reasonable alternative sites, which would permit the use of alternate fuels in compliance with applicable Federal or state environmental requirements, are not available.

NOTE: (1) For purposes of considering an exemption under this section, OFE's decision will be based solely on an analysis of the petitioner's capacity to physically achieve applicable environmental requirements. The cost of compliance is not relevant, but cost-related considerations may be presented as part of a demonstration submitted under § 503.32 (Lack of alternate fuel supply).

(2) Prior to deciding to submit an exemption petition, it is recommended that a petitioner request a meeting with OFE and EPA or the appropriate state or local regulatory agency to discuss options for operating an alternate fuel-fired facility in compliance with the applicable environmental requirements.

(b) [Reserved]

(c) *Evidence required in support of a petition*. The petitioner must include in the petition the following evidence in order to make the demonstration required by this section:

(1) Where the petitioner has applied for a construction permit from EPA or an appropriate state agency prior to petitioning for an exemption from OFE under this section, a copy of such application and a synopsis of all supporting documents filed with or subsequent to the application must be submitted to OFE with the petition or at the time filed with the permitting agency;

(2) To the extent applicable, a copy of the EPA or state denial of the construction permit application;

(3) To the extent applicable, a synopsis of the administrative record of the EPA or state or local permit proceedings;

(4) To the extent applicable, a summary of the technology upon which the denial was based, including a performance comparison between the proposed technology and that technology which

provides the maximum possible reduction of pollution;

(5) An examination of the environmental compliance of the facility, including an analysis of its ability to meet applicable standards and criteria when using both the proposed fuel and the alternate fuel(s) which would provide the basis for the exemption. All such analysis must be based on accepted analytical techniques, such as air quality modeling, and reflect current conditions of the area which would be affected by the facility. The petitioner is responsible for obtaining the necessary data to accurately characterize these conditions. Environmental compliance must be examined in the context of available pollution control equipment which would provide the maximum possible reduction of pollution. The analysis must contain: (i) Requests for bids and other inquiries made and responses received by the petitioner concerning the availability and performance of pollution control equipment; or (ii) other comparable evidence such as technical studies documenting the efficacy of equipment to meet applicable requirements;

(6) An examination of any regulatory options available to the petitioner in seeking to achieve environmental compliance (such as offsets, variances and State Implementation Plan (SIP) revisions); and

(7) Any other documentation which demonstrates an inability to comply with applicable environmental requirements;

(8) No alternate power supply exists as required under § 503.8 of these regulations;

(9) Use of mixtures is not feasible, as required under § 503.9 of these regulations;

(10) Alternative sites are not available, as required under § 503.11 of these regulations;

(11) Environmental impact analysis, as required under § 503.13 of these regulations; and

(12) Fuels search, as required under § 503.14 of these regulations.

(d) *Certification alternative.* (1) To qualify for this exemption, in lieu of meeting the evidentiary requirements of paragraph (c) of this section, a petitioner may certify that:

(i) The site for the facility is or will be located in a Class I area or Class II area in which the allowable increment established by law has been consumed, as defined in part C of the Clean Air Act; the use of an alternate fuel will cause or contribute to concentrations of pollutants which would exceed the maximum allowable increases in a Class I or Class II area even with the application of best available control technology; the site for the facility is or will be located in a non-attainment area as defined in part D of the Clean Air Act for any pollutant which would be emitted by the facility; or, even with the application of the lowest achievable emission rate, the use of an alternate fuel will cause or contribute to concentrations in an air quality control region of a pollutant for which any national ambient air quality standard is or would be exceeded;

(ii) No alternate power supply exists, as required under § 503.8 of these regulations;

(iii) Alternative sites are not available, as required under § 503.11 of these regulations; and

(iv) Use of mixtures is not feasible, as required under § 503.19 of these regulations.

(2) A petition by certification under this paragraph must include:

(i) Duly executed certifications required under paragraph (d)(1) of this section;

(ii) Exhibits containing the basis for the certifications required under paragraph (d)(1) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

(iii) Environmental impact analysis, as required under § 503.13 of these regulations; and

(iv) Fuels search, as required under § 503.14 of these regulations.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52895, Dec. 22, 1989]

### § 503.35 Inability to obtain adequate capital.

(a) *Eligibility.* Section 212(a)(1)(D) of the Act provides for a permanent exemption due to inability to obtain adequate capital. To qualify, a petitioner must certify that:

(1) Despite good faith efforts the petitioner will be unable to comply with the applicable prohibitions imposed by the Act because the additional capital required for an alternate fuel-capable unit beyond that required for the proposed unit cannot be raised;

(2) The additional capital cannot be raised:

(i) Due to specific restrictions (e.g., convenants on existing bonds) which constrain management's ability to raise debt or equity capital;

(ii) Without a substantial dilution of shareholder equity;

(iii) Without an unreasonably adverse affect on the utility's credit rating; or

(iv) In the case of non-investor-owned public utilities, without jeopardizing the utility's ability to recover its capital investment, through tariffs, without unreasonably adverse economic effect on its service area (such as adverse impacts on local industry or undue hardship to ratepayers).

(3) No alternative power supply exists, as required under § 503.8 of these regulations;

(4) Use of mixtures is not feasible, as required under § 503.9 of these regulations; and

(5) Alternative sites are not available, as required under § 503.11 of these regulations.

(b) *Evidence required in support of a petition*. A petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

(3) Environmental impact analysis, as required under § 503.13 of these regulations; and

(4) Fuels search, as required under § 503.14 of these regulations.

[46 FR 59903, Dec. 7, 1981, as amended at 47 FR 15315, Apr. 9, 1982; 54 FR 52895, Dec. 22, 1989]

**§ 503.36 State or local requirements.**

(a) *Eligibility*. Section 212(b) of the Act provides for an exemption due to certain State or local requirements. To qualify a petitioner must certify that:

(1) With respect to the proposed site of the unit, the operation or construction of the new unit using an alternate fuel is infeasible because of a State of local requirement other than a building code, nuisance, or zoning law;

(2) The petitioner has made a good faith effort to obtain a variance from the State or local requirement but has been unable to do so or has demonstrated why none is available;

(3) The granting of the exemption would be in the public interest and would be consistent with the purposes of the Act;

(4) The petitioner is not entitled to an exemption for lack of alternate fuel supply, site limitation, environmental requirements, or inability to obtain adequate capital at the site of the proposed powerplant or at any reasonable alternative site for the alternate fuel(s) considered;

(5) At the proposed site and every reasonable alternative site where the petitioner is not entitled to an exemption for lack of alternate fuel supply, site limitation, environmental requirements, or inability to obtain adequate capital, the petitioner nevertheless would be barred at each such proposed or alternate site from burning an alternate fuel by reason of a State or local requirement;

(6) No alternate power supply exists, as required under § 503.8 of these regulations; and

(7) Use of mixtures is not feasible, as required under § 503.9 of these regulations.

(b) *Evidence required in support of a petition*. The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials

deemed by the petitioner to be sufficient to support the granting of this exemption);

(3) Environmental impact analysis, as required under § 503.13 of these regulations; and

(4) Fuels search, as required under § 503.14 of these regulations.

[46 FR 59903, Dec. 7, 1981; 46 FR 63033, Dec. 30, 1981, as amended at 54 FR 52895, Dec. 22, 1989]

### § 503.37 Cogeneration.

The following table may be used to determine eligibility for a permanent exemption based on oil and natural gas savings.

AVERAGE ANNUAL UTILIZATION OF OIL AND NATURAL GAS FOR ELECTRICITY GENERATION BY STATE

[BTU's per KWHR sold]

| State name | Oil/gas savings Btu/kWh |
|---|---|
| Alabama | 33 |
| Arizona | 802 |
| Arkansas | 1,363 |
| California | 3,502 |
| Colorado | 289 |
| Connecticut | 3,924 |
| Delaware | 3,478 |
| Washington, DC. | 895 |
| Florida | 3,177 |
| Georgia | 45 |
| Idaho | 0 |
| Illinois | 250 |
| Indiana | 53 |
| Iowa | 147 |
| Kansas | 686 |
| Kentucky | 34 |
| Louisiana | 4,189 |
| Maine | 2,560 |
| Maryland | 895 |
| Massachusetts | 5,250 |
| Michigan | 256 |
| Minnesota | 151 |
| Mississippi | 1,519 |
| Missouri | 57 |
| Montana | 60 |
| Nebraska | 139 |
| Nevada | 761 |
| New Hampshire | 2,695 |
| New Jersey | 1,894 |
| New Mexico | 1,528 |
| New York | 4,219 |
| North Carolina | 49 |
| North Dakota | 47 |
| Ohio | 36 |
| Oklahoma | 5,180 |
| Oregon | 0 |
| Pennsylvania | 771 |
| Rhode Island | 1,800 |
| South Carolina | 24 |
| South Dakota | 36 |
| Tennessee | 20 |
| Texas | 4,899 |
| Utah | 107 |
| Vermont | 105 |

AVERAGE ANNUAL UTILIZATION OF OIL AND NATURAL GAS FOR ELECTRICITY GENERATION BY STATE—Continued

[BTU's per KWHR sold]

| State name | Oil/gas savings Btu/kWh |
|---|---|
| Virginia | 460 |
| Washington | 3 |
| West Virginia | 126 |
| Wisconsin | 72 |
| Wyoming | 75 |

Data are based upon 1987 oil, natural gas and electricity statistics published by DOE's Energy Information Administration.

*Example:* The proposed cogeneration project is to be located in Massachusetts and is to use distillate oil. It will have a capacity of 50 MW, an average annual heat rate of 7600 BTU/KWHR, and be operated at a capacity factor of 90%. The annual fuel consumption is therefore calculated to be $2,996 \times 10^9$ Btu/yr. (50,000 KW × 7600 BTU/KWHR × .9 × 8760 HR/YR) The oil and gas backed off the grid would be calculated to be $.2070 \times 10^9$ BTU/YR. (50,000 KW × 5250 BTU/KWHR × .9 × 8760 HR/YR) since the proposed unit would consume more oil that would be ''backed off'' the grid, the unit would not be eligible for a permanent exemption based on savings of oil and natural gas.

[54 FR 52895, Dec. 22, 1989]

### § 503.38 Permanent exemption for certain fuel mixtures containing natural gas or petroleum.

(a) *Eligibility*. Section 212(d) of the Act provides for a permanent exemption for certain fuel mixtures. To qualify a petitioner must certify that:

(1) The petitioner proposes to use a mixture of natural gas or petroleum and an alternate fuel as a primary energy source;

(2) The amount of petroleum or natural gas proposed to be used in the mixture will not exceed the minimum percentage of the total annual Btu heat input of the primary energy sources needed to maintain operational reliability of the unit consistent with maintaining a reasonable level of fuel efficiency; and

(3) No alternate power supply exists, as required under § 503.8 of these regulations.

(b) *Evidence required in support of a petition*. The petition must include the following evidence in order to make

the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

(3) A description of the fuel mixture, including component fuels and the percentage of each such fuel to be used; and

(4) Environmental impact analysis as required under § 503.13 of these regulations.

(c) *Solar mixtures.* OFE will grant a permanent mixtures exemption for the use of a mixture of solar energy (including wind, tide, and other intermittent sources) and petroleum or natural gas, where:

(1) Solar energy will account for at least 20 percent of the total annual Btu heat input, of the primary energy sources of the unit; and

(2) Petitioner meets the eligibility and evidentiary requirements of paragraphs (a) and (c) of this section.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52896, Dec. 22, 1989]

### §§ 503.39–503.44 [Reserved]

## PART 504—EXISTING POWERPLANTS

Sec.
504.2 Purpose and scope.
504.3–504.4 [Reserved]
504.5 Prohibitions by order (certifying powerplants under section 301 of FUA, as amended).
504.6 Prohibitions by order (case-by-case).
504.7 Prohibition against excessive use of petroleum or natural gas in mixtures—electing powerplants.
504.8 Prohibitions against excessive use of petroleum or natural gas in mixtures—certifying powerplants.
504.9 Environmental requirements for certifying powerplants.
APPENDIX I TO PART 504—PROCEDURES FOR THE COMPUTATION OF THE REAL COST OF CAPITAL
APPENDIX II TO PART 504—FUEL PRICE COMPUTATION

AUTHORITY: Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. § 7101 *et seq.*); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3289 (42 U.S.C. 8301 *et seq.*); Energy Security Act, Pub. L. 96–294, 94 Stat. 611 (42 U.S.C. 8701 *et seq.*); E.O. 1209, 42 FR 46267, Sept. 15, 1977.

SOURCE: 45 FR 53692, Aug. 12, 1980, unless otherwise noted.

(Approved by the Office of Management and Budget under control number 1903–0075. See 46 FR 63209, Dec. 31, 1981)

### § 504.2 Purpose and scope.

(a) Sections 504.5, 504.6, and 504.8, set forth the prohibitions that OFP, pursuant to section 301 of the Act, as amended, may impose upon existing powerplants after a review of the certification and prohibition order compliance schedule submitted by the owner or operator of a powerplant. Sections 504.5 and 504.8 are explanatory sections, and § 504.6 provides the informational requirements necessary to support the certification.

(b) Sections 504.6 and 504.7, set forth the prohibitions that OFP may impose upon certain electing powerplants, pursuant to former section 301 (b) and (c) of FUA, where OFP can make the findings as to the unit's technical capability and financial feasibility to use coal or another alternate fuel as a primary energy source. The prohibitions may be made to apply to electing powerplants unless an exemption is granted by OFP under the provisions of the Final Rule for Existing Facilities (10 CFR parts 500, 501 and 504) published at 45 FR 53682, Aug. 12, 1980 and 46 FR 59872, Dec. 7, 1981. Any person who owns, controls, rents or leases an existing electing powerplant may be subject to the prohibitions imposed by and the sanctions provided for in the Act or these regulations, if OFP can make the findings required by former section 301 (b) and (c) of FUA.

(Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 *et seq.*); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3269 (42 U.S.C. 8301 *et seq.*); Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35; E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[47 FR 50849, Nov. 10, 1982]

**§§ 504.3–504.4 [Reserved]**

**§ 504.5 Prohibitions by order (certifying powerplants under section 301 of FUA, as amended).**

(a) In the case of existing powerplants, OFP may prohibit, in accordance with section 301 of the Act, as amended, the use of petroleum or natural gas as a primary energy source where the owner or operator of the powerplant presents a complete certification concurred in by OFP. The certification, which may be presented at any time, pertains to the unit's technical capability and financial feasibility to use coal or another alternate fuel as a primary energy source in the unit. The informational requirements necessary to support a certification are contained in § 504.6 of these regulations. A prohibition compliance schedule which meets the requirements of § 504.5(d) shall also be submitted.

(b) If OFP concurs with the certification, a prohibition order on the powerplant's use of petroleum or natural gas will be issued following the procedure outlined in § 501.52 of these regulations.

(c) The petitioner may amend its certification at any time prior to the effective date of the prohibitions contained in the final prohibition order in order to take into account changes in relevant facts and circumstances by following the procedure contained in § 501.52(d).

(d) *Prohibition order compliance schedule.* The certification described above, which forms the basis for the issuance of a prohibition order to a powerplant, shall include a prohibition order compliance schedule. The compliance schedule should contain the following:

(1) A schedule of progressive events involved in the conversion project, including construction of any facilities for the production of fuel or fuel handling equipment, and contracts for the purchase of alternate fuels, and estimated date of compliance with the applicable prohibitions of the Act; and

(2) A schedule indicating estimated dates for obtaining necessary federal, state, and local permits and approvals. Any prohibition order issued under the certification provisions of §§ 504.5, 504.6, and 504.8 will be subject to appropriate conditions subsequent so as to delay the effectiveness of the prohibitions contained in the final prohibition order until the above events or permits have occurred or been obtained.

(Approved by the Office of Management and Budget under control number 1903–0077)

(Department of Energy Organization Act, Pub. L. 95–91 (42 U.S.C. 7101 *et seq.*); Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93–319, as amended by Pub. L. 94–163, Pub. L. 95–70, and Pub. L. 95–620 (15 U.S.C. 719 *et seq.*); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, as amended by Pub. L. 97–35 (42 U.S.C. 8301 *et seq.*); Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35)

[47 FR 17044, Apr. 21, 1982]

**§ 504.6 Prohibitions by order (case-by-case).**

(a) OFP may prohibit, by order, the use of natural gas or petroleum as a primary energy source in existing powerplants under certain circumstances. In the case of certifying powerplants under section 301 of the Act, as amended, the petitioner must present evidence to support the certification, required by § 504.6 (c), (d), (e), and (f). In the case of electing powerplants, OFP must make the following findings required by § 504.6 (c), (d), (e), and (f), in order to issue a prohibition order to the unit, pursuant to former section 301 (b) or (c):

(1) The unit currently has, or previously had, the technical capability to use an alternate fuel as a primary energy source;

(2) The unit has this technical capability now, or it could have the technical capability without:

(i) A substantial physical modification of the unit; or

(ii) A substantial reduction in the rated capacity of the unit; and

(3) It is financially feasible for the unit to use an alternate fuel as its primary energy source.

(b) In the case of electing powerplants, OFP must make a proposed finding regarding the technical capability of a unit to use alternate fuel as identified in paragraph (a) (1) of this section prior to the date of publication of the notice of the proposed prohibition. OFP will publish this finding in

The FEDERAL REGISTER along with the notice of the proposed prohibition.

(c) *Technical capability*. (1) In the case of electing and certifying powerplants, OFP will consider ''technical capability'' on a case-by-case basis in order to make the required finding. In the case of a certifying powerplant, the powerplant should present information to support the certification relevant to the considerations set forth below. OFP will consider the ability of the unit, from the point of fuel intake to physically sustain combustion of a given fuel and to maintain heat transfer.[2]

(2) OFP considers that a unit ''had'' the technical capability to use an alternate fuel if the unit was once able to burn that fuel (regardless of whether the unit was expressly designed to burn that fuel or whether it ever actually did burn it), but is no longer able to do so at the present due to temporary or permanent alterations to the unit itself.[3]

(3) A unit ''has'' the technical capability to use an alternate fuel if it can burn an alternate fuel, notwithstanding the fact that adjustments must be made to the unit beforehand or that pollution control equipment may be required to meet air quality requirements.[4]

(d) *Substantial physical modification*. In the case of electing and certifying powerplants, OFP will make its determination on whether a physical modification to a unit is ''substantial'' on a case-by-case basis. In the case of certifying powerplants, OFP will consider the factors set forth below for the purpose of concurrence in the certification. OFP will consider physical modifications made to the unit as ''substantial'' where warranted by the magnitude and complexity of the engineering task or where the modification would impact severely upon operations at the site.[5] OFP will not, however, assess physical modification on the basis of cost.

(e) *Substantial reduction in rated capacity*. In the case of electing and certifying powerplants, OFP will make this determination on the basis of the following factors. A certifying powerplant should present information to support its certification regarding these factors in order for OFP to make its review for concurrence.

(1) OFP regards a unit's derating of 25 percent or more, as a result of converting a unit from oil or gas to an alternate fuel, as substantial.

(2) OFP will presume that a derating of less than 10 percent, as a result of converting a unit from oil or gas to an alternate fuel, is not substantial unless

[2] OFP will not ordinarily consider the nature or absence of appurtenances outside the unit. For example, OFP will examine the furnace configuration and ash removal capability but will not normally consider the need to install pollution control equipment as a measure of technical capability. Furthermore, OFP will not normally conclude that the absence of fuel handling equipment, such as conveyor belts, pulverizers, or unloading facilities, bears on the issue of a unit's ''technical capability'' to burn an alternate fuel.

[3] For example, a unit which at one time burned solid coal but which could no longer do so because its coal firing ports and sluicing channels had been cemented over, would be classified as having ''had'' the technical capability to use coal. (The question of whether it again ''could have'' such capability without ''substantial physical modification'' is a separate and additional question.)

[4] A unit designed to burn natural gas shall be presumed to have the technical capability to burn a synthetic fuel such as medium Btu gas from coal (assuming such gas is available unless convincing evidence to the contrary is submitted in rebuttal). Also a unit designed to burn oil may, depending upon the chemical characteristics, be a unit that ''has'' the technical capability to burn liquefied coal. The fact that certain adjustments may be necessary does not render this a ''hypothetical'' as opposed to a ''real'' capability. Even an oil fired unit converting from the use of #2 distillate to #6 residual oil may be required to adjust or replace burner nozzles and add soot blowers.

[5] Generally, modification of a unit to burn coal or an alternate fuel will be considered insubstantial if significant alterations to the boiler, such as a change to the furnace configuration or a complete respacing of the tubes, are not required. Minor alterations such as replacement of burners or additions of soot blowers, and additions or alterations outside the boiler, shall not cause the modification to be substantial.

convincing evidence to the contrary is submitted in rebuttal.[6]

(3) OFP will assess units for which a derating is claimed of 10 percent or more, but less than 25 percent, on a case-by-case.

(4) In assessing whether a unit's derating is not substantial, OFP will consider the impact of a reduction in rated capacity of the unit taking into consideration all necessary appurtenances such as air pollution control equipment required to burn an alternate fuel in compliance with environmental requirements expected to be applicable at the date the prohibitions contained in the final prohibition order become effective. However, the potential order recipient may raise in rebuttal the impact of derating on the site at which the unit is located and on the system as well as on the unit itself, if under paragraph (e)(2), or case-by-case, if under paragraph (e)(3) of this section.

(f) *Financial feasibility*. In the case of certifying and electing powerplants, OFP will make this finding based on the following considerations. A certifying powerplant should present information to support its certification relevant to these considerations in order for OFP to make its review for concurrence. Conversion of a unit to burn coal or an alternate fuel shall be deemed financially feasible if the firm has the actual ability to obtain sufficient capital to finance the conversion, including all necessary land, coal and ash handling equipment, pollution control equipment, and all other necessary expenditures, without violating legal restrictions on its ability to raise debt or equity capital, unreasonably diluting shareholder equity, or unreasonably adversely affecting its credit rating. OFP will consider any economic or financial factors presented by the proposed order recipient in determining the firm's ability or inability to finance the conversion including, but not limited to, the following:

(1) The required coverage ratios on the firm's debt and preferred stock;

(2) The firm's investment program; and

(3) The financial impact of the conversion, including other conversions which are or may be undertaken voluntarily by the proposed order recipient or imposed upon the recipient's system by the Act, and including pending or planned construction or reconstruction of alternate-fuel-fired plants and plants exempt from FUA prohibitions.[7] Where helpful in clarifying the long-term financial feasibility of a conversion, DOE may analyze the economic benefits anticipated from operation of the converted unit or units using coal or other alternate fuel relative to those from continued operation using petroleum or natural gas.

(Approved by the Office of Management and Budget under control number 1903–0077)

(Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93–319, as amended by Pub. L. 94–163, Pub. L. 95–70, and 15 U.S.C. 719 *et seq.;* Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 *et seq.*); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3269 (42 U.S.C. 8301 *et seq.*); Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97–35); E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[45 FR 53692, Aug. 12, 1980, as amended at 47 FR 17044, Apr. 21, 1982; 47 FR 50849, Nov. 10, 1982]

### § 504.7 Prohibition against excessive use of petroleum or natural gas in mixtures—electing powerplants.

(a) In the case of electing powerplants, if OFP finds that it is technically and financially feasible for a unit to use a mixture of petroleum or natural gas and an alternate fuel as its primary energy source, OFP may prohibit, by order, the use in that unit of

[6] For example, units that are the subject of a prohibition order will not have installed any operating air pollution control equipment sufficient to burn coal in compliance with applicable environmental equipments. The installation and use of air pollution control equipment alone can, in many cases, produce a derating. Moreover, the shift to coal itself will, because of differences in energy density and fuel flow characteristics, typically involve some derating.

[7] OFP will not require the proposed order recipient to cancel or defer construction or reconstruction of any alternate-fuel-fired facility, or any facility exempt from the prohibitions of the Act, for which a decision to finance such facility has been made by the appropriate company official before the publication of the prohibition order. The proposed order recipient may choose to cancel or defer any such facility.

petroleum or natural gas, or both, in amounts exceeding the minimum amount necessary to maintain reliability of operation consistent with maintaining reasonable fuel efficiency of the mixture.

(b) In making the technical feasibility finding required by former section 301 (b) and (c) of the Act and paragraph (a) of this section, OFP may weigh ''physical modification'' or ''derating of the unit,'' but these considerations, by themselves, will not control the technical feasibility finding. A technical feasibility finding might be made notwithstanding the need for substantial physical modification. The economic consequences of a substantial physical modification are taken into account in determining financial feasibility.

(Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93–319, as amended by Pub. L. 94–163, Pub. L. 95–70, and 15 U.S.C. 719 *et seq.;* Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 *et seq.*); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3269 (42 U.S.C. 8301 *et seq.*); Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97–35); E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[47 FR 17045, Apr. 21, 1982, and 47 FR 50850, Nov. 10, 1982]

### § 504.8 Prohibitions against excessive use of petroleum or natural gas in mixtures—certifying powerplants.

(a) In the case of certifying powerplants, OFP may prohibit the use of petroleum or natural gas in such powerplant in amounts exceeding the minimum amount necessary to maintain reliability of operation consistent with maintaining the reasonable fuel efficiency of the mixture. This authority is contained in section 301(c) of the Act, as amended. The owner or operator of the powerplant may certify at any time to OFP that it is technically capable and financially feasible for the unit to use a mixture of petroleum or natural gas and coal or another alternate fuel as a primary energy source. In assessing whether the unit is technically capable of using a mixture of petroleum or natural gas and coal or another alternate fuel as a primary energy source, for purposes of this section, the extent of any physical modification necessary to convert the unit and any concomitant reduction in rated capacity are not relevant factors. So long as a unit as proposed to be modified would be technically capable of using the mixture as a primary energy source under § 504.6(c), this certification requirement shall be deemed met. The criteria for certification of financial feasibility are found at § 504.6(f). In addition, the powerplant's owner or operator must submit a prohibition compliance schedule, which meets the requirements of § 504.5(d).

(b) If OFP concurs with the certification, a prohibition order against the unit's excessive use of petroleum or natural gas in the mixture will be issued following the procedure outlined in § 501.52 of these regulations.

(c) The petitioner may seek to amend its certification in order to take into account changes in relevant facts and circumstances by following the procedure contained in § 501.52(d).

NOTE: The authority of OFP implemented under this section should not be confused with the other two fuel mixture provisions of these regulations. One is the general requirement that petitioners for permanent exemptions demonstrate that the use of a mixture of natural gas or petroleum and an alternate fuel is not economically or technically feasible (See § 504.15). The second is the permanent fuel mixtures exemption itself (See § 504.56).

(Approved by the Office of Management and Budget under control number 1903–0077)

(Department of Energy Organization Act, Pub. L. 95–91 (42 U.S.C. 7101 *et seq.*); Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93–319, as amended by Pub. L. 94–163, Pub. L. 95–70, and Pub. L. 95–620 (15 U.S.C. 719 *et seq.*); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, as amended by Pub. L. 97–35 (42 U.S.C. 8301 *et seq.*); Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35)

[47 FR 17045, Apr. 21, 1982]

### § 504.9 Environmental requirements for certifying powerplants.

Under §§ 501.52, 504.5 and 504.6 of these regulations, OFP may prohibit, in accordance with section 301 and section 303 (a) or (b) of FUA, as amended, the use of natural gas or petroleum, or both, as a primary energy source in any certifying powerplant. Under sections 301(c) and 303(a) of FUA, as amended, and §§ 501.52, 504.6, and 504.8 of

these regulations, OFP may prohibit the excessive use of natural gas or petroleum in a mixture with an alternate fuel as a primary energy source in a certifying powerplant.

(a) *NEPA compliance.* Except as provided in paragraph (c) of this section, where the owner or operator of a powerplant seeks to obtain an OFP prohibition order through the certification procedure, and did not hold either a proposed prohibition order under former section 301 of FUA or pending order under section 2 of ESECA, it will be responsible for the costs of preparing any necessary Environmental Assessment (EA) or Environmental Impact Statement (EIS) arising from OFP's obligation to comply with NEPA. The powerplant owner or operator shall enter into a contract with an independent party selected by OFP, who is qualified to conduct an environmental review and prepare an EA or EIS, as appropriate, and who does not have a financial or other interest in the outcome of the proceedings, under the supervision of OFP. The NEPA process must be completed and approved before OFP will issue a final prohibition order based on the certification.

(b) *Environmental review procedure.* Except as provided in paragraph (c) of this section, environmental documents, including the EA and EIS, where necessary, will be prepared utilizing the process set forth above. OFP, the powerplant owner or operator and the independent third party shall enter into an agreement for the owner or operator to engage and pay directly for the services of the qualified third party to prepare the necessary documents. The third party will execute an OFP prepared disclosure document stating that he does not have any conflict of interest, financial or otherwise, in the outcome of either the environmental process or the prohibition order proceeding. The agreement shall outline the responsibilities of each party and his relationship to the other two parties regarding the work to be done or supervised. OFP shall approve the information to be developed and supervise the gathering, analysis and presentation of the information. In addition, OFP will have the authority to approve and modify any statement, analysis, and conclusion contained in the third party prepared environmental documents.

(c) *Financial hardship.* Whenever the bona fide estimate of the costs associated with NEPA compliance, if borne by the powerplant owner or operator, would make the conversion financially infeasible, OFP may waive the requirement set forth in paragraphs (a) and (b) of this section and perform the necessary environmental review.

(Approved by the Office of Management and Budget under control number 1903–0077)

(Department of Energy Organization Act, Pub. L. 95–91 (42 U.S.C. 7101 *et seq.*); Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93–319, as amended by Pub. L. 94–163, Pub. L. 95–70, and Pub. L. 95–620 (15 U.S.C. 719 *et seq.*); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, as amended by Pub. L. 97–35 (42 U.S.C. 8301 *et seq.*); Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35)

[47 FR 17046, Apr. 21, 1982]

## APPENDIX I TO PART 504—PROCEDURES FOR THE COMPUTATION OF THE REAL COST OF CAPITAL

(a) The firm's real after-tax weighted average marginal cost of capital (K) is computed with equation 1.

EQ 1

$$K = W_d \left[ \frac{\hat{R}_d (1-t)}{1 - f_d} - INF \right] + W_p \left[ \frac{\hat{R}_p}{1-f_p} - INF \right] + W_e \left[ \frac{\hat{R}_e}{1-f_e} - INF \right]$$

The terms in equation 1 are defined as follows:

$W_d$ = Fraction of existing capital structure which is debt.

$W_p$ = Fraction of existing capital structure which is preferred equity.

$W_e$ = Fraction of existing capital structure which is common equity and retained earnings.

$\hat{R}_d$ = Predicted nominal cost of long term debt expressed as a fraction.

$\hat{R}_p$ = Predicted nominal cost of preferred stock expressed as a fraction.

$\hat{R}_e$ = Predicted nominal cost of common stock expressed as a fraction.

INF = Percentage change in the GNP implicit price deflator over the past 12 months expressed as a fraction.

$f_d$ = Flotation cost of debt expressed as a fraction.

$f_p$ = Flotation cost of preferred stock expressed as a fraction.

$f_e$ = Flotation cost of common stock expressed as a fraction.

t = Marginal federal income tax rate for the current year.

(b) *Information on parameters used in Equation 1.* (1) The parameters used in equation 1 will be the best practicable estimates. They will be obtained from the firm, accepted rating services (e.g., Standard & Poors, Moody's), government publications, accepted financial publications, annual financial reports and statements of firms, and investment bankers.

(2) The predicted nominal cost of debt ($\hat{R}_d$) may be estimated by determining the current average yield on newly issued bonds—industrial or utility as appropriate—which have the same rating as the firm's most recent debt issue.

(3) The predicted nominal cost of preferred stock ($\hat{R}_p$) may be estimated by determining the current average yield on newly issued preferred stock—industrial or utility as appropriate—which has the same rating as the firm's most recent preferred stock issue.

(4)(A) The predicted nominal cost of common stock ($\hat{R}_e$) is computed with equation 2.

Eq 2 $\hat{R}_e = \hat{R}_f + B \times \bar{R}_m$

where:

$\hat{R}_f$ = The risk free interest rate—the average of the most recent auction rates of U.S. Government 13-week Treasury Bills,

B = The ''beta'' coefficient—the relationship between the excess return on common stock and the excess return on the S&P 500 composite index, and

$\bar{R}_m$ = The mean excess return on the S&P 500 composite index—the mean of the difference between the return on the S&P 500 composite index and the risk free interest rate for the years 1926–1976 as computed by Ibbotson and Sinquefield*(1)*—9.2%

(B) The ''beta'' coefficient is computed with regression analysis techniques. The regression equation is Equation 3.

$$(R_e^t - R_f^t) = A + B(R_m^t - R_f^t) + e^t \qquad \text{Eq. 3}$$

where

$$R_e^t = \frac{PRCC_t - PRCC_{t-1} + (DIVRATE/12)}{PRCC_{t-1}}$$

$R_f t$ = The risk free interest rate in month t—the average of the yields on 13-week treasury bills auctioned in month t.*(2)*

A = A constant which should not be significantly different than zero.

$$R_m^t = \frac{V_{sp,t} - V_{sp,t-1} + D_{sp,t}}{V_{sp,t-1}}, \text{ and}$$

$e^t$ = The error in month t.

$PRCC_t$ = Closing market prices of the firm's common stock at the end of month t fully adjusted for splits and stock dividends.

$DIVRATE_t$ = The sum of the dividends paid in the fiscal year which contain month t.

$V_{sp,t}$ = The market value of ''one share'' of the S&P 500 composite index at the end of month t.

$D_{sp,t}$ = The estimated monthly income received from holding ''one share'' of the S&P 500 in month t.

The regression analysis is done with sixty months of data. The first month (t = 1) is sixty months before the month in which the firm's current fiscal year started. The last month (t = 60) is the last month of the past fiscal year.

(5) Where the parameters specified above are not obtainable, alternate parameters that closely correspond to those above may be used. This may include substituting a bond yield for nominal cost of preferred stock where the former is not available. Where the capital structure does not consist of any debt, preferred equity, or common equity, an alternate methodology to predict the firm's real after-tax marginal cost of capital may be used.

Example of using alternate parameters that closely correspond to those above are:

(A) In the case of industrials, who do not typically issue preferred stock, the predicted nominal cost of preferred stock ($\hat{R}_P$) can be estimated by determining the current average yield on newly issued industrial bonds which have the same rating as the firm's most recent debt issue.

(B) If necessary, the following assumptions can be made to determine the nominal cost of debt or preferred stock and their flotation costs.

(i) Where a company issued privately placed debt that was not rated, the rating, applied to preferred stock could be used to

determine the cost of debt and its flotation cost.

(ii) Where a company issued privately placed preferred stock that was not rated, the rating applied to debt could be used to determine the cost of preferred stock and its flotation costs.

(iii) In the case where all issues were privately placed, the current average yield on all newly issued debt or preferred could be used to determine the cost of debt or preferred respectively, and an average flotation cost, for debt or preferred, could be used.

(C) *Evidence Requirements*. Copies of this calculation with notations as to the source of the data must be submitted.

FOOTNOTES

(1) Ibbotson, R.E. and R.A. Sinquefield, *Stocks, Bonds, Bills, and Inflation,* Charlottesville, Va.: The Financial Analysts Research Foundation, 1977, cited by Ernst & Whinney, *Costs of Capital and Rates of Return for Industrial Firms and Class A&B Electric Utility Firms,* June 1979, p. 3–8.

(2) As an option, $R_f$ t can be developed with the following equation:

$$R_f{}^t = \frac{365D^t}{360 - ND^t} \times \frac{1}{12}$$

where:

$D^t$ = The average annual yield on three month U.S. Treasury bills reported in the *Survey of Current Business* auctioned in month t—which is reported using the bank discount method.

N = Number of days to maturity.

[46 FR 59920, Dec. 7, 1981]

## APPENDIX II TO PART 504—FUEL PRICE COMPUTATION

(a) *Introduction*. This appendix provides the equations and parameters needed to specify the price of the delivered fuels to be used in the cost calculations associated with parts 503 and 504 of these regulations. The delivered price of the fuel to be used to calculate delivered fuel expenses must reflect (1) the price of each fuel at the time of the petition, and (2) the effects of future real price increases for each fuel. The delivered price of an alternate fuel used to calculate delivered fuel expenses must reflect the petitioner's delivered price of the alternate fuel and the effects of real increases in the price of that alternate fuel. Paragraphs (b), (c) and (d) below provide the procedure to: (1) Calculate fuel price and inflation indices; (2) account for projected real increases in fuel prices when planning to burn one or more than one fuel; and (3) account for projected real increases in the price of the alternate fuel. Table II–1 of this appendix (See paragraph (b)) contains example fuel price and inflation indices based on the latest data appearing in the Energy Information Administration's (EIA) *Annual Energy Outlook* (AEO).

The fuel price and inflation indices will change yearly with the publication of the *AEO*. Revisions shall become effective after final publication. However, the relevant set of parameters for a specific petition for exemption will be the set in effect at the time the petition is submitted or the set in effect at the time a decision is rendered, whichever is more favorable to the petitioner.

(b) *Computation of Fuel Price and Inflation Indices*. (1) the Petitioner is responsible for computing the annual fuel price and inflation indices by using Equation II–1 and Equation II–2, respectively. The petitioner may compute the fuel price index specified in Equation II–1 or use his own price index. However, if he uses his own price index, the source or the derivation of the index must be fully documented and be contained in the evidential summary.

EQ II–2 is:

$$PX_i = \frac{P_i}{P_o}$$

where:

$PXV_i$ = The fuel price index for each fuel in year i. $P_i$ = Price of fuel in year i.

$P_o$ = Price of fuel in base year.

EQ II–2 is:

$$IX_i = \frac{GX_i}{GX_o}$$

where:

$IX_i$ = The inflation index in year i.

$GX_i$ = The NIPA GNP price deflator for year i.

$GX_o$ = The NIPA GNP price deflator for the base year.

(2) The parameters to be used in EQ II–1 are the Base Case fuel price projections found in EIA's current *AEO*.

(3) When computing annual inflation indices, the petitioner is to use the Base Case National Macroeconomic Indicators (NIPA GNP Price Deflator) contained in EIA's current *AEO*. If necessary, the petitioner must rebase the projection to the same year used for the fuel price projections. For example, in 1989 *AEO* projects the price deflator in 1982 dollars; this must be rebased to the year in which the petition is filed. The methodology used to rebase the inflation indices must follow standard statistical procedures and must be fully documented within the petition. This index will remain frozen at the last year of the *AEO*'s projection for the remainder of the unit'(s) useful life.

(4) Table II–1 is provided as an example of the application of equations II–1 and II–2. This table contains annual fuel price indices

for distillate oil, residual oil, natural gas, and coal. It also contains annual inflation indices. These values were computed from information contained in Table A3 and Table A11 of EIA's *AEO, 1989*.

TABLE II–1: PRICE AND INFLATION INDICES FOR USE IN THE COST CALCULATIONS

| Year | Distillate (DPX) | Residual (RPX) | Natural gas (GPX) | Coal (CPX) | Inflation (IX) |
|---|---|---|---|---|---|
| 1986 | 1.0000 | 1.0000 | 1.0000 | 1.0000 | 1.0000 |
| 1987 | 0.9810 | 1.2134 | 0.9508 | 0.9231 | 1.0334 |
| 1988 | 0.9429 | 0.9407 | 0.8934 | 0.8876 | 1.0658 |
| 1989 | 0.8929 | 0.9328 | 0.9057 | 0.8639 | 1.1054 |
| 1990 | 0.9905 | 1.0119 | 0.9221 | 0.9112 | 1.1607 |
| 1991 | 1.0381 | 1.0751 | 0.9344 | 0.9172 | 1.2204 |
| 1992 | 1.0929 | 1.1344 | 1.0205 | 0.9231 | 1.2836 |
| 1993 | 1.1595 | 1.2292 | 1.1148 | 0.9349 | 1.3512 |
| 1994 | 1.2286 | 1.3241 | 1.1844 | 0.9467 | 1.4214 |
| 1995 | 1.3000 | 1.4150 | 1.2705 | 0.9527 | 1.4960 |
| 1996 | 1.4000 | 1.5415 | 1.4016 | 0.9586 | 1.5768 |
| 1997 | 1.4762 | 1.6403 | 1.4918 | 0.9704 | 1.6585 |
| 1998 | 1.5452 | 1.7273 | 1.5615 | 0.9763 | 1.7410 |
| 1999 | 1.6143 | 1.7905 | 1.6475 | 0.9882 | 1.8235 |
| 2000 | 1.6690 | 1.8340 | 1.7049 | 0.9941 | 1.9025 |
| 2001 | 1.6690 | I.8340 | 1.7049 | 0.9941 | 1.9025 |
| 2002 | 1.6690 | 1.8340 | 1.7049 | 0.9941 | 1.9025 |
| 2003 | 1.6690 | 1.8340 | 1.7049 | 0.9941 | 1.9025 |
| 2004 | 1.6690 | 1.8340 | 1.7049 | 0.9941 | 1.9025 |
| 2005 | 1.6690 | 1.8340 | 1.7049 | 0.9941 | 1.9025 |
| 2006 | 1.6690 | 1.8340 | 1.7049 | 0.9941 | 1.9025 |
| 2007 | 1.6690 | 1.8340 | 1.7049 | 0.9941 | 1.9025 |
| 2008 | 1.6690 | 1.8430 | 1.7049 | 0.9941 | 1.9025 |
| 2009 | 1.6690 | 1.8340 | 1.7049 | 0.9941 | 1.9025 |
| 2010 | 1.6690 | 1.8340 | 1.7049 | 0.9941 | 1.9025 |

(C) *Fuel Price Computation*. (1) The delivered price of the proposed fuel to be burned ($FPB_i$) must reflect the real escalation rate of the proposed fuel, and must be computed with Equation EQ II–3.

EQ-II-3 is: $FPB_i = MPB\ [PX_i]$

where:

$FPB_i$ = Price of the proposed fuel (distillate oil, residual oil, or natural gas) in year i.
MPB = The current delivered market price of the proposed fuel.
$PX_i$ = The fuel price index value in year i, computed with Equation II–1.

or:

(2) When planning to use more than one fuel in the proposed unit(s), the petitioner must use Equation II–1 and Equation II–3 to calculate the annual fuel price of each fuel to be used. The petitioner then must estimate the proportion of each fuel to be burned annually over the useful life of the unit(s). With these proportions and the respective annual fuel prices for each fuel, the petitioner must compute an annual weighted average fuel price. The methodology used to calculate the weighted average fuel price must follow standard statistical procedures and be fully documented within the petition.

(d) *Fuel Price Computation—Alternate Fuel*. The delivered price of alternate fuel ($PFA_i$) must reflect the real escalation rate of alternate fuel and must be computed with Equation II–4.
Equation II–4 is:

$PFA_i = APF \times apx_i$

where:

PFA = The price of the alternate fuel in year i.
$APF^{-i}$ = The current market price of the alternate fuel f.o.b. the facility).
$APX_i$ = The alternate fuel price index value for year i, computed with Equation II–1.

In most cases the alternate fuel will be coal. The petitioner must use Equation II–1 (paragraph (b)) to compute the escalation rate ($APX_i$). If an alternate fuel other than coal is proposed the source or the derivation of the index must be fully documented and be contained in the evidential summary.

[54 FR 52896, Dec. 22, 1989]

## PART 508 [RESERVED]

## PART 516 [RESERVED]

# SUBCHAPTER G—NATURAL GAS (ECONOMIC REGULATORY ADMINISTRATION)

## PART 580—CURTAILMENT PRIORITIES FOR ESSENTIAL AGRICULTURAL USES

Sec.
580.01 Purpose.
580.02 Definitions.
580.03 Curtailment priorities.
580.04 Administrative procedures. [Reserved]

AUTHORITY: Secs. 401, 403, Pub. L. 95–621, 92 Stat. 3394–3395, 3396; secs. 301(b), 402(a), Pub. L. 95–91, 91 Stat. 578, 594, (42 U.S.C. 7115(b), 7117(a)); E.O. 12009, 42 FR 46267.

SOURCE: 44 FR 15646, Mar. 15, 1979, unless otherwise noted.

### § 580.01 Purpose.

The purpose of this part is to implement the authority granted to the Secretary of Energy in section 401 of the Natural Gas Policy Act of 1978, Public Law 95–621, 92 Stat. 3394–3395 (1978).

### § 580.02 Definitions.

(a) Terms defined in section 2 of the Natural Gas Policy Act of 1978 shall have the same meaning, as applicable, for purposes of this part, unless further defined in paragraph (b) of this section.

(b) The following definitions are applicable to this part:

(1) *Commercial establishment* means any establishment, (including institutions and local, state and federal government agencies) engaged primarily in the sale of goods or services, where natural gas is used for purposes other than those involving manufacturing or electric power generation.

(2) *Essential agricultural use* means any use of natural gas:

(i) For agricultural production, natural fiber production, natural fiber processing, food processing, food quality maintenance, irrigation pumping, crop drying; or

(ii) As a process fuel or feedstock in the production of fertilizer, agricultural chemicals, animal feed, or food which the Secretary of Agriculture determines is necessary for full food and fiber production.

(3) *Essential agricultural user* means any person who uses natural gas for an essential agricultural use as defined in paragraph (b)(2) of this section.

(4) *Hospital* means a facility whose primary function is delivering medical care to patients who remain at the facility, including nursing and convalescent homes. Outpatient clinics or doctors' offices are not included in this definition.

(5) *High-priority use* means any use of natural gas by a high-priority user as defined in paragraph (a)(6) of this section.

(6) *High-priority user* means, in no specific order, any person who uses natural gas:

(i) In a residence, or

(ii) In a commercial establishment in amounts of less than 50 Mcf on a peak day; or

(iii) In any school or hospital; or

(iv) For minimum plant protection when operations are shut down, for police protection, for fire protection, in a sanitation facility, in a correctional facility, or for emergency situations pursuant to 18 CFR 2.78(a)(4).

(7) *Interstate pipeline* means any person engaged in natural gas transportation subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act.

(8) *Residence* means a dwelling using natural gas predominately for residential purposes such as space heating, air conditioning, hot water heating, cooking, clothes drying, and other residential uses, and includes apartment buildings and other multi-unit residential buildings.

(9) *School* means a facility, the primary function of which is to deliver instruction to regularly enrolled students in attendance at such facility. Facilities used for both educational and non-educational activities are not included under this definition unless the latter are merely incidental to the delivery of instruction.

**§ 580.03 Curtailment priorities.**

(a) Notwithstanding any provision of law other than section 401(b) of the Natural Gas Policy Act of 1978, or any other rule, regulation, or order of the Department of Energy, the Federal Energy Regulatory Commission or their predecessor agencies, and to the maximum extent practicable, no curtailment plan of an interstate pipeline may provide for curtailment of deliveries of natural gas for any essential agricultural use, unless:

(1) Such curtailment does not reduce the quantity of natural gas delivered for such use below the use requirement certified by the Secretary of Agriculture under section 401(c) of the Natural Gas Policy Act of 1978 in order to meet the requirements of full food and fiber production; or

(2) Such curtailment is necessary in order to meet the requirements of high-priority users; or

(3) The Federal Energy Regulatory Commission, in consultation with the Secretary of Agriculture, determines, by rule or order issued pursuant to section 401(b) of the Natural Gas Policy Act of 1978, that use of a fuel (other than natural gas) is economically practicable and that the fuel is reasonably available as an alternative for such essential agricultural use.

(b) Any essential agricultural user who also qualifies as a high-priority user shall be a high-priority user for purposes of paragraph (a) of this section.

(c) The specific relative order of priority for all uses and users of natural gas, including high-priority and essential agricultural uses and users, shall remain as reflected in effective curtailment plans of interstate pipelines filed with the Federal Energy Regulatory Commission to the extent that the relative order of priorities does not conflict with paragraph (a) of this section.

(d) Nothing in this rule shall prohibit the injection of natural gas into storage by interstate pipelines or deliveries to its customers for their injection into storage unless it is demonstrated to the Federal Energy Regulatory Commission that these injections or deliveries are not reasonably necessary to meet the requirements of high-priority users or essential agricultural uses.

**§ 580.04 Administrative procedures. [Reserved]**

# PART 590—ADMINISTRATIVE PROCEDURES WITH RESPECT TO THE IMPORT AND EXPORT OF NATURAL GAS

## Subpart A—General Provisions

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590.505 Answers to applications for rehearing.

AUTHORITY: Secs. 301(b), 402(f), and 644, Pub. L. 95–91, 91 Stat. 578, 585, and 599 (42 U.S.C. 7151(b), 7172(f), and 7254), Sec. 3, Act of June 21, 1938, c. 556, 52 Stat. 822 (15 U.S.C. 717b); E.O. 12009 (42 FR 46267, September 15, 1977); DOE Delegation Order Nos. 0204–111 and 0204–127 (49 FR 6684, February 22, 1984; 54 FR 11437, March 20, 1989).

SOURCE: 54 FR 53531, Dec. 29, 1989, unless otherwise noted.

## Subpart A—General Provisions

### § 590.100 OMB Control Numbers.

The information collection requirements contained in this part have been approved by the Office of Management and Budget under Control No. 1903–0081.

### § 590.101 Purpose and scope.

The purpose of this part is to establish the rules and procedures required to be followed by persons to obtain authorizations from DOE to import or export natural gas under the Natural Gas Act and by all other persons interested in participating in a natural gas import or export proceeding before the agency. This part establishes the procedural rules necessary to implement the authorities vested in the Secretary of Energy by sections 301(b) and 402(f) of the DOE Act, which have been delegated to the Assistant Secretary.

### § 590.102 Definitions.

As used in this part:

(a) *Assistant Secretary* means the Assistant Secretary for Fossil Energy or any employee of the DOE who has been delegated final decisional authority.

(b) *Contested proceeding* means a proceeding:

(1) Where a protest or a motion to intervene, or a notice of intervention, in opposition to an application or other requested action has been filed, or

(2) Where a party otherwise notifies the Assistant Secretary and the other parties to a proceeding in writing that it opposes an application or other requested action.

(c) *Decisional employee* means the Assistant Secretary, presiding officials at conferences, oral presentations or trial-type hearings, and any other employee of the DOE, including consultants and contractors, who are, or may reasonably be expected to be, involved in the decision-making process, including advising the Assistant Secretary on the resolution of issues involved in a proceeding. The term includes those employees of the DOE assisting in the conduct of trial-type hearings by performing functions on behalf of the Assistant Secretary or presiding official.

(d) *DOE* means the Department of Energy, of which FE is a part.

(e) *DOE Act* means the Department of Energy Organization Act, Public Law 95–91, 91 Stat. 565 (42 U.S.C. 7101 *et seq.*).

(f) *FE* means the Office of The Assistant Secretary for Fossil Energy.

(g) *FERC* means the Federal Energy Regulatory Commission.

(h) *Interested person* means a person, other than a decisional employee, whose interest in a proceeding goes beyond the general interest of the public as a whole and includes applicants, intervenors, competitors of applicants, and other individuals and organizations, including non-profit and public interest organizations, and state, local, and other public officials, with a proprietary, financial or other special interest in the outcome of a proceeding. The term does not include other federal agencies or foreign governments and their representatives, unless the agency, foreign government, or representative of a foreign government is a party to the proceeding.

(i) *Natural gas* means natural gas and mixtures of natural gas and synthetic natural gas, regardless of physical form or phase, including liquefied natural gas and gels primarily composed of natural gas.

(j) *NGA* means the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821 (15 U.S.C. 717 *et seq.*).

(k) *Off-the-record communication* means a written or oral communication not on the record which is relevant to the merits of a proceeding, and about which the parties have not been given reasonable prior notice of

the nature and purpose of the communication and an opportunity to be present during such communication or, in the case of a written communication, an opportunity to respond to the communication. It does not include communications concerned solely with procedures which are not relevant to the merits of a proceeding. It also does not include general background discussions about an entire industry or natural gas markets or communications of a general nature made in the course of developing agency policy for future general application, even though these discussions may relate to the merits of a particular proceeding.

(l) *Party* means an applicant, any person who has filed a motion for and been granted intervenor status or whose motion to intervene is pending, and any state commission which has intervened by notice pursuant to § 590.303(a).

(m) *Person* means any individual, firm, estate, trust, partnership, association, company, joint-venture, corporation, United States local, state and federal governmental unit or instrumentality thereof, charitable, educational or other institution, and others, including any officer, director, owner, employee, or duly authorized representative of any of the foregoing.

(n) *Presiding official* means any employee of the DOE who has been designated by the Assistant Secretary to conduct any stage of a proceeding, which may include presiding at a conference, oral presentation, or trial-type hearing, and who has been delegated the authority of the Assistant Secretary to make rulings and issue orders in the conduct of such proceeding, other than final opinions and orders, orders to show cause, emergency interim orders, or conditional decisions under subpart D and orders on rehearing under subpart E.

(o) *Proceeding* means the process and activity, and any part thereof, instituted by FE either in response to an application, petition, motion or other filing under this part, or on its own initiative, by which FE develops and considers the relevant facts, policy and applicable law concerning the importation or exportation of natural gas and which may lead to the issuance of an order by the Assistant Secretary under subparts D and E.

(p) *State commission* means the regulatory body of a state or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the state or municipality, or having any regulatory jurisdiction over parties involved in the import or export arrangement.

**§ 590.103 General requirements for filing documents with FE.**

(a) Any document, including but not limited to an application, amendment of an application, request, petition, motion, answer, comment, protest, complaint, and any exhibit submitted in connection with such documents, shall be filed with FE under this part. Such document shall be considered officially filed with FE when it has been received and stamped with the time and date of receipt by the Office of Fuels Programs, FE. Documents transmitted to FE must be addressed as provided in § 590.104. All documents and exhibits become part of the record in the official FE docket file and will not be returned. An original and fifteen (15) copies of all applications, filings and submittals shall be provided to FE. No specific format is required. Applicants required to file quarterly reports as a condition to an authorization need only file an original and four (4) copies.

(b) Upon receipt by FE, each application or other initial request for action shall be assigned a docket number. Any petition, motion, answer, request, comment, protest, complaint or other document filed subsequently in a docketed proceeding with FE shall refer to the assigned docket number. All documents shall be signed either by the person upon whose behalf the document is filed or by an authorized representative. Documents signed by an authorized representative shall contain a certified statement that the representative is a duly authorized representative unless the representative has a certified statement already on file in the FE docket of the proceeding. All documents shall also be verified under oath or affirmation by the person filing, or by an officer or authorized representative of the firm having knowledge of the facts alleged. Each document filed

with FE shall contain a certification that a copy has been served as required by § 590.107 and indicate the date of service. Service of each document must be made not later than the date of the filing of the document.

(c) A person who files an application shall state whether, to the best knowledge of that person, the same or a related matter is being considered by any other part of the DOE, including the FERC, or any other Federal agency or department and, if so, shall identify the matter and the agency or department.

**§ 590.104 Address for filing documents.**

All documents filed under this part shall be addressed to: Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Docket Room 3F–056, FE–50, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585. All hand delivered documents shall be filed with the Office of Fuels Programs at the above address between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

**§ 590.105 Computation of time.**

(a) In computing any period of time prescribed or allowed by these regulations, the day of the act or event from which the designated period of time begins to run is not included. The period of time begins to run the next day after the day of the act or event. The last day of the period so computed is included unless it is a Saturday, Sunday, or legal Federal holiday, in which event the period runs until the end of the next day that is neither a Saturday, Sunday, nor a legal Federal holiday, unless otherwise provided by this part or by the terms of an FE order. Documents received after the regular business hours of 8 a.m. to 4:30 p.m. are deemed filed on the next regular business day.

(b) When a document is required to be filed with FE within a prescribed time, an extension of time to file may be granted for good cause shown.

(c) An order is issued and effective when date stamped by the Office of Fuels Programs, FE, after the order has been signed unless another effective date is specified in the order.

**§ 590.106 Dockets.**

The FE shall maintain a docket file of each proceeding under this part, which shall contain the official record upon which all orders provided for in subparts D and E shall be based. The official record in a particular proceeding shall include the official service list, all documents filed under § 590.103, the official transcripts of any procedures held under subpart C, and opinions and orders issued by FE under subparts D and E, and reports of contract amendments under § 590.407. All dockets shall be available for inspection and copying by the public during regular business hours between 8 a.m. and 4:30 p.m. Dockets are located in the Office of Fuels Programs, FE, Docket Room 3F–056, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585.

**§ 590.107 Service.**

(a) An applicant, any other party to a proceeding, or a person filing a protest shall serve a copy of all documents filed with FE upon all parties unless otherwise provided in this part. The copy of a document served upon parties shall be a true copy of the document filed with FE, but does not have to be a copy stamped with the time and date of receipt by FE. The FE shall maintain an official service list for each proceeding which shall be provided upon request.

(b) When the parties are not known, such as during the initial comment period following publication of the notice of application, service requirements under paragraph (a) of this section may be met by serving a copy of all documents on the applicant and on FE for inclusion in the FE docket in the proceeding.

(c) All documents required to be served under this part may be served by hand, certified mail, registered mail, or regular mail. It shall be the responsibility of the serving party to ensure that service is effected in a timely manner. Service is deemed complete upon delivery or upon mailing, whichever occurs first.

(d) Service upon a person's duly authorized representatives on the official service list shall constitute service upon that person.

(e) All FE orders, notices, or other FE documents shall be served on the parties by FE either by hand, registered mail, certified mail, or regular mail, except as otherwise provided in this part.

### § 590.108 Off-the-record communications.

(a) In any contested proceeding under this part:

(1) No interested person shall make an off-the-record communication or knowingly cause an off-the-record communication to be made to any decisional employee.

(2) No decisional employee shall make an off-the-record communication or knowingly cause an off-the-record communication to be made to any interested person.

(3) A decisional employee who receives, makes, or knowingly causes to be made an oral off-the-record communication prohibited by this section shall prepare a memorandum stating the substance of the communication and any responses made to it.

(4) Within forty-eight (48) hours of the off-the-record communication, a copy of all written off-the-record communications or memoranda prepared in compliance with paragraph (a)(3) of this section shall be delivered by the decisional employee to the Assistant Secretary and to the Deputy Assistant Secretary for Fuels Programs. The materials will then be made available for public inspection by placing them in the docket associated with the proceeding.

(5) Requests by a party for an opportunity to rebut, on the record, any facts or contentions in an off-the-record communication may be filed in writing with the Assistant Secretary. The Assistant Secretary shall grant such requests only for good cause.

(6) Upon being notified of an off-the-record communication made by a party in violation of this section, the Assistant Secretary may, to the extent consistent with the interests of justice and the policies of the NGA and the DOE Act, require the party to show cause why the party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation.

(b) The prohibitions of paragraph (a) of the section shall apply only to contested proceedings and begin at the time either a protest or a motion to intervene or notice of intervention in opposition to the application or other requested action is filed with FE, or a party otherwise specifically notifies the Assistant Secretary and the other parties in writing of its opposition to the application or other requested action, whichever occurs first.

### § 590.109 FE investigations.

The Assistant Secretary or the Assistant Secretary's delegate may investigate any facts, conditions, practices, or other matters within the scope of this part in order to determine whether any person has violated or is about to violate any provision of the NGA or other statute or any rule, regulation, or order within the Assistant Secretary's jurisdiction. In conducting such investigations, the Assistant Secretary or the Assistant Secretary's delegate may, among other things, subpoena witnesses to testify, subpoena or otherwise require the submission of documents, and order testimony to be taken by deposition.

## Subpart B—Applications for Authorization To Import or Export Natural Gas

### § 590.201 General.

(a) Any person seeking authorization to import or export natural gas into or from the United States, to amend an existing import or export authorization, or seeking any other requested action, shall file an application with the FE under the provisions of this part.

(b) Applications shall be filed at least ninety (90) days in advance of the proposed import or export or other requested action, unless a later date is permitted for good cause shown.

[54 FR 53531, Dec. 29, 1989; 55 FR 14916, Apr. 19, 1990]

### § 590.202 Contents of applications.

(a) Each application filed under § 590.201 shall contain the exact legal

name of the applicant, the names, titles, and mailing addresses of a maximum of two persons for the official service list, a statement describing the action sought from FE, the justification for such action, including why the proposed action is not inconsistent with the public interest, and the FE docket number, if applicable.

(b) Each application shall include the matters listed below to the extent applicable. All factual matters shall be supported to the extent practicable by the necessary data or documents. Copies of relevant documents filed or intended to be filed with FERC may be submitted to satisfy the requirements of this section. Topics to be addressed or described shall include:

(1) The scope of the project, including the volumes of natural gas involved, expressed in either Mcf or Bcf and their Btu equivalents, the dates of commencement and completion of the proposed import or export, and the facilities to be utilized or constructed;

(2) The source and security of the natural gas supply to be imported or exported, including contract volumes and a description of the gas reserves supporting the project during the term of the requested authorization;

(3) Identification of all the participants in the transaction, including the parent company, if any, and identification of any corporate or other affiliations among the participants;

(4) The terms of the transaction, such as take-or-pay obligations, make-up provisions, and other terms that affect the marketability of the gas;

(5) The provisions of the import arrangement which establish the base price, volume requirements, transportation and other costs, and allow adjustments during the life of the project, and a demonstration as to why the import arrangement is and will remain competitive over the life of the project and is otherwise not inconsistent with the public interest;

(6) For proposed imports, the need for the natural gas by the applicant or applicant's prospective customers, including a description of the persons who are expected to purchase the natural gas; and for proposed exports, the lack of a national or regional need for the gas; and

(7) The potential environmental impact of the project. To the extent possible, the application shall include a listing and description of any environmental assessments or studies being performed on the proposed gas project. The application shall be updated as the status of any environmental assessments changes.

(c) The application shall also have attached a statement, including a signed opinion of legal counsel, showing that a proposed import or export of natural gas is within the corporate powers of the applicant and a copy of all relevant contracts and purchase agreements.

(d) The Assistant Secretary or the Assistant Secretary's delegate may at any time require the applicant and other parties to make supplemental filings of additional information necessary to resolve issues raised by the application.

(e) All information and data filed in support of or against an application will be placed in the official FE docket file of the proceeding and will not be afforded confidential treatment, unless the party shows why the information or data should be exempted from public disclosure and the Assistant Secretary or Assistant Secretary's delegate determines that such information or data shall be afforded confidential treatment. Such determination shall be made in accordance with 10 CFR 1004.11.

[54 FR 53531, Dec. 29, 1989; 55 FR 18227, May 1, 1990]

### § 590.203 Deficient applications.

If an application is incomplete or otherwise deemed deficient, the Assistant Secretary or the Assistant Secretary's delegate may require the applicant to submit additional information or exhibits to remedy the deficiency. If the applicant does not remedy the deficiency within the time specified by the Assistant Secretary or the Assistant Secretary's delegate, the application may be dismissed without prejudice to refiling at another time.

### § 590.204 Amendment or withdrawal of applications.

(a) The applicant may amend or supplement the application at any time

prior to issuance of the Assistant Secretary's final opinion and order resolving the application, and shall amend or supplement the application whenever there are changes in material facts or conditions upon which the proposal is based.

(b) The Assistant Secretary may for good cause shown by motion of a party or upon the Assistant Secretary's own initiative decline to act on, in whole or in part, an amendment or supplement requested by an applicant under paragraph (a) of this section.

(c) After written notice to FE and service upon the parties of that notice an applicant may withdraw an application. Such withdrawal shall be effective thirty (30) days after notice to FE if the Assistant Secretary does not issue an order to the contrary within that time period.

**§ 590.205 Notice of applications.**

(a) Upon receipt of an application, the FE shall publish a notice of application in the FEDERAL REGISTER. The notice shall summarize the proposal. Except in emergency circumstances, generally the notice shall provide a time limit of not less than thirty (30) days from the notice's date of publication in the FEDERAL REGISTER for persons to file protests, comments, or a motion to intervene or notice of intervention, as applicable. The notice may also request comments on specific issues or matters of fact, law, or policy raised by the application.

(b) The notice of application shall advise the parties of their right to request additional procedures, including the opportunity to file written comments and to request that a conference, oral presentation, or trial-type hearing be convened. Failure to request additional procedures at this time shall be deemed a waiver of any right to additional procedures should the Assistant Secretary decide to grant the application and authorize the import or export by issuing a final opinion and order in accordance with § 590.316.

(c) Where negotiations between the DOE, including FE, and a foreign government have resulted in a formal policy agreement or statement affecting a particular import or export proceeding, FE shall include in the notice of application a description of the terms or policy positions of that agreement or statement to the extent they apply to the proceeding, and invite comment. A formal policy agreement or statement affecting a particular import or export proceeding that is arrived at after publication of the notice of application shall be placed on the record in that proceeding and the parties given an opportunity to comment thereon.

**§ 590.206 Notice of procedures.**

In all proceedings where, following a notice of application and the time specified in the notice for the filing of responses thereto, the Assistant Secretary determines to have additional procedures, which may consist of the filing of supplemental written comments, written interrogatories or other discovery procedures, a conference, oral presentation, or trial-type hearing, the Assistant Secretary shall provide the parties with notice of the procedures the Assistant Secretary has determined to follow in the proceeding and advise the parties of their right to request any additional procedures in accordance with the provisions of § 590.310. The notice of procedures may identify and request comments on specific issues of fact, law, or policy relevant to the proceeding and may establish a time limit for requesting additional procedures.

**§ 590.207 Filing fees.**

A non-refundable filing fee of fifty dollars ($50) shall accompany each application filed under § 590.201. Checks shall be made payable to ''Treasury of the United States.''

**§ 590.208 Small volume exports.**

Any person may export up to 100,000 cubic feet of natural gas (14.73 pounds per square inch at 60 degrees Fahrenheit) or the liquefied or compressed equivalent thereof, in a single shipment for scientific, experimental, or other non-utility gas use without prior authorization of the Assistant Secretary.

### § 590.209 Exchanges by displacement.

Any importer of natural gas may enter into an exchange by displacement agreement without the prior authorization of the Assistant Secretary when the net effect of the exchange is no different than under the importer's existing authorization. An exchange by displacement is an arrangement whereby authorized imported volumes are displaced by other gas for purposes of storage or flexibility. The term of the exchange agreement may not exceed five (5) years, the volumes imported may not exceed the importer's existing import authorization, and no actual natural gas may flow across the United States border under the terms of the exchange agreement. Any importer who enters into an exchange agreement pursuant to this section shall file with FE within fifteen (15) days after the start up of the exchange, a written description of the transaction, the exact volume of natural gas to be displaced, the name of the purchaser, and the import authorization under which the exchange is being carried out.

## Subpart C—Procedures

### § 590.301 General.

The procedures of this subpart are applicable to proceedings conducted on all applications or other requested actions filed under this part. The Assistant Secretary may conduct all aspects of the procedures of this subpart or may designate a presiding official pursuant to § 590.314.

### § 590.302 Motions and answers.

(a) Motions for any procedural or interlocutory ruling shall set forth the ruling or relief requested and state the grounds and the statutory or other authority relied upon. All written motions shall comply with the filing requirements of § 590.103. Motions made during conferences, oral presentations or trial-type hearings may be stated orally upon the record, unless the Assistant Secretary or the presiding official determines otherwise.

(b) Any party may file an answer to any written motion within fifteen (15) days after the motion is filed, unless another period of time is established by the Assistant Secretary or the presiding official. Answers shall be in writing and shall detail each material allegation of the motion being answered. Answers shall state clearly and concisely the facts and legal authorities relied upon.

(c) Any motion, except for motions seeking intervention or requesting that a conference, oral presentation or trial-type hearing be held, shall be deemed to have been denied, unless the Assistant Secretary or presiding official acts within thirty (30) days after the motion is filed.

### § 590.303 Interventions and answers.

(a) A state commission may intervene in a proceeding under this part as a matter of right and become a party to the proceeding by filing a notice of intervention no later than the date fixed for filing motions to intervene in the applicable FE notice or order. If the period for filing the notice has expired, a state commission may be permitted to intervene by complying with the filing and other requirements applicable to any other person seeking to become a party to the proceeding as provided in this section.

(b) Any other person who seeks to become a party to a proceeding shall file a motion to intervene, which sets out clearly and concisely the facts upon which the petitioner's claim of interest is based.

(c) A motion to intervene shall state, to the extent known, the position taken by the movant and the factual and legal basis for such positions in order to advise the parties and the Assistant Secretary as to the specific issues of policy, fact, or law to be raised or controverted.

(d) Motions to intervene may be filed at any time following the filing of an application, but no later than the date fixed for filing such motions or notices in the applicable FE notice or order, unless a later date is permitted by the Assistant Secretary for good cause shown and after considering the impact of granting the late motion of the proceeding. Each motion or notice shall list the names, titles, and mailing addresses of a maximum of two persons for the official service list.

(e) Any party may file an answer to a motion to intervene, but such answer shall be made within fifteen (15) days after the motion to intervene was filed, unless a later date is permitted by the Assistant Secretary for good cause shown. Answers shall be in writing. Answers shall detail each material allegation of the motion to intervene being answered and state clearly and concisely the facts and legal authorities relied upon. Failure to answer is deemed a waiver of any objection to the intervention. This paragraph does not prevent the Assistant Secretary from ruling on a motion to intervene and issuing a final opinion and order in accordance with § 590.316 prior to the expiration of the fifteen (15) days in which a party has to answer a motion to intervene.

(f) If an answer in opposition to a motion to intervene is timely filed or if the motion to intervene is not timely filed, then the movant becomes a party only after the motion to intervene is expressly granted.

(g) If no answer in opposition to a motion to intervene is filed within the period of time prescribed in paragraph (e) of this section, the motion to intervene shall be deemed to be granted, unless the Assistant Secretary denies the motion in whole or in part or otherwise limits the intervention prior to the expiration of the time allowed in paragraph (e) for filing an answer to the motion to intervene. Where the motion to intervene is deemed granted, the participation of the intervenor shall be limited to matters affecting asserted rights and interests specifically set forth in the motion to intervene, and the admission of such intervenor to party status shall not be construed as recognition by FE that the intervenor might be aggrieved because of any order issued.

(h) In the event that a motion for late intervention is granted, an intervenor shall accept the record of the proceeding as it was developed prior to the intervention.

### § 590.304 Protests and answers.

(a) Any person objecting to an application filed under § 590.201 of this part or to any action taken by FE under this part may file a protest. No particular form is required. The protest shall identify the person filing the protest, the application or action being objected to, and provide a concise statement of the reasons for the protest.

(b) The filing of a protest, without also filing a motion to intervene or a notice of intervention, shall not make the person filing the protest a party to the proceeding.

(c) A protest shall be made part of the official FE docket file in the proceeding and shall be considered as a statement of position of the person filing the protest, but not as establishing the validity of any assertion upon which the decision would be based.

(d) Protests shall be served on the applicant and all parties by the person filing the protest. If the person filing the protest is unable to provide service on any person identified as a party to the proceeding after a good faith effort, then FE shall effect service. However, when the parties are not known, service requirements may be met by serving a copy on the applicant and on FE as provided in § 590.107(b).

(e) Protests may be filed at any time following the filing of an application, but no later than the date fixed for filing protests in the applicable FE notice or order, unless a later date is permitted by the Assistant Secretary for good cause shown.

(f) Any party may file an answer to a protest but such answer must be filed within fifteen (15) days after the protest was filed, unless a later date is permitted by the Assistant Secretary for good cause shown.

[54 FR 53531, Dec. 29, 1989; 55 FR 14916, Apr. 19, 1990]

### § 590.305 Informal discovery.

The parties to a proceeding may conduct discovery through use of procedures such as written interrogatories or production of documents. In response to a motion by a party, the Assistant Secretary or presiding official may determine the procedures to be utilized for discovery if the parties cannot agree on such procedures.

### § 590.306 Subpoenas.

(a) Subpoenas for the attendance of witnesses at a trial-type hearing or for

the production of documentary evidence may be issued upon the initiative of the Assistant Secretary or presiding official, or upon written motion of a party or oral motion of a party during a conference, oral presentation, or trial-type hearing, if the Assistant Secretary or presiding official determines that the evidence sought is relevant and material.

(b) Motions for the issuance of a subpoena shall specify the relevance, materiality, and scope of the testimony or documentary evidence sought, including, as to documentary evidence, specification to the extent possible of the documents sought and the facts to be proven by them, the issues to which they relate, and why the information or evidence was not obtainable through discovery procedures agreed upon by the parties.

(c) If service of a subpoena is made by a United States Marshal or a Deputy United States Marshal, service shall be evidenced by their return. If made by another person, that person shall affirm that service has occurred and file an affidavit to that effect with the original subpoena. A witness who is subpoenaed shall be entitled to witness fees as provided in § 590.315(c).

### § 590.307 Depositions.

(a) Upon motion filed by a party, the Assistant Secretary or presiding official may authorize the taking of testimony of any witness by deposition. Unless otherwise directed in the authorization issued, a witness being deposed may be examined regarding any matter which is relevant to the issues involved in the pending proceeding.

(b) Parties authorized to take a deposition shall provide written notice to the witness and all other parties at least ten (10) days in advance of the deposition unless such advance notice is waived by mutual agreement of the parties.

(c) The requesting motion and notice shall state the name and mailing address of the witness, delineate the subject matters on which the witness is expected to testify, state the reason why the deposition should be taken, indicate the time and place of the deposition, and provide the name and mailing address of the person taking the deposition.

(d) A witness whose testimony is taken by deposition shall be sworn in or shall affirm concerning the matter about which the witness has been called to testify before any questions are asked or testimony given. A witness deposed shall be entitled to witness fees as provided in § 590.315(c).

(e) The moving party shall file the entire deposition with FE after it has been subscribed and certified. No portion of the deposition shall constitute a part of the record in the proceedings unless received in evidence, in whole or in part, by the Assistant Secretary or presiding official.

### § 590.308 Admissions of facts.

(a) At any time prior to the end of a trial-type hearing, or, if there is no trial-type hearing, prior to the issuance of a final opinion and order under § 590.404, any party, the Assistant Secretary, or the presiding official may serve on any party a written request for admission of the truth of any matters at issue in the proceeding that relate to statements or opinions of fact or of the application of law to fact.

(b) A matter shall be considered admitted and conclusively established for the purposes of any proceeding in which a request for admission is served unless, within fifteen (15) days of such time limit established by the Assistant Secretary or presiding official, the party to whom the request is directed answers or objects to the request. Any answer shall specifically admit or deny the matter, or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny, unless the answering party states that, after reasonable inquiry, the answering party has been unable to obtain sufficient information to admit or deny. If an objection is made, the answering party shall state the reasons for the objection.

(c) If the Assistant Secretary or presiding official determines that an answer to a request for admission does not comply with the requirements of this section, the Assistant Secretary or

presiding official may order either that the matter is admitted or that an amended answer be served.

(d) A copy of all requests for admission and answers thereto shall be filed with FE in accordance with § 590.103. Copies of any documents referenced in the request shall be served with the request unless they are known to be in the possession of the other parties.

(e) The Assistant Secretary or presiding official may limit the number of requests for admission of facts in order to expedite a proceeding through elimination of duplicative requests.

### § 590.309 Settlements.

The parties may conduct settlement negotiations. If settlement negotiations are conducted during a conference, at the request of one of the parties, the Assistant Secretary or presiding official may order that the discussions be off-the-record with no transcript of such settlement negotiations being prepared for inclusion in the official record of the proceeding. No offer of settlement, comment or discussion by the parties with respect to an offer of settlement shall be subject to discovery or admissible into evidence against any parties who object to its admission.

### § 590.310 Opportunity for additional procedures.

Any party may file a motion requesting additional procedures, including the opportunity to file written comments, request written interrogatories or other discovery procedures, or request that a conference, oral presentation or trial-type hearing be held. The motion shall describe what type of procedure is requested and include the information required by §§ 590.311, 590.312 and 590.313, as appropriate. Failure to request additional procedures within the time specified in the notice of application or in the notice of procedure, if applicable, shall constitute a waiver of that right unless the Assistant Secretary for good cause shown grants additional time for requesting additional procedures. If no time limit is specified in the notice or order, additional procedures may be requested at any time prior to the issuance of a final opinion and order. At any time during a proceeding, the Assistant Secretary or presiding official may on his or her own initiative determine to provide additional procedures.

[54 FR 53531, Dec. 29, 1989; 55 FR 14916, Apr. 19, 1990]

### § 590.311 Conferences.

(a) Upon motion by a party, a conference of the parties may be convened to adjust or settle the proceedings, set schedules, delineate issues, stipulate certain issues of fact or law, set procedures, and consider other relevant matters where it appears that a conference will materially advance the proceeding. The Assistant Secretary or presiding official may delineate the issues which are to be considered and may place appropriate limitations on the number of intervenors who may participate, if two or more intervenors have substantially like interests.

(b) A motion by a party for a conference shall include a specific showing why a conference will materially advance the proceeding.

(c) Conferences shall be recorded, unless otherwise ordered by the Assistant Secretary or presiding official, and the transcript shall be made a part of the official record of the proceeding and available to the public.

### § 590.312 Oral presentations.

(a) Any party may file a motion requesting an opportunity to make an oral presentation of views, arguments, including arguments of counsel, and data on any aspect of the proceeding. The motion shall identify the substantial question of fact, law or policy at issue and demonstrate that it is material and relevant to the merits of the proceeding. The party may submit material supporting the existence of substantial issues. The Assistant Secretary or presiding official ordinarily will grant a party's motion for an oral presentation, if the Assistant Secretary or presiding official determines that a substantial question of fact, law, or policy is at issue in the proceeding and illumination of that question will be aided materially by such an oral presentation.

(b) The Assistant Secretary or presiding official may require parties making oral presentations to file briefs

or other documents prior to the oral presentation. The Assistant Secretary or presiding official also may delineate the issues that are to be considered at the oral presentation and place appropriate limitations on the number of intervenors who may participate if two or more intervenors have substantially like interests.

(c) Oral presentations shall be conducted in an informal manner with the Assistant Secretary or the presiding official and other decisional employees presiding as a panel. The panel may question those parties making an oral presentation. Cross-examination by the parties and other more formal procedures used in trial-type hearings will not be available in oral presentations. The oral presentation may be, but need not be, made by legal counsel.

(d) Oral presentations shall be recorded, and the transcript shall be made part of the official record of the proceeding and available to the public.

**§ 590.313 Trial-type hearings.**

(a) Any party may file a motion for a trial-type hearing for the purpose of taking evidence on relevant and material issues of fact genuinely in dispute in the proceeding. The motion shall identify the factual issues in dispute and the evidence that will be presented. The party must demonstrate that the issues are genuinely in dispute, relevant and material to the decision and that a trial-type hearing is necessary for a full and true disclosure of the facts. The Assistant Secretary or presiding official shall grant a party's motion for a trial-type hearing, if the Assistant Secretary or presiding official determines that there is a relevant and material factual issue genuinely in dispute and that a trial-type hearing is necessary for a full and true disclosure of the facts.

(b) In trial-type hearings, the parties shall have the right to be represented by counsel, to request discovery, to present the direct and rebuttal testimony of witnesses, to cross-examine witnesses under oath, and to present documentary evidence.

(c) The Assistant Secretary or presiding official upon his or her own initiative or upon the motion of any party may consolidate any proceedings involving common questions of fact in whole or in part for a trial-type hearing. The Assistant Secretary or presiding official may also place appropriate limitations on the number of intervenors who may participate if two or more intervenors have substantially like interests.

(d) The Assistant Secretary or presiding official may make such rulings for trial-type hearings, including delineation of the issues and limitation of cross-examination of a witness, as are necessary to obtain a full and true disclosure of the facts and to limit irrelevant, immaterial, or unduly repetitious evidence.

(e) At trial-type hearings, the Assistant Secretary or presiding official, or any other decisional employee directed by the Assistant Secretary or presiding official, may call witnesses for testimony or presenting exhibits that directly relate to a particular issue of fact to be considered at the hearing. The Assistant Secretary or presiding official, or any other decisional employee directed by the Assistant Secretary or presiding official, may also question witnesses offered by the parties concerning their testimony.

(f) Trial-type hearings shall be recorded, and the transcript shall be made part of the official record of the proceeding and available to the public.

**§ 590.314 Presiding officials.**

(a) The Assistant Secretary may designate a presiding official to conduct any stage of the proceeding, including officiating at a conference, oral presentation, or trial-type hearing. The presiding official shall have the full authority of the Assistant Secretary during such proceedings.

(b) A presiding official at a conference, oral presentation, or trial-type hearing shall have the authority to regulate the conduct of the proceeding including, but not limited to, determination of the issues to be raised during the course of the conference, oral presentation, or trial-type hearing, administering oaths or affirmations, directing discovery, ruling on objections to the presentation of testimony or exhibits, receiving relevant and material

evidence, requiring the advance submission of written testimony and exhibits, ruling on motions, determining the format, directing that briefs be filed with respect to issues raised or to be raised during the course of the conference, oral presentation or trial-type hearing, questioning witnesses, taking reasonable measures to exclude duplicative material, and placing limitations on the number of witnesses to be called by a party.

**§ 590.315 Witnesses.**

(a) The Assistant Secretary or presiding official may require that the direct testimony of witnesses in trial-type hearings be submitted in advance of the hearing and be under oath, and in written form.

(b) Witnesses who testify in trial-type hearings shall be under oath or affirmation before being allowed to testify.

(c) Witnesses subpoenaed pursuant to § 590.306 shall be paid the same fees and mileage as paid for like services in the District Courts of the United States.

(d) Witnesses subpoenaed pursuant to § 590.307 shall be paid the same fees and mileage as paid for like services in the District Court of the United States.

[54 FR 53531, Dec. 29, 1989; 55 FR 14916, Apr. 19, 1990]

**§ 590.316 Shortened proceedings.**

In any proceeding where, in response to a notice of application or notice of procedures, if applicable, no party files a motion requesting additional procedures, including the right to file written comments, or the holding of a conference, oral presentation, or trial-type hearing, or where the Assistant Secretary determines that such requested additional procedures are not required pursuant to §§ 590.310, 590.311, 590.312 and 590.313, the Assistant Secretary may issue a final opinion and order on the basis of the official record, including the application and all other filings. In any proceeding in which the Assistant Secretary intends to deny the application or grant the application with the attachment of material conditions unknown to, or likely to be opposed by, the applicant, solely on the basis of the application and responses to the notice of application or notice of procedures, if applicable, without additional procedures, the Assistant Secretary shall advise the parties in writing generally of the issues of concern to the Assistant Secretary upon which the denial or material conditions would be based and provide them with an opportunity to request additional procedures pursuant to §§ 590.310, 590.311, 590.312 and 590.313.

**§ 590.317 Complaints.**

(a) Any person may file a complaint objecting to the actions by any other person under any statute, rule, order or authorization applicable to an existing import or export authorization over which FE has jurisdiction. No particular form is required. The complaint must be filed with FE in writing and must contain the name and address of the complainant and the respondent and state the facts forming the basis of the complaint.

(b) A complaint concerning an existing import or export authorization shall be served on all parties to the original import or export authorization proceeding either by the complainant or by FE if the complainant has made a good faith effort but has been unable to effect service.

(c) The Assistant Secretary may issue an order to show cause under § 590.401, or may provide opportunity for additional procedures pursuant to §§ 590.310, 590.311, 590.312, or § 590.313, in order to determine what action should be taken in response to the complaint.

## Subpart D—Opinions and Orders

**§ 590.401 Orders to show cause.**

A proceeding under this part may commence upon the initiative of the Assistant Secretary or in response to an application by any person requesting FE action against any other person alleged to be in contravention or violation of any authorization, statute, rule, order, or law administered by FE applicable to the import or export of natural gas, or for any other alleged wrong involving importation or exportation of natural gas over which FE has jurisdiction. Any show cause order issued shall identify the matters of interest or the matters complained of

that the Assistant Secretary is inquiring about, and shall be deemed to be tentative and for the purpose of framing issues for consideration and decision. The respondent named in the order shall respond orally or in writing, or both, as required by the order. A show cause order is not a final opinion and order.

**§ 590.402 Conditional orders.**

The Assistant Secretary may issue a conditional order at any time during a proceeding prior to issuance of a final opinion and order. The conditional order shall include the basis for not issuing a final opinion and order at that time and a statement of findings and conclusions. The findings and conclusions shall be based solely on the official record of the proceeding.

**§ 590.403 Emergency interim orders.**

Where consistent with the public interest, the Assistant Secretary may waive further procedures and issue an emergency interim order authorizing the import or export of natural gas. After issuance of the emergency interim order, the proceeding shall be continued until the record is complete, at which time a final opinion and order shall be issued. The Assistant Secretary may attach necessary or appropriate terms and conditions to the emergency interim order to ensure that the authorized action will be consistent with the public interest.

**§ 590.404 Final opinions and orders.**

The Assistant Secretary shall issue a final opinion and order and attach such conditions thereto as may be required by the public interest after completion and review of the record. The final opinion and order shall be based solely on the official record of the proceeding and include a statement of findings and conclusions, as well as the reasons or basis for them, and the appropriate order, condition, sanction, relief or denial.

**§ 590.405 Transferability.**

Authorizations by the Assistant Secretary to import or export natural gas shall not be transferable or assignable, unless specifically authorized by the Assistant Secretary.

**§ 590.406 Compliance with orders.**

Any person required or authorized to take any action by a final opinion and order of the Assistant Secretary shall file with FE, within thirty (30) days after the requirement or authorization becomes effective, a notice, under oath, that such requirement has been complied with or such authorization accepted or otherwise acted upon, unless otherwise specified in the order.

**§ 590.407 Reports of changes.**

Any person authorized to import or export natural gas has a continuing obligation to give the Assistant Secretary written notification, as soon as practicable, of any prospective or actual changes to the information submitted during the application process upon which the authorization was based, including, but not limited to, changes to: The parties involved in the import or export arrangement, the terms and conditions of any applicable contracts, the place of entry or exit, the transporters, the volumes accepted or offered, or the import or export price. Any notification filed under this section shall contain the FE docket number(s) to which it relates. Compliance with this section does not relieve an importer or exporter from responsibility to file the appropriate application to amend a previous import or export authorization under this part whenever such changes are contrary to or otherwise not permitted by the existing authorization.

## Subpart E—Applications for Rehearing

**§ 590.501 Filing.**

(a) An application for rehearing of a final opinion and order, conditional order, or emergency interim order may be filed by any party aggrieved by the issuance of such opinion and order within thirty (30) days after issuance. The application shall be served on all parties.

(b) The application shall state concisely the alleged errors in the final opinion and order, conditional order, or emergency interim order and must set forth specifically the ground or grounds upon which the application is

based. If an order is sought to be vacated, reversed, or modified by reason of matters that have arisen since the issuance of the final opinion and order, conditional order, or emergency interim order, the matters relied upon shall be set forth with specificity in the application. The application shall also comply with the filing requirements of § 590.103.

**§ 590.502 Application is not a stay.**

The filing of an application for rehearing does not operate as a stay of the Assistant Secretary's order, unless specifically ordered by the Assistant Secretary.

**§ 590.503 Opinion and order on rehearing.**

Upon application for rehearing, the Assistant Secretary may grant or deny rehearing or may abrogate or modify the final opinion and order, conditional order, or emergency interim order with or without further proceedings.

**§ 590.504 Denial by operation of law.**

Unless the Assistant Secretary acts upon the application for rehearing within thirty (30) days after it is filed, it is deemed to be denied. Such denial shall constitute final agency action for the purpose of judicial review.

**§ 590.505 Answers to applications for rehearing.**

No answers to applications for rehearing shall be entertained. Prior to the issuance of any final opinion and order on rehearing, however, the Assistant Secretary may afford the parties an opportunity to file briefs or answers and may order that a conference, oral presentation, or trial-type hearing be held on some or all of the issues presented by an application for rehearing.

# SUBCHAPTER H—ASSISTANCE REGULATIONS

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AUTHORITY: 42 U.S.C. 7101 *et seq.;* 31 U.S.C. 6301–6308; 50 U.S.C. 2401 *et seq.*

## Subpart A—General

SOURCE: 61 FR 7166, Feb. 26, 1996, unless otherwise noted.

### § 600.1 Purpose.

This part implements the Federal Grant and Cooperative Agreement Act, Pub. L. 95–224, as amended by Pub. L. 97–258 (31 U.S.C. 6301–6308), and establishes uniform policies and procedures for the award and administration of DOE grants and cooperative agreements. This subpart (Subpart A) sets forth the general policies and procedures applicable to the award and administration of grants, cooperative agreements, and technology investment agreements. The specific guidance for technology investment agreements is contained in part 603.

[61 FR 7166, Feb. 26, 1996, as amended at 70 FR 69253, Nov. 15, 2005]

### § 600.2 Applicability.

(a) Except as otherwise provided by Federal statute or program rule, this part applies to applications, funding opportunity announcement, and new, continuation, and renewal awards (and any subsequent subawards).

(b) Any new, continuation, or renewal award (and any subsequent subaward) shall comply with any applicable Federal statute, Federal rule, Office of Management and Budget (OMB) Circular and Governmentwide guidance in effect as of the date of such award.

(c) Financial assistance to foreign entities is governed, to the extent appropriate, by this part and by the administrative requirements and cost principles applicable to their respective recipient type, e.g, governmental, non-profit, commercial.

[61 FR 7166, Feb. 26, 1996, as amended at 74 FR 44275, Aug. 28, 2009]

### § 600.3 Definitions.

*Amendment* means the written document executed by a DOE Contracting Officer that changes one or more terms or conditions of an existing financial assistance award.

*Award* means the written document executed by a DOE Contracting Officer, after an application is approved, which contains the terms and conditions for providing financial assistance to the recipient.

*Budget period* means the interval of time, specified in the award, into which a project is divided for budgeting and funding purposes.

*Continuation award* means an award for a succeeding or subsequent budget period after the initial budget period of either an approved project period or renewal thereof.

*Contract* means a written procurement contract executed by a recipient or subrecipient for the acquisition of property or services under a financial assistance award.

*Contracting Officer* means the DOE official authorized to execute awards on behalf of DOE and who is responsible for the business management and nonprogram aspects of the financial assistance process.

*Cost sharing or matching* means that portion of project or programs costs not borne by the Federal Government.

*DOE Patent Counsel* means the Department of Energy Patent Counsel assisting the Contracting Officer in the review and coordination of patents and data related items.

*Financial assistance* means the transfer of money or property to a recipient

or subrecipient to accomplish a public purpose of support or stimulation authorized by Federal statute. For purposes of this part, financial assistance instruments are grants and cooperative agreements and subawards.

*Head of Contracting Activity* or HCA means a DOE official with senior management authority for the award and administration of financial assistance instruments within one or more DOE organizational elements.

*Merit review* means a thorough, consistent, and objective examination of applications based on pre-established criteria by persons who are independent of those submitting the applications and who are knowledgeable in the field of endeavor for which support is requested.

*Nonprofit organization* means any corporation, trust, foundation, or institution which is entitled to exemption under section 501(c)(3) of the Internal Revenue Code, or which is not organized for profit and no part of the net earnings of which inure to the benefit of any private shareholder or individual (except that the definition of ''nonprofit organization'' at 48 CFR 27.301 shall apply for patent matters set forth at §§ 600.136 and 600.325).

*Program rule* means a rule issued by a DOE program office for the award and administration of financial assistance which may describe the program's purpose or objectives, eligibility requirements for applicants, types of program activities or areas to be supported, evaluation and selection process, cost sharing requirements, etc. These rules usually supplement the generic policies and procedures for financial assistance contained in this part.

*Project* means the set of activities described in an application, State plan, or other document that is approved by DOE for financial assistance (whether such financial assistance represents all or only a portion of the support necessary to carry out those activities.)

*Project period* means the total period of time indicated in an award during which DOE expects to provide financial assistance. A project period may consist of one or more budget periods and may be extended by DOE.

*Recipient* means the organization, individual, or other entity that receives an award from DOE and is financially accountable for the use of any DOE funds or property provided for the performance of the project, and is legally responsible for carrying out the terms and conditions of the award.

*Renewal award* means an award which adds one or more additional budget periods to an existing project period.

*Research and development* means all research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other non-profit institutions and commercial organizations. ''Research'' is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function. ''Development'' is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes.

*Total Project Cost* means all allowable costs, as set forth in the applicable Federal cost principles, incurred in accomplishing the objective of the project during the project period, including the value of contributions made by third parties and costs incurred by Federally Funded Research and Development Centers.

[61 FR 7166, Feb. 26, 1996, as amended at 64 FR 56420, Oct. 20, 1999; 68 FR 50650, Aug. 21, 2003; 74 FR 44275, Aug. 28, 2009]

### § 600.4 Deviations.

(a) *General.* (1) A deviation is the use of any policy, procedure, form, standard, term, or condition which varies from a requirement of this part, or the waiver of any such requirement, unless such use or waiver is authorized or precluded by Federal statute. The use of optional or discretionary provisions of this part, including special restrictive conditions used in accordance with §§ 600.114, 600.212, and 600.304 are not deviations. Awards to foreign entities

and the waiver of the cost sharing requirements in § 600.30 are not subject to this section.

(2) A single-case deviation is a deviation which applies to one financial assistance transaction and one applicant, recipient, or subrecipient only.

(3) A class deviation is a deviation which applies to more than one financial assistance transaction, applicant, recipient, or subrecipient.

(b) The DOE officials specified in paragraph (c) of this section may authorize a deviation only upon a written determination that the deviation is—

(1) Necessary to achieve program objectives;

(2) Necessary to conserve public funds;

(3) Otherwise essential to the public interest; or

(4) Necessary to achieve equity.

(c) *Approval procedures.* (1) A deviation request must be in writing and must be submitted to the responsible DOE Contracting Officer. An applicant for a subaward or a subrecipient shall submit any such request through the recipient.

(2) Except as provided in paragraph (c)(3) of this section—

(i) A single-case deviation may be authorized by the responsible HCA.

(ii) A class deviation may be authorized by the Director, Procurement and Assistance Management or designee.

(3) Whenever the approval of OMB, other Federal agency, or other DOE office is required to authorize a deviation, the proposed deviation must be submitted to the Director, Procurement and Assistance Management or designee for concurrence prior to submission to the authorizing official.

(d) *Notice.* Whenever a request for a class deviation is approved, DOE shall publish a notice in the FEDERAL REGISTER at least 15 days before the class deviation becomes effective. Whenever a class deviation is contained in a proposed program rule, the preamble to the proposed rule shall describe the purpose and scope of the deviation.

(e) *Subawards.* A recipient may use a deviation in a subaward only with the prior written approval of a DOE Contracting Officer.

[61 FR 7166, Feb. 26, 1996, as amended at 64 FR 56420, Oct. 20, 1999; 68 FR 50650, Aug. 21, 2003; 74 FR 44275, Aug. 28, 2009]

### § 600.5 Selection of award instrument.

(a) If DOE has administrative discretion in the selection of the award instrument, the DOE decision as to whether the relationship is principally one of procurement or financial assistance shall be made pursuant to the Federal Grant and Cooperative Agreement Act as codified at 31 U.S.C. 6301–6306. A grant or cooperative agreement shall be the appropriate instrument, in accordance with this part, when the principal purpose of the relationship is the transfer of money or property to accomplish a public purpose of support or stimulation authorized by Federal statute. In selecting the type of financial assistance instrument, DOE shall limit involvement between itself and the recipient in the performance of a project to the minimum necessary to achieve DOE program objectives.

(b) When it is anticipated that substantial involvement will be necessary between DOE and the recipient during performance of the contemplated activity, the award instrument shall be a cooperative agreement rather than a grant. Every cooperative agreement shall explicitly state the substantial involvement anticipated between DOE and the recipient during the performance of the project. Substantial involvement exists if:

(1) Responsibility for the management, control, or direction of the project is shared by DOE and the recipient; or

(2) Responsibility for the performance of the project is shared by DOE and the recipient.

(c) Providing technical assistance or guidance of a programmatic nature to a recipient does not constitute substantial involvement if:

(1) the recipient is not required to follow such guidance;

(2) the technical assistance or guidance is not expected to result in continuing DOE involvement in the performance of the project; or

(3) The technical assistance or guidance pertains solely to the administrative requirements of the award.

(d) In cooperative agreements, DOE has the right to intervene in the conduct or performance of project activities for programmatic reasons. Intervention includes the interruption or modification of the conduct or performance of project activities. Suspension or termination of the cooperative agreement under §§ 600.162, 600.243 and 600.352 does not constitute intervention in the conduct or performance of project activities.

[61 FR 7166, Feb. 26, 1996, as amended at 74 FR 44275, Aug. 28, 2009]

### § 600.6 Eligibility.

(a) *General*. DOE shall solicit applications for financial assistance in a manner which provides for the maximum amount of competition feasible.

(b) *Restricted eligibility*. If DOE restricts eligibility, an explanation of why the restriction of eligibility is considered necessary shall be included in the funding opportunity announcement, program rule, or published notice.

(1) If the aggregate amount of DOE funds available for award under a funding opportunity announcement or published notice is $1million or more, unless authorized by statute or program rule, such restriction of eligibility shall be:

(i) Supported by a written determination initiated by the program office;

(ii) Concurred in by legal counsel and the Contracting Officer; and

(iii) Approved by an official no less than one level below the responsible program Assistant Secretary, Deputy Administrator, or other official of equivalent authority.

(2) Where the amount of DOE funds is less than $1 million, the cognizant HCA and the Contracting Officer may approve the determination.

(c) *Noncompetitive financial assistance*. DOE may award a grant or cooperative agreement or technology investment agreement on a noncompetitive basis only if the application satisfies one or more of the follow selection criteria:.

(1) The activity to be funded is necessary to the satisfactory completion of, or is a continuation or renewal of, an activity presently being funded by DOE or another Federal agency, and for which competition for support would have a significant adverse effect on continuity or completion of the activity.

(2) The activity is being or would be conducted by the applicant using its own resources or those donated or provided by third parties; however, DOE support of that activity would enhance the public benefits to be derived and DOE knows of no other entity which is conducting or is planning to conduct such an activity.

(3) The applicant is a unit of government and the activity to be supported is related to performance of a governmental function within the subject jurisdiction, thereby precluding DOE provision of support to another entity.

(4) The applicant has exclusive domestic capability to perform the activity successfully, based upon unique equipment, proprietary data, technical expertise, or other such unique qualifications.

(5) The award implements an agreement between the United States Government and a foreign government to fund a foreign applicant.

(6) Time constraints associated with a public health, safety, welfare or national security requirement preclude competition.

(7) The proposed project was submitted as an unsolicited proposal and represents a unique or innovative idea, method, or approach that would not be eligible for financial assistance under a recent, current, or planned funding opportunity announcement, and if, as determined by DOE, a competitive funding opportunity announcement would not be appropriate.

(8) The responsible program Assistant Secretary, Deputy Administrator, or other official of equivalent authority determines that a noncompetitive award is in the public interest. This authority may not be delegated.

(d) *Approval requirements*. (1) Where the amount of DOE funds is $1 million or greater, determinations of noncompetitive awards shall be:

(i) Documented in writing;

(ii) Concurred in by the responsible program technical official and local legal counsel; and

(iii) Approved, prior to award, by the responsible program Assistant Secretary, Deputy Administrator, or official of equivalent authority and the Contracting Officer. The approval authority may be delegated to one organizational level below the Assistant Secretary, Deputy Administrator, or official of equivalent authority.

(2) Where the amount of DOE funds is less than $1 million, determinations of noncompetitive awards shall be:

(i) Documented in writing;

(ii) Concurred in by local legal counsel, unless for a particular award or class of awards of $1 million or less, review is waived by legal counsel; and

(iii) Approved by the cognizant HCA and the Contracting Officer.

[74 FR 44275, Aug. 28, 2009, as amended at 74 FR 48850, Sept. 25, 2009]

### § 600.7 Small and disadvantaged and women-owned business participation.

(a) DOE encourages the participation in financial assistance awards of small businesses, including those owned by socially and economically disadvantaged individuals and women, of historically black colleges, and of colleges and universities with substantial minority enrollments.

(b) For definitions of the terms in paragraph (a) of this section, see the Higher Education Act of 1965, and 15 U.S.C. 644, as amended by the Federal Acquisition Streamlining Act (FASA), and implementing regulations under FASA issued by the Office of Federal Procurement Policy.

(c) When entering into contracts under financial assistance awards, recipients and subrecipients shall comply with the requirements of §§ 600.144, 600.236 and 600.331, as applicable.

[61 FR 7166, Feb. 26, 1996, as amended at 74 FR 44276, Aug. 28, 2009]

### § 600.8 Funding Opportunity Announcement.

(a) *General.* Funding Opportunity Announcements (FOA) include any issuance used to announce funding opportunities that would result in the award of a discretionary grant, cooperative agreement, or technology investment agreement, whether it is called a program announcement, program notice, solicitation, broad agency announcement, research announcement, notice of program interest, or something else.

(1) A Program Assistant Secretary (or official of equivalent authority) may annually issue a program notice describing research areas in which financial assistance is being made available. Such notice shall also state whether the research areas covered by the notice are to be added to those listed in a previously issued program rule. If they are to be included, then applications received as a result of the notice may be treated as having been in response to that previously published program rule. If they are not to be included, then applications received in response to the notice are to be treated as unsolicited applications. FOAs may be issued by a DOE Contracting Officer or program office with prior concurrence of the contracting office.

(2) DOE must post synopses of its FOAs and modifications to the announcements at the Grants.gov Internet site, using the standard data elements/format, except for:

(i) Announcements of funding opportunities for awards less than $25,000 for which 100 percent of eligible applicants live outside of the United States.

(ii) Single source announcements of funding opportunities which are specifically directed to a known recipient.

(b) *Subawards.* In accordance with the provisions of the applicable statute and program rules, if a DOE financial assistance program involves the award of financial assistance by a recipient to a subrecipient, the recipient shall provide sufficient advance notice so that potential subrecipients may prepare timely applications and secure prerequisite reviews and approvals.

(c) *Announcement format.* DOE must use the government-wide standard format to publish program announcements of funding opportunities.

[61 FR 7166, Feb. 26, 1996, as amended at 69 FR 7867, Feb. 20, 2004; 70 FR 69254, Nov. 15, 2005; 74 FR 44276, Aug. 28, 2009]

### § 600.9 [Reserved]

### § 600.10 Form and content of applications.

(a) *General*. Applications shall be required for all financial assistance projects or programs.

(b) *Forms*. Applications shall be on the form specified in a program rule, the program announcement, or these regulations. (See also §§ 600.112 and 600.210.) For unsolicited applications, a guide for preparation and submission is available from U.S. Department of Energy, Federal Energy Technology Center, Attn: Unsolicited Proposal Manager, Post Office Box 10940, Pittsburgh, PA, 15236–0940.

(c) *Contents of an application*. In general, a financial assistance application shall include:

(1) A facesheet containing basic identifying information. The facesheet shall be the Standard Form (SF)424;

(2) A detailed narrative description of the proposed project, including the objectives of the project and the applicant's plan for carrying it out;

(3) A budget with supporting justification; and

(d) *Incomplete applications*. DOE may return an application that:

(1) Is not signed, either in writing or electronically, by an official authorized to bind the applicant; or

(2) Omits any information or documentation required by statute, program rule, or the solicitation, if the nature of the omission precludes review of the application.

(e) *Supplemental information*. During the review of a complete application, DOE may request the submission of additional information only if the information is essential to evaluate the application.

(f) Registration is required in the Central Contractor Registration (CCR) for all applications. Information on registration can be obtained at *http://www.ccr.gov/Grantees.aspx*.

[61 FR 7166, Feb. 26, 1996, as amended at 64 FR 56420, Oct. 20, 1999; 69 FR 7867, Feb. 20, 2004; 74 FR 44276, Aug. 28, 2009]

### §§ 600.11–600.12 [Reserved]

### § 600.13 Merit review.

(a) It is the policy of DOE that discretionary financial assistance be awarded through a merit-based selection process. A merit review means a thorough, consistent, and objective examination of applications based on preestablished criteria by persons who are independent of those submitting the applications and who are knowledgeable in the field of endeavor for which support is requested.

(b) Each program office must establish a merit review system covering the financial assistance programs it administers. Merit review of financial assistance applications is intended to be advisory and is not intended to replace the authority of the project/program official with responsibility for deciding whether an award will be made.

[64 FR 56420, Oct. 20, 1999]

### § 600.14 [Reserved]

### § 600.15 Authorized uses of information.

(a) *General*. Information contained in applications shall be used only for evaluation purposes unless such information is generally available to the public or is already the property of the Government. The Trade Secrets Act, 18 U.S.C. 1905, prohibits the unauthorized disclosure by Federal employees of trade secret and confidential business information.

(b) *Treatment of application information*. (1) An application or other document, including any unsolicited information, may include technical data and other data, including trade secrets and commercial or financial information that is privileged or confidential, which the applicant does not want disclosed to the public or used by the Government for any purpose other than application evaluation.

(i) To protect such data, the submitter must mark the cover sheet of the application or other document with the following Notice:

Notice of Restriction on Disclosure and Use of Data

Pages [____] of this document may contain trade secrets or commercial or financial information that is privileged or confidential and is exempt from public disclosure. Such information shall be used or disclosed only for evaluation purposes or in accordance with a financial assistance or loan agreement between the submitter and the Government. The Government may use or disclose any information that is not appropriately marked or otherwise restricted, regardless of source.

(ii)(A) To further protect such data, except as otherwise provided in paragraph (b)(1)(iii) of this section, each page containing trade secrets or commercial or financial information that is privileged or confidential must be specifically identified and marked with text similar to the following:

May contain trade secrets or commercial or financial information that is privileged or confidential and exempt from public disclosure.

(B) In addition, each line or paragraph containing trade secrets or commercial or financial information that is privileged or confidential must be marked with brackets or other clear identification, such as highlighting.

(iii) (A) In the case where a form for data submission is unalterable, such as certain forms submitted through Grants.gov, submitters must include in a cover letter or the project narrative a notice like the following:

Forms [____] *may contain trade secrets or commercial or financial information that is privileged or confidential and exempt from public disclosure. Such information shall be used or disclosed only for evaluation purposes or in accordance with a financial assistance or loan agreement between the submitter and the Government. The Government may use or disclose any information that is not appropriately marked or otherwise restricted, regardless of source.*

(B) The cover letter or project narrative must also specify the particular information on such forms that the submitter believes contains trade secrets or commercial or financial information that is privileged or confidential.

(2) Unless DOE specifies otherwise, DOE shall not refuse to consider an application or other document solely on the basis that the application or other document is restrictively marked in accordance with paragraph (b)(1) of this section.

(3) Data (or abstracts of data) specifically marked in accordance with paragraph (b)(1) of this section shall be used by DOE or its designated representatives solely for the purpose of evaluating the proposal. The data so marked shall not be disclosed or used for any other purpose except to the extent provided in any resulting assistance agreement, or to the extent required by law, including the Freedom of Information Act (5 U.S.C. 552) (10 CFR Part 1004). The Government shall not be liable for disclosure or use of unmarked data and may use or disclose such data for any purpose.

(4) This process enables DOE to follow the provisions of 10 CFR 1004.11(d) in the event a Freedom of Information Act (5 U.S.C. 552) request is received for the data submitted, such that information not identified as subject to a claim of exemption may be released without obtaining the submitter's views under the process set forth in 10 CFR 1004.11(c)

[76 FR 26581, May 9, 2011]

### § 600.16 Legal authority and effect of an award.

(a) A DOE financial assistance award is valid only if it is in writing and is signed, either in writing or electronically, by a DOE Contracting Officer.

(b) Recipients are free to accept or reject the award. A request to draw down DOE funds constitutes acceptance; however, DOE may require formal acceptance of an award.

(c) DOE funds awarded under a grant, cooperative agreement, or technology investment agreement shall be obligated as of the date the DOE Contracting Officer signs the award; however, the recipient is not authorized to incur costs under an award prior to the beginning date of the budget period shown in the award except as may be authorized in accordance with §§ 600.125(e), 600.230, 600.317(b), or 603.830 of this part. The duration of the DOE financial obligation shall not extend beyond the expiration date of the budget period shown in the award unless authorized by a DOE Contracting Officer by means of a continuation or renewal

award or other extension of the budget period.

[61 FR 7166, Feb. 26, 1996, as amended at 70 FR 69254, Nov. 15, 2005; 74 FR 44276, Aug. 28, 2009]

### § 600.17 Contents of Award.

Each financial assistance award shall be made on a Notice of Financial Assistance Award (NFAA) which contains basic identifying and funding information. The NFAA provides the contents of the award including any special terms and conditions, program regulations, the National Policy Assurances, and any other provisions necessary to establish the respective rights, duties, obligations, and responsibilities of DOE and the recipient, consistent with the requirements of this part.

[74 FR 44276, Aug. 28, 2009]

### § 600.18 [Reserved]

### § 600.19 Notification to unsuccessful applicants.

DOE shall promptly notify in writing each applicant whose application has not been selected for award or whose application cannot be funded because of the unavailability of appropriated funds. If the application was not selected, the written notice shall explain why the application was not selected.

[61 FR 7166, Feb. 26, 1996, as amended at 74 FR 44276, Aug. 28, 2009]

### § 600.20 Maximum DOE obligation.

(a) The maximum DOE obligation to the recipient is—

(1) For monetary awards, the amount shown in the award as the amount of DOE funds obligated, and

(2) Any designated property.

(b) DOE shall not be obligated to make any additional, supplemental, continuation, renewal, or other award for the same or any other purpose.

### § 600.21 Access to records.

(a) In addition to recipient and subrecipient responsibilities relative to access to records specified in §§ 600.153, 600.242 and 600.342, for any negotiated contract or subcontract in excess of $10,000 under a grant or cooperative agreement, DOE, the Comptroller General of the United States, the recipient and the subrecipient (if the contract was awarded under a financial assistance subaward), or any of their authorized representatives shall have the right of access to any books, documents, papers, or other records of the contractor or subcontractor which are pertinent to that contract or subcontract, in order to make audit, examination, excerpts, and copies.

(b) The right of access may be exercised for as long as the applicable records are retained by the recipient, subrecipient, contractor, or subcontractor.

[61 FR 7166, Feb. 26, 1996, as amended at 74 FR 44276, Aug. 28, 2009]

### § 600.22 Disputes and appeals.

(a) *Informal dispute resolution.* Whenever practicable, DOE shall attempt to resolve informally any dispute over the award or administration of financial assistance. Informal resolution, including resolution through an alternative dispute resolution mechanism, shall be preferred over formal procedures, to the extent practicable.

(b) *Alternative dispute resolution (ADR).* Before issuing a final determination in any dispute in which informal resolution has not been achieved, the Contracting Officer shall suggest that the other party consider the use of voluntary consensual methods of dispute resolution, such as mediation. The DOE dispute resolution specialist is available to provide assistance for such disputes, as are trained mediators of other federal agencies. ADR may be used at any stage of a dispute.

(c) *Final determination.* Whenever a dispute is not resolved informally or through an alternative dispute resolution process, DOE shall mail (by certified mail) a brief written determination signed by a Contracting Officer, setting forth DOE's final disposition of such dispute. Such determination shall contain the following information:

(1) A summary of the dispute, including a statement of the issues and of the positions taken by the Department and the party or parties to the dispute; and

(2) The factual, legal and, if appropriate, policy reasons for DOE's disposition of the dispute.

(d) *Right of appeal.* Except as provided in paragraph (f)(1) of this section, the

final determination under paragraph (c) of this section may be appealed to the cognizant Senior Procurement Executive (SPE) for either DOE or the National Nuclear Security Administration (NNSA). The mailing address for the DOE SPE is Office of Procurement and Assistance Management, 1000 Independence Ave., SW, Washington, DC 20585. The mailing address for the NNSA SPE is Office of Acquisition and Supply Management, 1000 Independence Ave., SW., Washington, DC 20585.

(e) *Effect of appeal.* The filing of an appeal with the SPE shall not stay any determination or action taken by DOE which is the subject of the appeal. Consistent with its obligation to protect the interests of the Federal Government, DOE may take such authorized actions as may be necessary to preserve the status quo pending decision by the SPE, or to preserve its ability to provide relief in the event the SPE decides in favor of the appellant.

(f) *Review on appeal.* (1) The SPE shall have no jurisdiction to review

(i) Any preaward dispute (except as provided in paragraph (f)(2)(ii) of this section), including use of any special restrictive condition pursuant to § 600.114, § 600.212, or § 600.304;

(ii) DOE denial of a request for a deviation under § 600.4, § 600.103, § 600.205, or § 600.303 of this part;

(iii) DOE denial of a request for a budget revision or other change in the approved project under § 600.125, § 600.127, § 600.222, § 600.230, § 600.315, or § 600.317 of this part or under another term or condition of the award;

(iv) Any DOE action authorized under § 600.162(a)(1), (2), (3) or (5), § 600.243(a)(1), (a)(3), or § 600.352(a)(1), (2), (3) or (5) for suspensions only; or § 600.162(a)(4), § 600.243(a)(4) or § 600.352(a)(4) for actions disapproving renewal applications or other requests for extension of time or additional funding for the same project when related to recipient noncompliance, or such actions authorized by program rule;

(v) Any DOE decision about an action requiring prior DOE approval under § 600.144, § 600.236, or § 600.331 of this part or under another term or condition of the award;

(2) In addition to any right of appeal established by program rule, or by the terms and conditions (not inconsistent with paragraph (f)(1) of this section) of an award, the Board shall have jurisdiction to review:

(i) A DOE determination that the recipient has failed to comply with the applicable requirements of this part, the program statute or rules, or other terms and conditions of the award;

(ii) A DOE decision not to make a continuation award based on any of the determinations described in paragraph (f)(2)(i) of this section;

(iii) Termination of an award for cause, in whole or in part, by DOE;

(iv) A DOE determination that an award is void or invalid;

(v) The application by DOE of an indirect cost rate; and

(vi) DOE disallowance of costs.

(3) In reviewing disputes authorized under paragraph (f)(2) of this section, the Board shall be bound by the applicable law, statutes, and rules, including the requirements of this part, and by the terms and conditions of the award.

(4) The decision of the Board shall be the final decision of the Department.

[61 FR 7166, Feb. 26, 1996, as amended at 74 FR 44276, Aug. 28, 2009]

### § 600.23 [Reserved]

### § 600.24 Noncompliance.

(a) Except for noncompliance with nondiscrimination requirements under 10 CFR part 1040, whenever DOE determines that a recipient has not complied with the applicable requirements of this part, with the requirements of any applicable program statute or rule, or with any other term or condition of the award, a DOE Contracting Officer shall provide to the recipient (by certified mail, return receipt requested) a written notice setting forth:

(1) The factual and legal bases for the determination of noncompliance;

(2) The corrective actions and the date (not less than 30 days after the date of the notice) by which they must be taken.

(3) Which of the actions authorized under § 600.122(n), § 600.162(a) § 600.243(a), § 600.312(g), or § 600.352(a) of this part DOE may take if the recipient does not

achieve compliance within the time specified in the notice, or does not provide satisfactory assurances that actions have been initiated which will achieve compliance in a timely manner.

(b) DOE may take any of the actions set forth in § 600.122(n), § 600.162(a), §§ 600.243(a), 600.312(g), or 600.352(a) of this part concurrent with the written notice required under paragraph (a) of this section or with less than 30 days written notice to the recipient whenever:

(1) There is evidence the award was obtained by fraud;

(2) The recipient ceases to exist or becomes legally incapable of performing its responsibilities under the financial assistance award; or

(3) There is a serious mismanagement or misuse of financial assistance award funds necessitating immediate action.

[61 FR 7166, Feb. 26, 1996, as amended at 64 FR 56420, Oct. 20, 1999; 74 FR 44277, Aug. 28, 2009]

### § 600.25 Suspension and termination.

(a) *Suspension and termination for cause*. DOE may suspend or terminate an award for cause on the basis of:

(1) A noncompliance determination under § 600.24, § 600.122(n), § 600.162(a), § 600.243(a) or § 600.352(a); or

(2) A suspension or debarment of the awardee under 2 CFR 180 and 901.

(b) *Notification requirements*. Except as provided in § 600.24, § 600.162(a), § 600.243(a), or § 600.352(a) before suspending or terminating an award for cause, DOE shall mail to the awardee (by certified mail, return receipt requested) a separate written notice in addition to that required by § 600.24(a) at least ten days prior to the effective date of the suspension or termination. Such notice shall include, as appropriate:

(1) The factual and legal bases for the suspension or termination;

(2) The effective date or dates of the DOE action;

(3) If the action does not apply to the entire award, a description of the activities affected by the action;

(4) Instructions concerning which costs shall be allowable during the period of suspension, or instructions concerning allowable termination costs, including in either case, instructions concerning any subgrants or contracts;

(5) Instructions concerning required final reports and other closeout actions for terminated awards (see §§ 600.170 through 600.173, §§ 600.250 through 600.252 and §§ 600.350 through 600.353;

(6) A statement of the awardee's right to appeal a termination for cause pursuant to § 600.22; and

(7) The dated signature of a DOE Contracting Officer.

(c) *Suspension*. (1) Unless DOE and the awardee agree otherwise, no period of suspension shall exceed 90 days.

(2) DOE may cancel the suspension at any time, up to and including the date of expiration of the period of suspension, if the awardee takes satisfactory corrective action before the expiration date of the suspension or gives DOE satisfactory evidence that such corrective action will be taken.

(3) If the suspension has not been cancelled by the expiration date of the period of suspension, the awardee shall resume the suspended activities or project unless, prior to the expiration date, DOE notifies the awardee in writing that the period of suspension shall be extended consistent with paragraph (c)(1) of this section or that the award shall be terminated.

(4) As of the effective date of the suspension, DOE shall withhold further payments and shall allow new obligations incurred by the awardee during the period of suspension only if such costs were authorized in the notice of suspension or in a subsequent letter.

(5) If the suspension is cancelled or expires and the award is not terminated, DOE shall reimburse the awardee for any authorized allowable costs incurred during the suspension and, if necessary, may amend the award to extend the period of performance.

(d) *Termination by mutual agreement*. In addition to any situation where a termination for cause pursuant to §§ 600.24, 600.160 through 600.162 §§ 600.243 through 600.244 or §§ 600.350 through 600.353 is appropriate, either DOE or the awardee may initiate a termination of an award (or portion thereof) as described in this paragraph. If the awardee initiates a termination, the awardee must notify DOE in writing and specify the awardee's reasons for

requesting the termination, the proposed effective date of the termination, and, in the case of a partial termination, a description of the activities to be terminated, and an appropriate budget revision. DOE shall terminate an award or portion thereof under this paragraph only if both parties agree to the termination and the conditions under which it shall occur. If DOE determines that the remaining activities under a partially terminated award would not accomplish the purpose for which the award was originally awarded, DOE may terminate the entire award.

(e) *Effect of termination*. The awardee shall incur no new obligations after the effective date of the termination of an award (or portion thereof), and shall cancel as many outstanding obligations as possible. DOE shall allow full credit to the awardee for the DOE share of noncancellable obligations properly incurred by the awardee prior to the effective date of the termination.

(f) *Subgrants*. Awardees shall follow the policies and procedures in this section and in §§ 600.24, 600.160 through 600.162 §§ 600.243 through 600.244 or §§ 600.350 through 600.353 for suspending and terminating subgrants.

[61 FR 7166, Feb. 26, 1996, as amended at 74 FR 44277, Aug. 28, 2009]

### §§ 600.26–600.28 [Reserved]

### § 600.29 Fixed obligation awards.

(a) *General*. This section contains provisions applicable to the award of financial assistance instruments on a fixed amount basis. Under a fixed obligation award, funds are issued in support of a project without a requirement for Federal monitoring of actual costs subsequently incurred.

(b) *Provisions applicable to fixed obligation awards*. Financial assistance awards may be made on a fixed obligation basis subject to the following requirements:

(1) Each fixed obligation award may neither exceed $250,000 nor exceed one year in length.

(2) Programs which require mandatory cost sharing are not eligible.

(3) Proposed costs must be analyzed in detail to ensure consistency with applicable cost principles.

(4) Budget categories are not stipulated in making an award. However, budgets are submitted by an applicant and reviewed for purposes of establishing the amount to be awarded.

(5) Payments must be made in the same manner as other financial assistance awards, except that when determined appropriate by the cognizant program official and Contracting Officer a lump sum payment may be made.

(6) Recipients must certify in writing to the Contracting Officer at the end of the project that the activity was completed or the level of effort was expended, however should the activity or effort not be carried out, the recipient would be expected to make appropriate reimbursements.

(7) Periodic reports may be established for each award so long as they are not more frequently than quarterly.

(8) Changes in principal investigator or project leader, scope of effort, or institution, must receive the prior approval of the Department.

[61 FR 7166, Feb. 26, 1996, as amended at 74 FR 44277, Aug. 28, 2009]

### § 600.30 Cost sharing.

In addition to the requirements of § 600.123, § 600.224, or § 600.313, the following requirements apply to research, development, demonstration and commercial application activities projects:

(a) Cost sharing is required for most financial assistance awards for research, development, demonstration and commercial applications activities initiated after the enactment of the Energy Policy Act of 2005 on August 8, 2005. This requirement does not apply to:

(1) An award under the small business innovation research program or the small business technology transfer program; or

(2) A program with cost sharing requirements defined by other than Section 988 of the Energy Policy Act of 2005 including other sections of the 2005 Act and the Energy Policy Act of 1992.

(b) A cost share of at least 20 percent of the cost of the activity is required

for research and development except where:

(1) A research or development activity of a basic or fundamental nature has been excluded by an appropriate officer of the Department, generally an Under Secretary; or

(2) The Secretary has determined it is necessary and appropriate to reduce or eliminate the cost sharing requirement for a research and development activity of an applied nature.

(c) A cost share of at least 50 percent of the cost of a demonstration or commercial application program or activity is required unless the Secretary has determined it is necessary and appropriate to reduce the cost sharing requirements, taking into consideration any technological risk relating to the activity.

(d) Cost share shall be provided by non-Federal funds unless otherwise authorized by statute. In calculating the amount of the non-Federal contribution:

(1) Base the non-Federal contribution on total project costs, including the cost of work where funds are provided directly to a partner, consortium member or subrecipient, such as a Federally Funded Research and Development Center;

(2) Include the following costs as allowable in accordance with the applicable cost principles:

(i) Cash;

(ii) Personnel costs;

(iii) The value of a service, other resource, or third party in-kind contribution determined in accordance with the applicable circular of the Office of Management and Budget;

(iv) Indirect costs or facilities and administrative costs; and/or

(v) Any funds received under the power program of the Tennessee Valley Authority (except to the extent that such funds are made available under an annual appropriation Act);

(3) Exclude the following costs:

(i) Revenues or royalties from the prospective operation of an activity beyond the time considered in the award;

(ii) Proceeds from the prospective sale of an asset of an activity; or

(iii) Other appropriated Federal funds.

(iv) Repayment of the Federal share of a cost-shared activity under Section 988 of the Energy Policy Act of 2005 shall not be a condition of the award.

[74 FR 44277, Aug. 28, 2009]

### § 600.31 Research misconduct.

(a) A recipient is responsible for maintaining the integrity of research of any kind under an award from DOE including the prevention, detection, and remediation of research misconduct, and the conduct of inquiries, investigations, and adjudication of allegations of research misconduct in accordance with the requirements of this section.

(b) For purposes of this section, the following definitions are applicable:

*Adjudication* means a formal review of a record of investigation of alleged research misconduct to determine whether and what corrective actions and sanctions should be taken.

*Fabrication* means making up data or results and recording or reporting them.

*Falsification* means manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

*Finding of Research Misconduct* means a determination, based on a preponderance of the evidence, that research misconduct has occurred. Such a finding requires a conclusion that there has been a significant departure from accepted practices of the relevant research community and that it be knowingly, intentionally, or recklessly committed.

*Inquiry* means information gathering and initial fact-finding to determine whether an allegation or apparent instance of misconduct warrants an investigation.

*Investigation* means the formal examination and evaluation of the relevant facts.

*Plagiarism* means the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.

*Research* means all basic, applied, and demonstration research in all fields of science, medicine, engineering, and

mathematics, including, but not limited to, research in economics, education, linguistics, medicine, psychology, social sciences statistics, and research involving human subjects or animals.

*Research misconduct* means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results, but does not include honest error or differences of opinion.

*Research record* means the record of all data or results that embody the facts resulting from scientists' inquiries, including, but not limited to, research proposals, laboratory records, both physical and electronic, progress reports, abstracts, theses, oral presentations, internal reports, and journal articles.

(c) Unless otherwise instructed by the Contracting Officer, the recipient must conduct an initial inquiry into any allegation of research misconduct. If the recipient determines that there is sufficient evidence to proceed to an investigation, it must notify the Contracting Officer and, unless otherwise instructed, the recipient must:

(1) Conduct an investigation to develop a complete factual record and an examination of such record leading to either a finding of research misconduct and an identification of appropriate remedies or a determination that no further action is warranted;

(2) Inform the Contracting Officer if an initial inquiry supports an investigation and, if requested by the Contracting Officer thereafter, keep the Contracting Officer informed of the results of the investigation and any subsequent adjudication. When an investigation is complete, the recipient will forward to the Contracting Officer a copy of the evidentiary record, the investigative report, any recommendations made to the recipient's adjudicating official, and the adjudicating official's decision and notification of any corrective action taken or planned, and the subject's written response to the recommendations (if any).

(3) If the investigation leads to a finding of research misconduct, conduct an adjudication by a responsible official who was not involved in the inquiry or investigation and is separated organizationally from the element which conducted the investigation. The adjudication must include a review of the investigative record and, as warranted, a determination of appropriate corrective actions and sanctions.

(d) The Department may elect to act in lieu of the recipient in conducting an inquiry or investigation into an allegation of research misconduct if the Contracting Officer finds that:

(1) The research organization is not prepared to handle the allegation in a manner consistent with this section;

(2) The allegation involves an entity of sufficiently small size that it cannot reasonably conduct the inquiry;

(3) DOE involvement is necessary to ensure the public health, safety, and security, or to prevent harm to the public interest; or,

(4) The allegation involves possible criminal misconduct.

(e) DOE reserves the right to pursue such remedies and other actions as it deems appropriate, consistent with the terms and conditions of the award instrument and applicable laws and regulations. However, the recipient's good faith administration of this section and the effectiveness of its remedial actions and sanctions shall be positive considerations and shall be taken into account as mitigating factors in assessing the need for such actions. If DOE pursues any such action, it will inform the subject of the action of the outcome and any applicable appeal procedures.

(f) In conducting the activities in paragraph (c) of this section, the recipient and the Department, if it elects to conduct the inquiry or investigation, shall adhere to the following guidelines:

(1) *Safeguards for information and subjects of allegations.* The recipient shall provide safeguards to ensure that individuals may bring allegations of research misconduct made in good faith to the attention of the recipient without suffering retribution. Safeguards include: protection against retaliation; fair and objective procedures for examining and resolving allegations; and diligence in protecting positions and reputations. The recipient shall also provide the subjects of allegations confidence that their rights are protected

and that the mere filing of an allegation of research misconduct will not result in an adverse action. Safeguards include timely written notice regarding substantive allegations against them, a description of the allegation and reasonable access to any evidence submitted to support the allegation or developed in response to an allegation and notice of any findings of research misconduct.

(2) *Objectivity and expertise*. The recipient shall select individual(s) to inquire, investigate, and adjudicate allegations of research misconduct who have appropriate expertise and have no unresolved conflict of interest. The individual(s) who conducts an adjudication must not be the same individual(s) who conducted the inquiry or investigation, and must be separate organizationally from the element that conducted the inquiry or investigation.

(3) *Timeliness*. The recipient shall coordinate, inquire, investigate and adjudicate allegations of research misconduct promptly, but thoroughly. Generally, an investigation should be completed within 120 days of initiation, and adjudication should be complete within 60 days of receipt of the record of investigation.

(4) *Confidentiality*. To the extent possible, consistent with fair and thorough processing of allegations of research misconduct and applicable law and regulation, knowledge about the identity of the subjects of allegations and informants should be limited to those with a need to know.

(5) *Remediation and sanction*. If the recipient finds that research misconduct has occurred, it shall assess the seriousness of the misconduct and its impact on the research completed or in process. The recipient must take all necessary corrective actions. Such action may include but are not limited to, correcting the research record and as appropriate imposing restrictions, controls, or other parameters on research in process or to be conducted in the future. The recipient must coordinate remedial actions with the Contracting Officer. The recipient must also consider whether personnel sanctions are appropriate. Any such sanction must be consistent with any applicable personnel laws, policies, and procedures, and must take into account the seriousness of the misconduct and its impact, whether it was done knowingly or intentionally, and whether it was an isolated event or pattern of conduct.

(g) By executing this agreement, the recipient provides its assurance that it has established an administrative process for performing an inquiry, mediating if possible, investigating, and reporting allegations of research misconduct; and that it will comply with its own administrative process and the requirements and definitions of 10 CFR part 733 for performing an inquiry, possible mediation, investigation and reporting of allegations of research misconduct.

(h) The recipient must insert or have inserted the substance of this section, including paragraph (g), in subawards at all tiers that involve research.

[70 FR 37013, June 28, 2005, as amended at 74 FR 44278, Aug. 28, 2009]

## Subpart B—Uniform Administrative Requirements for Grants and Cooperative Agreements With Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations

SOURCE: 59 FR 53266, Oct. 21, 1994, unless otherwise noted.

GENERAL

### § 600.100 Purpose.

This subpart implements OMB Circular A–110 and establishes uniform administrative requirements for grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations. It also establishes rules governing subawards to institutions of higher education, hospitals, and non-profit organizations (including grants and cooperative agreements administered by State, local and Indian Tribal governments).

[59 FR 53266, Oct. 21, 1994, as amended at 68 FR 50650, Aug. 21, 2003]

**§ 600.101 Definitions.**

*Accrued expenditures* means the charges incurred by the recipient during a given period requiring the provision of funds for:

(1) Goods and other tangible property received;

(2) Services performed by employees, contractors, subrecipients, and other payees; and,

(3) Other amounts becoming owed under programs for which no current services or performance is required.

*Accrued income* means the sum of:

(1) Earnings during a given period from services performed by the recipient, and goods and other tangible property delivered to purchasers, and

(2) Amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

*Acquisition cost of equipment* means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

*Advance* means a payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

*Award* means financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants and other agreements in the form of money or property in lieu of money, by DOE to an eligible recipient. The term does not include: technical assistance, which provides services instead of money; other assistance in the form of loans, loan guarantees, interest subsidies, or insurance; direct payments of any kind to individuals; and, contracts which are required to be entered into and administered under procurement laws and regulations.

*Cash contributions* means the recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

*Closeout* means the process by which DOE determines that all applicable administrative actions and all required work of the award have been completed by the recipient and DOE.

*Contract* means a procurement contract under an award or subaward, and a procurement subcontract under a recipient's or subrecipient's contract.

*Cost sharing or matching* means that portion of project or program costs not borne by DOE.

*Date of completion* means the date on which all work under an award is completed or the date on the award document, or any supplement or amendment thereto, on which DOE sponsorship ends.

*Disallowed costs* means those charges to an award that the DOE determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

*Equipment* means tangible nonexpendable personal property including exempt property charged directly to the award having a useful life of more than one year and an acquisition cost of $5000 or more per unit. However, consistent with recipient policy, lower limits may be established.

*Excess property* means property under the control of any Federal awarding agency that, as determined by the head thereof, is no longer required for its needs or the discharge of its responsibilities.

*Exempt property* means tangible personal property acquired in whole or in part with Federal funds, where the Federal awarding agency has statutory authority to vest title in the recipient without further obligation to the Federal Government. An example of exempt property authority is contained in the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6306), for property acquired under an award to conduct basic or applied research by a non-profit institution of higher education or non-profit organization whose principal purpose is conducting scientific research.

*Federal awarding agency* means the Federal agency that provides an award to the recipient.

*Federal funds authorized* means the total amount of Federal funds obligated by the Federal Government for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by agency regulations or agency implementing instructions.

*Federal share* of real property, equipment, or supplies means that percentage of the property's acquisition costs and any improvement expenditures paid with Federal funds.

*Funding period or budget period* means the period of time when DOE funding is available for obligation by the recipient.

*Intangible property and debt instruments* means, but is not limited to, trademarks, copyrights, patents and patent applications and such property as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership, whether considered tangible or intangible.

*Obligations* means the amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.

*Outlays or expenditures* means charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees and other amounts becoming owed under programs for which no current services or performance are required.

*Personal property* means property of any kind except real property. It may be tangible, having physical existence, or intangible, having no physical existence, such as copyrights, patents, or securities.

*Prior approval* means written approval by a contracting officer evidencing prior consent.

*Program income* means gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in §§ 600.124 (e) and (h)). Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of DOE funds is not program income. Except as otherwise provided in this subpart, program regulations, or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

*Project costs* means all allowable costs, as set forth in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

*Project period* means the period established in the award document during which DOE sponsorship begins and ends.

*Property* means, unless otherwise stated, real property, equipment, intangible property and debt instruments.

*Real property* means land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

*Recipient* means an organization receiving financial assistance directly from DOE to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals, and other quasi-public and private nonprofit organizations such as, but not limited to, community action agencies,

research institutes, educational associations, and health centers. The term shall include commercial organizations which are recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients. The term does not include government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as federally-funded research and development centers.

*Research and development* means all research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other non-profit institutions. ''Research'' is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. ''Development'' is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function.

*Small award* means a grant or cooperative agreement not exceeding the small purchase threshold fixed at 41 U.S.C. 403(11) (currently $25,000).

*Subaward* means an award of financial assistance in the form of money, or property in lieu of money, made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement of goods and services nor does it include any form of assistance which is excluded from the definition of ''award'' above.

*Subrecipient* means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided. The term may include foreign or international organizations (such as agencies of the United Nations).

*Supplies* means all personal property excluding equipment, intangible property, and debt instruments as defined in this section, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement (''subject inventions''), as defined in 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements.''

*Suspension* means an action by DOE that temporarily withdraws DOE sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the DOE. Suspension of an award is a separate action from suspension under DOE regulations implementing E.O.'s 12549 and 12689, ''Debarment and Suspension'' (see 10 CFR part 1036).

*Termination* means the cancellation of DOE sponsorship, in whole or in part, under an agreement at any time prior to the date of completion.

*Third party in-kind contributions* means the value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the project or program.

*Unliquidated obligations,* for financial reports prepared on a cash basis, means the amount of obligations incurred by the recipient that have not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the recipient for which an outlay has not been recorded.

*Unobligated balance* means the portion of the funds authorized by DOE that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

*Unrecovered indirect cost* means the difference between the amount awarded and the amount which could have been awarded under the recipient's approved negotiated indirect cost rate.

*Working capital advance* means a procedure whereby funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period.

**§ 600.102 Effect on other issuances.**

For awards subject to this subpart, all administrative requirements of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with the requirements of this subpart shall be superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision in § 600.4.

**§ 600.103 Deviations.**

The deviation provisions of § 600.4 apply to this subpart.

**§ 600.104 Subawards.**

Unless sections of this subpart specifically exclude subrecipients from coverage, all DOE recipients, including State, local and Indian tribal governments, shall apply the provisions of this subpart to subrecipients performing work under awards if such subrecipients are institutions of higher education, hospitals, or other non-profit organizations organizations. Thus, this subpart is applicable to those types of organizations regardless of the type of recipient receiving the primary award. State and local government subrecipients are subject to the provisions of 10 CFR part 600, subpart C, ''Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.'' For-profit subrecipients are subject to the provisions of 10 CFR part 600, subpart D, Administrative Requirements for Grants and Cooperative Agreements with For-Profit Organizations.

[59 FR 53266, Oct. 21, 1994, as amended at 68 FR 50650, Aug. 21, 2003]

PRE-AWARD REQUIREMENTS

**§ 600.110 Purpose.**

Sections 600.111 through 600.117 prescribe forms and instructions and other pre-award matters to be used in applying for DOE awards.

**§ 600.111 Pre-award policies.**

(a) *Use of Grants and Cooperative Agreements, and Contracts.* In each instance, the DOE shall decide on the appropriate award instrument (i.e., grant, cooperative agreement, or contract). The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301–08) governs the use of grants, cooperative agreements and contracts. A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute. The statutory criterion for choosing between grants and cooperative agreements is that for the latter, ''substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.'' Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government.

(b) *Public Notice and Priority Setting.* DOE will, whenever practical, notify the public of its intended funding priorities for discretionary grant programs, unless funding priorities are established by Federal statute.

**§ 600.112 Forms for applying for Federal assistance.**

(a) *General.* An application for an award shall be on the form or in the format specified in a program rule or in the funding opportunity announcement. When a version of the Standard Form 424 is not used, DOE shall indicate whether the application is subject to review by the State under Executive Order 12372.

(b) *Budgetary information.* DOE may request and the applicant shall submit the minimum budgetary information necessary to evaluate the costs of the proposed project.

(c) DOE may, subsequent to receipt of an application, request additional information from an applicant when necessary for clarification or to make informed preaward determinations.

(d) *Continuation and renewal applications.* DOE may require that an application for a continuation or renewal award be made in the format or on the

forms authorized by paragraphs (a) and (b) of this section.

[74 FR 44278, Aug. 28, 2009]

### § 600.113 Debarment and suspension.

Recipients shall comply with the nonprocurement debarment and suspension common rule implementing E.O.'s 12549 and 12689, ''Debarment and Suspension,'' 2 CFR 180 and 901. This common rule restricts subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

[59 FR 53266, Oct. 21, 1994, as amended at 74 FR 44278, Aug. 28, 2009]

### § 600.114 Special award conditions.

(a) If an applicant or recipient has a history of poor performance, is not financially stable, has a management system that does not meet the standards prescribed in this subpart, has not conformed to the terms and conditions of a previous award, or is not otherwise responsible, DOE may impose additional requirements as needed, without regard to the deviation provisions of § 600.4. Such applicant or recipient will be notified in writing as to the nature of the additional requirements, the reason why the additional requirements are being imposed, the nature of the corrective action needed, and the time allowed for completing the corrective actions. Reconsideration of the additional requirements may be requested at any time. Any special conditions shall be promptly removed once the conditions that prompted them have been corrected.

(b) A recipient may place a special restrictive condition, as specified in paragraph (a) of this section, in a subaward. In any such case, the recipient must notify DOE in writing within 15 days of the subaward. DOE shall decide whether to notify OMB and other interested parties.

### § 600.115 Metric system of measurement.

The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205) declares that the metric system is the preferred measurement system for U.S. trade and commerce. The Act requires each Federal agency to establish a date or dates in consultation with the Secretary of Commerce, when the metric system of measurement will be used in the agency's procurements, grants, and other business-related activities. Metric implementation may take longer where the use of the system is initially impractical or likely to cause significant inefficiencies in the accomplishment of federally-funded activities. DOE will follow the provisions of E.O. 12770, ''Metric Usage in Federal Government Programs.''

### § 600.116 Resource Conservation and Recovery Act.

Under the Act (Pub. L. 94–580 codified at 42 U.S.C. 6962), any State agency or agency of a political subdivision of a State which is using appropriated Federal funds must comply with section 6002. Section 6002 requires that preference be given in procurement programs to the purchase of specific products containing recycled materials identified in guidelines developed by the Environmental Protection Agency (EPA) (40 CFR parts 247–254). Accordingly, State and local institutions of higher education, hospitals, and nonprofit organizations that receive direct Federal awards or other Federal funds shall give preference in their procurement programs funded with Federal funds to the purchase of recycled products pursuant to the EPA guidelines.

### § 600.117 [Reserved]

## POST-AWARD REQUIREMENTS

*Financial and Program Management*

### § 600.120 Purpose of financial and program management.

Sections 600.121 through 600.128 prescribe standards for financial management systems, methods for making payments and rules for satisfying cost sharing and matching requirements, accounting for program income, budget revision approvals, making audits, determining allowability of cost, and establishing fund availability.

**§ 600.121 Standards for financial management systems.**

(a) Recipients shall relate financial data to performance data and develop unit cost information whenever practical. For awards that support research, it should be noted that it is generally not appropriate to develop unit cost information.

(b) Except for the provisions of 600.121(f) and 600.181, recipients' financial management systems shall provide for the following:

(1) Accurate, current and complete disclosure of the financial results of each federally-sponsored project or program in accordance with the reporting requirements set forth in § 600.152. If a DOE award requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual basis, the recipient shall not be required to establish an accrual accounting system. These recipients may develop such accrual data for their reports on the basis of an analysis of the documentation on hand.

(2) Records that identify adequately the source and application of funds for federally-sponsored activities. These records shall contain information pertaining to Federal awards, authorizations, obligations, unobligated balances, assets, outlays, income and interest.

(3) Effective control over and accountability for all funds, property and other assets. Recipients shall adequately safeguard all such assets and assure they are used solely for authorized purposes.

(4) Comparison of outlays with budget amounts for each award. Whenever appropriate, financial information should be related to performance and unit cost data. As discussed in paragraph (a) of this section, unit cost data is generally not appropriate for awards that support research.

(5) Written procedures to minimize the time elapsing between the transfer of funds to the recipient from the U.S. Treasury and the issuance or redemption of checks, warrants or payments by other means for program purposes by the recipient. To the extent that the provisions of the Cash Management Improvement Act (CMIA) (Pub. L. 101–453) govern, payment methods of State agencies, instrumentalities, and fiscal agents shall be consistent with CMIA Treasury-State Agreements or the CMIA default procedures codified at 31 CFR part 205, ''Withdrawal of Cash from the Treasury for Advances under Federal Grant and Other Programs.''

(6) Written procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award.

(7) Accounting records including cost accounting records that are supported by source documentation.

(c) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the Contracting Officer, at his or her discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(d) The Contracting Officer may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(e) Where bonds are required in the situations described in §§ 600.121 (c) and (d), the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, ''Surety Companies Doing Business with the United States.''

(f) Individuals whose financial management systems do not meet the minimum standards of § 600.121 (b) shall maintain a separate bank account for deposit of award or subaward funds. Disbursements by the recipient or subrecipient from this account shall be supported by source documentation such as canceled checks, paid bills, receipts, payrolls, etc.

**§ 600.122 Payment.**

(a) Payment methods shall minimize the time elapsing between the transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payment by other means by the recipients. Payment methods of State agencies or instrumentalities shall be consistent with Treasury-State CMIA agreements or

default procedures codified at 31 CFR part 205.

(b) Recipients will be paid in advance, provided they maintain or demonstrate the willingness to maintain:

(1) Written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient, and

(2) Financial management systems that meet the standards for fund control and accountability as established in § 600.121. Cash advances to a recipient organization shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs.

(c) Whenever possible, advances shall be consolidated to cover anticipated cash needs for all awards made by the DOE to the recipient.

(1) Advance payment mechanisms include, but are not limited to, Treasury check and electronic funds transfer.

(2) Advance payment mechanisms are subject to 31 CFR part 205.

(3) Recipients may submit requests for advances and reimbursements at least monthly when electronic fund transfers are not used.

(d) Requests for Treasury check advance payment shall be submitted on SF–270, ''Request for Advance or Reimbursement,'' or other forms as may be authorized by OMB. This form is not to be used when Treasury check advance payments are made to the recipient automatically through the use of a predetermined payment schedule or if precluded by special DOE instructions for electronic funds transfer.

(e) Reimbursement is the preferred method when the requirements in paragraph (b) of this section cannot be met. DOE may also use this method on any construction agreement, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal assistance constitutes a minor portion of the project.

(1) When the reimbursement method is used, DOE shall make payment within 30 days after receipt of the billing, unless the billing is improper.

(2) Recipients are authorized to submit requests for reimbursement at least monthly when electronic funds transfers are not used.

(f) If a recipient cannot meet the criteria for advance payments and DOE has determined that reimbursement is not feasible because the recipient lacks sufficient working capital, DOE may provide cash on a working capital advance basis. Under this procedure, DOE advances cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the recipient's disbursing cycle. Thereafter, DOE reimburses the recipient for its actual cash disbursements. The working capital advance method of payment will not be used for recipients unwilling or unable to provide timely advances to their subrecipient to meet the subrecipient's actual cash disbursements.

(g) To the extent available, recipients shall disburse funds available from repayments to and interest earned on a revolving fund, program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(h) Unless otherwise required by statute, DOE will not withhold payments for proper charges made by recipients at any time during the project period unless paragraph (h)(1) or (h)(2) of this section apply.

(1) A recipient has failed to comply with the project objectives, the terms and conditions of the award, or DOE reporting requirements.

(2) The recipient or subrecipient is delinquent in a debt to the United States. Under such conditions, the Federal awarding agency may, upon reasonable notice, inform the recipient that payments shall not be made for obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated. Before withholding any payment, DOE shall notify the recipient that payments shall not

be made for obligations incurred after a specified date, which shall ordinarily be no sooner than 30 days from the date of the notice, until the recipient corrects the noncompliance or pays the indebtedness to the Federal government.

(i) Standards governing the use of banks and other institutions as depositories of funds advanced under awards are as follows.

(1) Except for situations described in paragraph (i)(2) of this section, DOE shall not require separate depository accounts for funds provided to a recipient or establish any eligibility requirements for depositories for funds provided to a recipient. However, recipients must be able to account for the receipt, obligation and expenditure of funds.

(2) Advances of Federal funds shall be deposited and maintained in insured accounts whenever possible.

(j) Consistent with the national goal of expanding the opportunities for women-owned and minority-owned business enterprises, recipients are encouraged to use women-owned and minority-owned banks (a bank which is owned at least 50 percent by women or minority group members).

(k) Recipients shall maintain advances of Federal funds in interest bearing accounts, unless paragraph (k)(1), (2) or (3) of this section apply.

(1) The recipient receives less than $120,000 in Federal awards per year.

(2) The best reasonably available interest bearing account would not be expected to earn interest in excess of $250 per year on Federal cash balances.

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(l) For those entities where CMIA and its implementing regulations do not apply, interest earned on Federal advances deposited in interest bearing accounts shall be remitted annually to the HHS Payment Management System through an electronic medium such as the FEDWIRE Deposit system. Recipients which do not have this capability should use a check. The address is the Department of Health and Human Services, Payment Management System, P.O. Box 6021, Rockville, MD 20852. Interest amounts up to $250 per year may be retained by the recipient for administrative expense. State universities and hospitals shall comply with CMIA, as it pertains to interest. If an entity subject to CMIA uses its own funds to pay pre-award costs for discretionary awards without prior written approval from the Federal awarding agency, it waives its right to recover the interest under CMIA.

(m) Except as noted elsewhere in this subpart, only the following forms shall be authorized for the recipients in requesting advances and reimbursements. Federal agencies shall not require more than an original and two copies of these forms.

(1) SF–270, Request for Advance or Reimbursement. Each Federal awarding agency shall adopt the SF–270 as a standard form for all nonconstruction programs when electronic funds transfer or predetermined advance methods are not used. Federal awarding agencies, however, have the option of using this form for construction programs in lieu of the SF–271, ''Outlay Report and Request for Reimbursement for Construction Programs.''

(2) SF–271, Outlay Report and Request for Reimbursement for Construction Programs. Each Federal awarding agency shall adopt the SF–271 as the standard form to be used for requesting reimbursement for construction programs. However, a Federal awarding agency may substitute the SF–270 when the Federal awarding agency determines that it provides adequate information to meet Federal needs.

(n) The DOE may convert a recipient from advance payment to reimbursement whenever the recipient no longer meets the criteria for advance payment specified in paragraph (b) of this section. Any such conversion may be accomplished only after the DOE has advised the recipient in writing of the reasons for the proposed action and has provided a period of at least 30 days within which the recipient may take corrective action or provide satisfactory assurances of its intention to take such action.

(o) With prior DOE approval and in accordance with written DOE instructions, a recipient may assign to a bank,

trust company or other financing institution, including any Federal lending agency, reimbursement by Treasury check due from DOE under the following conditions:

(1) The award provides for reimbursement totaling $1,000 or more;

(2) The assignment covers all amounts payable under the award that have not already been paid;

(3) Reassignment is prohibited; and

(4) The assignee files a written notice of award payment assignment and a true copy of the instrument of assignment with DOE. Any interest costs resulting from a loan obtained on the basis of an assignment are unallowable charges to DOE award funds or any required cost sharing.

(p) Recipients shall observe the requirements of this section in making or withholding payments to subrecipients except that the forms used by recipients are not required to be used by subrecipients when requesting advances or reimbursement.

**§ 600.123 Cost sharing or matching.**

(a) All cost sharing or matching contributions, including cash and third party in-kind, shall meet all of the following criteria.

(1) Are verifiable from the recipient's records.

(2) Are not included as contributions for any other federally-assisted project or program.

(3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) Are allowable under the applicable cost principles.

(5) Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.

(6) Are provided for in the approved budget.

(7) Conform to other provisions of this subpart, as applicable.

(b) Unrecovered indirect costs may be included as part of cost sharing or matching.

(c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If DOE authorizes recipients to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching shall be the lesser of either paragraph (c)(1) or (2) of this section.

(1) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation.

(2) The current fair market value. However, when there is sufficient justification, DOE may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project.

(d) Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the recipient's organization. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(e) When an employer other than the recipient furnishes the services of an employee, these services shall be valued at the employee's regular rate of pay (plus an amount of fringe benefits that are reasonable, allowable, and allocable, but exclusive of overhead costs), provided these services are in the same skill for which the employee is normally paid.

(f) Donated supplies may include such items as office supplies, laboratory supplies or workshop and classroom supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(g) The method used for determining cost sharing or matching for donated equipment, buildings and land for which title passes to the recipient may differ according to the purpose of the

award, if either paragraph (g)(1) or (2) of this section apply.

(1) If the purpose of the award is to assist the recipient in the acquisition of equipment, buildings or land, the total value of the donated property may be claimed as cost sharing or matching.

(2) If the purpose of the award is to support activities that require the use of equipment, buildings or land, normally only depreciation or use charges for equipment and buildings may be made. However, the full value of equipment or other capital assets and fair rental charges for land may be allowed, provided that DOE has approved the charges.

(h) The value of donated property shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications.

(1) The value of donated land and buildings shall not exceed its fair market value at the time of donation to the recipient as established by an independent appraiser (e.g., certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient.

(2) The value of donated equipment shall not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment shall not exceed its fair rental value.

(i) The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties.

(1) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(2) The basis for determining the valuation for personal service, material, equipment, buildings and land shall be documented.

(j) DOE shall specify in the solicitation or in the program rule, if any, any cost sharing requirement. The award document shall be specific as to whether the cost sharing is based on a minimum amount for the recipient or on a percentage of total costs.

(k) If DOE requires that a recipient provide cost sharing which is not required by statute or which exceeds a statutory minimum, DOE shall state in the program rule or solicitation the reasons for requiring such cost sharing, recommended or required levels of cost sharing, and the circumstances under which the requirement for cost sharing may be waived or adjusted during any negotiation.

(l) Whenever DOE negotiates the amount of cost sharing, DOE may take into account such factors as the use of program income (see § 600.124), patent rights, and rights in data. Foregone fee or profit shall not be considered in establishing the extent of cost sharing.

### § 600.124 Program income.

(a) The standards set forth in this section shall be used to account for program income related to projects financed in whole or in part with DOE funds.

(b) Except as provided in paragraph (h) of this section, program income earned during the project period shall be retained by the recipient and, in accordance with program regulations or the terms and conditions of the award, shall be used in one or more of the following ways.

(1) Added to funds committed to the project and used to further eligible project objectives.

(2) Used to finance the non-DOE share of the project.

(3) Deducted from the total project allowable cost in determining the net allowable costs on which the share of costs is based.

(c) When DOE authorizes the disposition of program income as described in paragraphs (b)(1) or (b)(2) of this section, program income in excess of any limits stipulated shall be used in accordance with paragraph (b)(3) of this section.

(d) In the event that the program regulations or the terms and conditions of the award do not specify how program income is to be used, paragraph (b)(3) of this section shall apply

automatically to all projects or programs except research. For awards that support research, paragraph (b)(1) of this section shall apply automatically unless the award indicates another alternative in the terms and conditions, the recipient is subject to special award conditions, as indicated in § 600.114, or the recipient is a commercial organization.

(e) Unless program regulations or the terms and conditions of the award provide otherwise, recipients shall have no obligation to the Federal Government regarding program income earned after the end of the project period.

(f) Unless program regulations or the terms and conditions of the award provide otherwise, costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

(g) Proceeds from the sale of property shall be handled in accordance with the requirements of the Property Standards (See §§ 600.130 through 600.137).

(h) Unless program regulations or the terms and condition of the award provide otherwise, recipients shall have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. However, Patent and Trademark Amendments (35 U.S.C. Chapter 18) apply to inventions made under an experimental, developmental, or research award.

### § 600.125 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. It includes the sum of the Federal and non-Federal share when there are cost sharing requirements. It shall be related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) For nonconstruction awards, recipients shall request prior approvals from the DOE for one or more of the following program or budget related reasons.

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The need for additional Federal funding.

(5) If required by program regulations, the transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa.

(6) The inclusion, unless waived by program regulations or the terms and conditions of award, of costs that require prior approval in accordance with OMB Circular A–21, ''Cost Principles for Institutions of Higher Education,'' OMB Circular A–122, ''Cost Principles for Non-Profit Organizations,'' or 45 CFR part 74 Appendix E, ''Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals,'' or 48 CFR part 31, ''Contract Cost Principles and Procedures,'' as applicable.

(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved awards, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment or general support services.

(d) No other prior approval requirements for specific items may be imposed unless a deviation has been approved in accordance with § 600.4.

(e) Except for requirements listed in paragraphs (c)(1) and (c)(4) of this section, program regulations may waive cost-related and administrative prior written approvals required by this subpart and its Appendices. Such waivers may include authorizing recipients to do any one or more of the following.

(1) Incur pre-award costs 90 calendar days prior to award without prior approval or more than 90 calendar days with the prior approval of DOE. All pre-award costs are incurred at the recipient's risk (i.e., DOE is under no obligation to reimburse such costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover such costs).

(2) Initiate a one-time extension of the expiration date of the final budget period of the project of up to 12 months unless one or more of the following conditions apply.

(i) The terms and conditions of award prohibit the extension.

(ii) The extension requires additional Federal funds.

(iii) The extension involves any change in the approved objectives or scope of the project.

(iv) The extension is being exercised merely for the purpose of using unobligated balances. For one-time extensions, the recipient must notify the DOE in writing with the supporting reasons and revised expiration date at least 10 days before the expiration date specified in the award.

(3) Carry forward unobligated balances to subsequent funding periods.

(4) For awards that support research, unless the terms and conditions of award provide otherwise, the prior approval requirements described in paragraph (e) of this section are automatically waived (i.e., recipients need not obtain such prior approvals) unless one of the conditions included in § 600.125(e)(2) applies.

(5) For continuation awards within a multiple year project in support of research, prior to receipt of continuation funding, preaward expenditures by recipients are not subject to the limitation or approval requirements of § 600.125(e)(1). Nevertheless, incurrence by the recipient does not impose any obligation on DOE if a continuation award is not subsequently made, or if an award is made for a lesser amount than the recipient expected.

(f) Program regulations may restrict the transfer of funds among direct cost categories or programs, functions and activities for awards in which DOE's share of the project exceeds $100,000 and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by DOE. However, no program regulation shall permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(g) All other changes to nonconstruction budgets, except for the changes described in paragraph (j) of this section, do not require prior approval.

(h) For construction awards, recipients shall request prior written approval promptly from the Contracting Officer for budget revisions whenever paragraph (h) (1), (2) or (3) of this section apply.

(1) The revision results from changes in the scope or the objective of the project or program.

(2) The need arises for additional Federal funds to complete the project.

(3) A revision is desired which involves specific costs for which prior written approval requirements may be imposed consistent with applicable OMB cost principles listed in § 600.127.

(i) Except in accordance with the deviation procedures in 600.4 or as may be provided for in program regulations, no other prior approval requirements for specific items will be imposed by DOE.

(j) When DOE makes an award that provides support for both construction and nonconstruction work, DOE may require the recipient to request prior approval from DOE before making any fund or budget transfers between the two types of work supported.

(k) For both construction and nonconstruction awards, recipients shall notify DOE in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the project period by more than $5000 or five percent of the Federal award, whichever is greater. This notification shall not be required if an application for additional funding is submitted for a continuation award.

(l) Requests for budget revisions may be made by letter.

(m) Within 30 calendar days from the date of receipt of the request for budget revisions, DOE shall review the request and notify the recipient whether

the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, DOE shall inform the recipient in writing of the date when the recipient may expect the decision.

(n) DOE approval or disapproval of a request for a budget or project revision shall be in writing and signed by a DOE Contracting Officer.

(o) A request by a subrecipient for prior approval shall be addressed in writing to the recipient. The recipient shall promptly review such request and shall approve or disapprove the request in writing within 30 days from the date of the recipient's request for the revision. A recipient shall not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the DOE award. If the revision requested by the subrecipient would result in a change to the recipient's approved budget or approved project which requires DOE prior approval, the recipient shall obtain DOE approval before approving such revision.

### § 600.126 Non-Federal audits.

(a) Recipients and subrecipients that are institutions of higher education or other non-profit organizations (including hospitals) shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.''

(b) State and local governments shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.''

(c) For-profit organizations that are subrecipients are subject to the audit requirements specified in 10 CFR 600.316.

[59 FR 53266, Oct. 21, 1994, as amended at 62 FR 45939, 45940, Aug. 29, 1997; 68 FR 50650, Aug. 21, 2003]

### § 600.127 Allowable costs.

(a) *General.* For each kind of recipient, there is a set of Federal principles for determining allowable costs. Allowability of costs shall be determined in accordance with the cost principles applicable to the entity incurring the costs. Thus, allowability of costs incurred by State, local or federally-recognized Indian tribal governments is determined in accordance with the provisions of OMB Circular A–87, ''Cost Principles for State and Local Governments.'' The allowability of costs incurred by non-profit organizations is determined in accordance with the provisions of OMB Circular A–122, ''Cost Principles for Non-Profit Organizations.'' The allowability of costs incurred by institutions of higher education is determined in accordance with the provisions of OMB Circular A–21, ''Cost Principles for Educational Institutions.'' The allowability of costs incurred by hospitals is determined in accordance with the provisions of Appendix E of 45 CFR part 74, ''Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.'' The allowability of costs incurred by commercial organizations and those non-profit organizations listed in Attachment C to Circular A–122 is determined in accordance with the provisions of the Federal Acquisition Regulation (FAR) at 48 CFR part 31.

(b) *Indirect costs.* Unless restricted by Federal statute or program rule, DOE shall provide for the reimbursement of appropriate indirect costs.

(1) DOE shall include an amount for indirect costs in an award only if the applicant requests reimbursement of such costs and—

(i) Submits evidence that a cognizant Federal agency has been assigned to establish indirect cost rates for the applicant and indicates or provides evidence that—

(A) A current agreement containing an applicable approved indirect cost rate(s) covering all or part of the budget period for which DOE may provide funding has been established; or

(B) An indirect cost proposal has been submitted to the cognizant agency in order to establish an applicable approved indirect cost rate(s) covering all or part of the budget period for which DOE may provide funding; or

(C) An indirect cost proposal covering all or part of the budget period

and applicable to the activities for which DOE may provide funding will be submitted to the cognizant agency for approval no later than three months after the beginning date of the initial budget period of the DOE award or, for subsequent budget periods, in accordance with any schedule established by the cognizant agency; or

(ii) If not assigned to a cognizant agency, the applicant includes, in the application, data that is current, complete, accurate, and sufficient to allow the Contracting Officer to determine a rate(s) for indirect costs. If the total approved budget will not exceed $100,000 or if the amount requested for indirect costs does not exceed $5,000, DOE may waive the requirement for negotiation of a rate and, in lieu thereof, provide a reasonable allowance for such costs.

(2) Indirect cost proposals shall be prepared and submitted in accordance with the applicable Federal cost principles and instructions from the cognizant agency or from DOE, as appropriate.

(3) If a subaward under an award or subaward provides for the payment of indirect costs, the recipient or subrecipient shall be responsible for negotiating appropriate indirect costs, using the cost principles applicable to the subrecipient or contractor, unless the subrecipient or contractor has negotiated an applicable rate directly with DOE or another Federal department or agency. DOE may review and audit the procedures a recipient or subrecipient uses in conducting indirect cost negotiations.

(c) *Fee or profit.* No increment above cost may be paid to a recipient or subrecipient under a DOE award or subaward. A fee or profit may be paid to a contractor providing goods or services under a contract with a recipient or subrecipient.

[59 FR 53266, Oct. 21, 1994, as amended at 68 FR 50650, Aug. 21, 2003]

### § 600.128 Period of availability of funds.

Where a funding period is specified, a recipient may charge to the award only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by DOE.

*Property Standards*

### § 600.130 Purpose of property standards.

Sections 600.131 through 600.137 set forth uniform standards governing management and disposition of property furnished by the Federal Government or whose cost was charged to a project supported by a Federal award. Recipients shall observe these standards under awards and shall not impose additional requirements, unless specifically required by Federal statute or program regulations. The recipient may use its own property management standards and procedures provided it observes the provisions of §§ 600.131 through 600.137.

### § 600.131 Insurance coverage.

Recipients shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with DOE funds as provided to property owned by the recipient. Federally-owned property need not be insured unless required by the terms and conditions of the award.

### § 600.132 Real property.

Unless otherwise provided by statute or program regulations, the requirements concerning the use and disposition of real property acquired in whole or in part under awards are as follows.

(a) Title to real property shall vest in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the project as long as it is needed and shall not encumber the property without approval of DOE.

(b) The recipient shall obtain written approval by DOE for the use of real property in other federally-sponsored projects when the recipient determines that the property is no longer needed for the purpose of the original project. Use in other projects shall be limited to those under federally-sponsored projects (i.e., awards) or programs that have purposes consistent with those authorized for support by DOE.

(c) When the real property is no longer needed as provided in paragraphs (a) and (b) of this section, the recipient shall request disposition instructions from DOE or its successor Federal awarding agency. DOE will give one or more of the following disposition instructions.

(1) The recipient may be permitted to retain title without further obligation to the Federal Government after it compensates the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project.

(2) The recipient may be directed to sell the property under guidelines provided by DOE and pay the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). When the recipient is authorized or required to sell the property, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(3) The recipient may be directed to transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the property.

### § 600.133 Federally-owned and exempt property.

(a) *Federally-owned property*. (1) Title to federally-owned property remains vested in the Federal Government. Recipients shall submit annually an inventory listing of federally-owned property in their custody to DOE. Upon completion of the award or when the property is no longer needed, the recipient shall report the property to DOE for further Federal agency utilization.

(2) If DOE has no further need for the property, it shall be declared excess and reported to the General Services Administration, unless DOE has statutory authority to dispose of the property by alternative methods (e.g., the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710 (i)) to donate research equipment to educational and non-profit organizations in accordance with E.O. 12821, ''Improving Mathematics and Science Education in Support of the National Education Goals.'') Appropriate instructions shall be issued to the recipient by DOE.

(b) *Exempt property*. When statutory authority exists, DOE may vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government and under conditions DOE considers appropriate. For example, under 31 U.S.C. 6306, DOE may so vest title to tangible personal property under a grant or cooperative agreement for basic or applied research in a nonprofit institution of higher education or in a nonprofit organization whose primary purpose is conducting scientific research. Such property is ''exempt property.'' Program regulations or the terms and conditions of award may establish provisions for vesting title to exempt property. Should such conditions not be established and the recipient has no need for the equipment, the recipient shall request disposition instructions from DOE. If DOE does not issue disposition instructions within 120 calendar days of receipt of the request, title to the property shall vest in the recipient without further obligation to the Federal Government. If, at the end of the project, DOE fails to issue disposition instructions within 120 calendar days of the receipt of a final inventory, title to the property shall vest in the recipient without further obligation to the Federal Government.

### § 600.134 Equipment.

(a) Title to equipment acquired by a recipient with Federal funds shall vest in the recipient, subject to conditions of this section.

(b) The recipient shall not use equipment acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute, for as long as the Federal Government retains an interest in the equipment.

(c) The recipient shall use the equipment in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds and shall not encumber the property without approval of DOE. When no longer needed for the original project or program, the recipient shall use the equipment in connection with its other federally-sponsored activities, in the following order of priority:

(1) Activities sponsored by DOE, then

(2) Activities sponsored by other Federal agencies.

(d) During the time that equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs if such other use will not interfere with the work on the project or program for which the equipment was originally acquired. First preference for such other use shall be given to other projects or programs sponsored by DOE that financed the equipment; second preference shall be given to projects or programs sponsored by other Federal awarding agencies. If the equipment is owned by the Federal Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by DOE. User charges shall be treated as program income.

(e) When acquiring replacement equipment, the recipient may use the equipment to be replaced as trade-in or sell the equipment and use the proceeds to offset the costs of the replacement equipment subject to the approval of DOE.

(f) The recipient's property management standards for equipment acquired with Federal funds and federally-owned equipment shall include all of the following.

(1) Equipment records shall be maintained accurately and shall include the following information.

(i) A description of the equipment.

(ii) Manufacturer's serial number, model number, Federal stock number, national stock number, or other identification number.

(iii) Source of the equipment, including the award number.

(iv) Whether title vests in the recipient or the Federal Government.

(v) Acquisition date (or date received, if the equipment was furnished by the Federal Government) and cost.

(vi) Information from which one can calculate the percentage of Federal participation in the cost of the equipment (not applicable to equipment furnished by the Federal Government).

(vii) Location and condition of the equipment and the date the information was reported.

(viii) Unit acquisition cost.

(ix) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates DOE for its share.

(2) Equipment owned by the Federal Government shall be identified to indicate Federal ownership.

(3) A physical inventory of equipment shall be taken and the results reconciled with the equipment records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the equipment.

(4) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment. Any loss, damage, or theft of equipment shall be investigated and fully documented; if the equipment was owned by the Federal Government, the recipient shall promptly notify DOE.

(5) Adequate maintenance procedures shall be implemented to keep the equipment in good condition.

(6) Where the recipient is authorized or required to sell the equipment, proper sales procedures shall be established which provide for competition to the extent practicable and result in the highest possible return.

(g) When the recipient no longer needs the equipment, the equipment may be used for other activities in accordance with the following standards. Equipment with a current per-unit fair market value of less than $5000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency. For equipment with

a current per unit fair market value of $5000 or more, the recipient may retain the equipment for other uses provided that compensation is made to the original Federal awarding agency or its successor. The amount of compensation shall be computed by applying the percentage of Federal participation in the cost of the original project or program to the current fair market value of the equipment. If the recipient has no need for the equipment, the recipient shall request disposition instructions from DOE. DOE shall determine whether the equipment can be used to meet DOE's requirements. If no requirement exists within DOE, the availability of the equipment shall be reported to the General Services Administration by DOE to determine whether a requirement for the equipment exists in other Federal agencies. DOE will issue instructions to the recipient no later than 120 calendar days after the recipient's request and the following procedures shall govern.

(1) If so instructed or if disposition instructions are not issued within 120 calendar days after the recipient's request, the recipient shall sell the equipment and reimburse DOE an amount computed by applying to the sales proceeds the percentage of Federal participation in the cost of the original project or program. However, the recipient shall be permitted to deduct and retain from the Federal share $500 or ten percent of the proceeds, whichever is less, for the recipient's selling and handling expenses.

(2) If the recipient is instructed to ship the equipment elsewhere, the recipient shall be reimbursed by the Federal Government by an amount which is computed by applying the percentage of the recipient's participation in the cost of the original project or program to the current fair market value of the equipment, plus any reasonable shipping or interim storage costs incurred.

(3) If the recipient is instructed to otherwise dispose of the equipment, the recipient shall be reimbursed by DOE for such costs incurred in its disposition.

(h) DOE reserves the right, at the end of a project, to transfer the title to the Federal Government or to a third party named by DOE when such third party is otherwise eligible under existing statutes. Such transfer shall be subject to the following standards.

(1) The equipment shall be appropriately identified in the award or otherwise made known to the recipient in writing.

(2) DOE shall issue disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory shall list all equipment acquired with award funds and federally-owned equipment. If DOE fails to issue disposition instructions within the 120 calendar day period, the provisions of § 600.134(g)(1) apply.

(3) When DOE exercises its right to take title, the equipment shall be subject to the provisions for federally-owned equipment.

### § 600.135 Supplies and other expendable property.

(a) Title to supplies and other expendable property shall vest in the recipient upon acquisition. If there is a residual inventory of unused supplies exceeding $5000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other federally-sponsored project or program, the recipient shall retain the supplies for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal Government for its share. The amount of compensation shall be computed in the same manner as for equipment.

(b) The recipient shall not use supplies acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute as long as the Federal Government retains an interest in the supplies.

### § 600.136 Intangible property.

(a) Recipients may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. DOE reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish or otherwise use the work for

Federal purposes and to authorize others to do so.

(b) Recipients are subject to applicable regulations governing patents and inventions, including government-wide regulations issued by the Department of Commerce at 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements.''

(c) The DOE has the right to:

(1) Obtain, reproduce, publish or otherwise use the data first produced under an award; and

(2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(d)(1) In addition, in response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under an award that were used by the Federal Government in developing an agency action that has the force and effect of law, the DOE shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If the DOE obtains the research data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

(2) The following definitions apply for purposes of this paragraph (d):

(i) *Research data* is defined as the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This ''recorded'' material excludes physical objects (e.g., laboratory samples). *Research data* also do not include:

(A) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and

(B) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

(ii) *Published* is defined as either when:

(A) Research findings are published in a peer-reviewed scientific or technical journal; or

(B) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(iii) *Used by the Federal Government in developing an agency action that has the force and effect of law* is defined as when an agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(e) Title to intangible property and debt instruments acquired under an award or subaward vests upon acquisition in the recipient. The recipient shall use that property for the originally-authorized purpose, and the recipient shall not encumber the property without approval of DOE. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of § 600.134(g).

[61 FR 7165, Feb. 26, 1996, as amended at 65 FR 14407, 14408, Mar. 16, 2000; 68 FR 50650, Aug. 21, 2003]

### § 600.137 Property trust relationship.

Real property, equipment, intangible property and debt instruments that are acquired or improved with Federal funds shall be held in trust by the recipient as trustee for the beneficiaries of the project or program under which the property was acquired or improved. Recipients shall record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with Federal funds and that use and disposition conditions apply to the property.

*Procurement Standards*

### § 600.140 Purpose of procurement standards.

Sections 600.141 through 600.148 set forth standards for use by recipients in establishing procedures for the procurement of supplies and other expendable property, equipment, real property and other services with Federal funds. These standards are furnished to ensure that such materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and executive orders. No additional procurement standards or requirements shall be imposed by DOE upon recipients, unless specifically required by Federal statute or executive order or in accordance with the deviation procedures of § 600.4.

### § 600.141 Recipient responsibilities.

The standards contained in this section do not relieve the recipient of the contractual responsibilities arising under its contract(s). The recipient is the responsible authority, without recourse to DOE regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of statute are to be referred to such Federal, State or local authority as may have proper jurisdiction.

### § 600.142 Codes of conduct.

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

### § 600.143 Competition.

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

### § 600.144 Procurement procedures.

(a) All recipients shall establish written procurement procedures. These procedures shall provide for, at a minimum, that paragraphs (a)(1), (2) and (3) of this section apply.

(1) Recipients avoid purchasing unnecessary items.

(2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement.

(3) Solicitations for goods and services provide for all of the following.

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of ''brand name or equal'' descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

(b) Positive efforts shall be made by recipients to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of DOE awards shall take all of the following steps to further this goal.

(1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(2) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

(3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

(5) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The ''cost-plus-a-percentage-of-cost'' or ''percentage of construction cost'' methods of contracting shall not be used.

(d) Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by DOE's implementation, in 10 CFR part 1036, of E.O.'s 12549 and 12689, ''Debarment and Suspension.''

(e) Recipients shall, on request, make available for DOE, pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply.

(1) A recipient's procurement procedures or operation fails to comply with the procurement standards in this subpart.

(2) The procurement is expected to exceed the small purchase threshold fixed at 41 U.S.C. 403 (11) (currently $25,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase threshold, specifies a ''brand name'' product.

(4) The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

(f) By agreement of the recipient or subrecipient and the contractor, if consistent with the recipient's or subrecipient's usual business practices and applicable state and local law, any contract to which this section applies may provide for the payment of interest penalties on amounts overdue under such contract except that—

(1) In no case shall any obligation to pay such interest penalties be construed to be an obligation of the Federal government, and

(2) Any payment of such interest penalties may not be made from DOE funds nor be counted toward meeting a cost sharing requirement of a DOE award.

### § 600.145 Cost and price analysis.

Some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability.

### § 600.146 Procurement records.

Procurement records and files for purchases in excess of the small purchase threshold shall include the following at a minimum:

(a) Basis for contractor selection,

(b) Justification for lack of competition when competitive bids or offers are not obtained, and

(c) Basis for award cost or price.

### § 600.147 Contract administration.

A system for contract administration shall be maintained to ensure contractor conformance with the terms, conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions and specifications of the contract.

### § 600.148 Contract provisions.

The recipient shall include, in addition to provisions to define a sound and complete agreement, the following provisions in all contracts. The following provisions shall also be applied to subcontracts.

(a) Contracts in excess of the small purchase threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(b) All contracts in excess of the small purchase threshold shall contain suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds $100,000. For those contracts or subcontracts exceeding $100,000, DOE may accept the bonding policy and requirements of the recipient, provided the DOE has made a determination that the Federal Government's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows.

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The ''bid guarantee'' shall consist of a firm commitment such as a

bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A ''performance bond'' is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A ''payment bond'' is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR part 223, ''Surety Companies Doing Business with the United States.''

(d) All negotiated contracts (except those for less than the small purchase threshold) awarded by recipients shall include a provision to the effect that the recipient, DOE, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

(e) All contracts, including small purchases, awarded by recipients and their contractors shall contain the procurement provisions of appendix A to this subpart, as applicable.

### § 600.149 Resource Conservation and Recovery Act (RCRA).

Recipients' procurements shall comply with applicable requirements of RCRA, as described at § 600.116 of this subpart.

*Reports and Records*

### § 600.150 Purpose of reports and records.

Sections 600.151 through 600.153 set forth the procedures for monitoring and reporting on the recipient's financial and program performance and the necessary standard reporting forms. They also set forth record retention requirements.

### § 600.151 Monitoring and reporting program performance.

(a) Recipients are responsible for managing and monitoring each project, program, subaward, function or activity supported by the award. Recipients shall monitor subawards to ensure subrecipients have met the audit requirements as delineated in § 600.126.

(b) The terms and conditions of the award will prescribe the frequency with which the performance reports shall be submitted. Except as provided in paragraph (f) of this section, performance reports shall not be required more frequently than quarterly or less frequently than annually. Annual reports shall be due 90 calendar days after the award year; quarterly or semi-annual reports shall be due 30 days after the reporting period. DOE may require annual reports before the anniversary dates of multiple year awards in lieu of these requirements. The final performance reports are due 90 calendar days after the expiration or termination of the award.

(c) If inappropriate, a final technical or performance report shall not be required after completion of the project.

(d) When required, performance reports shall generally contain, for each award, brief information on each of the following.

(1) A comparison of actual accomplishments with the goals and objectives established for the period, the findings of the investigator, or both. Whenever appropriate and the output of programs or projects can be readily quantified, such quantitative data should be related to cost data for computation of unit costs.

(2) Reasons why established goals were not met, if appropriate.

(3) Other pertinent information including, when appropriate, analysis

and explanation of cost overruns or high unit costs.

DOE may specify in the award that the recipient provide this information on the Federal Assistance Program/Project Status Report (DOE F 4600.6), the technical reporting formats, or the Federal Assistance Management Summary Report. DOE may require that the Federal Assistance Management Summary Report be used as a performance report only when such use is authorized by program rule or the need for this form is explained in the solicitation. The requirements of this section concerning reporting frequency and deadlines shall apply to the Federal Assistance Management Summary Report. (See also § 600.112 with regard to use of this form as part of the award application.)

(e) Recipients shall not be required to submit more than the original and two copies of performance reports.

(f) Recipients shall immediately notify DOE of developments that have a significant impact on the award-supported activities. Also, notification shall be given in the case of problems, delays, or adverse conditions which materially impair the ability to meet the objectives of the award. This notification shall include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.

(g) DOE may make site visits, as needed.

(h) DOE shall comply with applicable clearance requirements of 5 CFR part 1320 when requesting performance data from recipients.

(i) Recipients may place performance reporting requirements on subawards consistent with the provisions of this section and shall require interim reporting in accordance with § 600.151(f).

### § 600.152 Financial reporting.

(a) The following forms or such other forms as may be approved by OMB are authorized for obtaining financial information from recipients.

(1) SF–269 or SF–269A, Financial Status Report.

(i) Recipients shall use the SF–269 or SF–269A to report the status of funds for all nonconstruction projects or programs, except that DOE has the option of not requiring the SF–269 or SF–269A when the SF–270, Request for Advance or Reimbursement, or SF–272, Report of Federal Cash Transactions, is determined to provide adequate information to meet DOE needs. However, a final SF–269 or SF–269A shall be required at the completion of the project when the SF–270 is used only for advances.

(ii) The terms and conditions of award shall prescribe whether the report shall be on a cash or accrual basis. DOE may require accrual reporting only if such reporting is required by program statute or rule. If the award requires accrual information and the recipient's accounting records are not normally kept on the accrual basis, the recipient shall not be required to convert its accounting system, but shall develop such accrual information through best estimates based on an analysis of the documentation on hand.

(iii) DOE shall determine the frequency of the Financial Status Report for each project or program, considering the size and complexity of the particular project or program. However, the report shall not be required more frequently than quarterly or less frequently than annually. A final report shall be required at the completion of the agreement.

(iv) DOE shall require recipients to submit the SF–269 or SF–269A (an original and no more than two copies) no later than 30 days after the end of each specified reporting period for quarterly and semi-annual reports, and 90 calendar days for annual and final reports. Extensions of reporting due dates may be approved by the DOE upon request of the recipient.

(2) SF–272, Report of Federal Cash Transactions.

(i) When funds are advanced, each recipient shall submit the SF–272 and, when necessary, its continuation sheet, SF–272a. DOE will use this report to monitor cash advanced to recipients and to obtain disbursement information for each agreement with the recipients.

(ii) Recipients shall forecast Federal cash requirements in the ''Remarks'' section of the report.

(iii) When practical and deemed necessary, DOE may require recipients to report in the ''Remarks'' section the

amount of cash advances received in excess of three days. Recipients shall provide short narrative explanations of actions taken to reduce the excess balances.

(iv) Recipients shall be required to submit not more than the original and two copies of the SF–272 15 calendar days following the end of each quarter. DOE may require a monthly report from those recipients receiving advances totaling $1 million or more per year.

(v) DOE may waive the requirement for submission of the SF–272 for any one of the following reasons:

(A) When monthly advances do not exceed $25,000 per recipient, provided that such advances are monitored through other forms contained in this section;

(B) If, in the contracting officer's opinion, the recipient's accounting controls are adequate to minimize excessive Federal advances; or,

(C) When electronic payment mechanisms provide adequate data.

(b) When DOE needs additional information or more frequent reports, the following shall be observed:

(1) When additional information is needed to comply with legislative requirements, DOE shall issue instructions to require recipients to submit such information under the ''Remarks'' section of the reports.

(2) When DOE determines that a recipient's accounting system does not meet the standards in § 600.121, additional pertinent information to further monitor awards may be obtained upon written notice to the recipient until such time as the system is brought up to standard. DOE, in obtaining this information, shall comply with report clearance requirements of 5 CFR part 1320.

(3) Contracting officers are encouraged to shade out any line item on any report if not necessary.

(4) DOE may accept the identical information from the recipients in machine readable format or computer printouts or electronic outputs in lieu of prescribed formats.

(5) Computer or electronic outputs may be provided to recipients when that expedites or contributes to the accuracy of reporting.

**§ 600.153 Retention and access requirements for records.**

(a) This section sets forth requirements for record retention and access to records for awards to recipients. DOE shall not impose any other record retention or access requirements upon recipients, unless such requirements are established in program regulations.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report or, for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, as authorized by DOE. The only exceptions are the following:

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.

(3) When records are transferred to or maintained by DOE, the 3-year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocations plans, and related records, for which retention requirements are specified in § 600.153(g).

(c) Copies of original records may be substituted for the original records if authorized by DOE.

(d) DOE shall request transfer of certain records to its custody from recipients when it determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, DOE may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) DOE, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits,

examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, DOE shall place no restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when DOE can demonstrate that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to DOE.

(g) Paragraphs (g)(1) and (g)(2) of this section apply to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) *If submitted for negotiation.* If the recipient submits to the Federal agency responsible for negotiating the recipient's indirect cost rate or the subrecipient submits to the recipient the proposal, plan, or other computation to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts on the date of such submission.

(2) *If not submitted for negotiation.* If the recipient is not required to submit to the cognizant Federal agency or the subrecipient is not required to submit to the recipient the proposal, plan, or other computation for negotiation purposes, then the 3-year retention period for the proposal, plan, or other computation and its supporting records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(h) If, by the terms and conditions of the award, the recipient or subrecipient—

(1) Is accountable for program income earned or received after the end of the project period or after the termination of an award or subaward, or

(2) If program income earned during the project period is required to be applied to costs incurred after the end of the project period or after termination of an award or subaward, the record retention period shall start on the last day of the recipient's or subrecipient's fiscal year in which such income was earned or received or such costs were incurred. All other program income records shall be retained in accordance with § 600.153(b).

*Termination and Enforcement*

### § 600.160 Purpose of termination and enforcement.

Sections 600.161 and 600.162 set forth uniform suspension, termination and enforcement procedures.

### § 600.161 Termination.

(a) Awards may be terminated in whole or in part only if paragraph (a)(1), (2) or (3) of this section apply.

(1) By DOE, if a recipient materially fails to comply with the terms and conditions of an award.

(2) By DOE with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the recipient upon sending to DOE written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if DOE determines in the case of partial termination that the reduced or modified portion of the award will not accomplish the purposes for which the award was made, it may terminate the award in its entirety under either paragraph (a)(1) or (2) of this section.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in § 600.171(a), including those for property management as applicable, shall be considered in the

termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

**§ 600.162 Enforcement.**

(a) *Remedies for noncompliance.* If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, DOE may, in addition to imposing any of the special conditions outlined in § 600.114, take one or more of the following actions, as appropriate in the circumstances.

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by DOE.

(2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award.

(4) Withhold further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) *Hearings and appeals.* In taking an enforcement action, DOE shall provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of a recipient resulting from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if paragraph (c)(1) and (2) of this section apply.

(1) The costs result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable.

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude a recipient from being subject to debarment and suspension under 10 CFR part 1036.

AFTER-THE-AWARD REQUIREMENTS

**§ 600.170 Purpose.**

Sections 600.171 through 600.173 contain closeout procedures and other procedures for subsequent disallowances and adjustments.

**§ 600.171 Closeout procedures.**

(a) Recipients shall submit, within 90 calendar days after the date of completion of the award, all financial, performance, and other reports as required by the terms and conditions of the award. DOE may approve extensions when requested by the recipient.

(b) Unless DOE authorizes an extension, a recipient shall liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion as specified in the terms and conditions of the award or in agency implementing instructions.

(c) DOE shall make prompt payments to a recipient for allowable reimbursable costs under the award being closed out.

(d) The recipient shall promptly refund any balances of unobligated cash that DOE has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. OMB Circular A–129 governs unreturned amounts that become delinquent debts.

(e) When authorized by the terms and conditions of the award, DOE shall make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The recipient shall account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§ 600.131 through 600.137.

(g) In the event a final audit has not been performed prior to the closeout of

an award, DOE shall retain the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

### § 600.172 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following.

(1) The right of DOE to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in § 600.126.

(4) Property management requirements in §§ 600.131 through 600.137.

(5) Records retention as required in § 600.153.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of DOE and the recipient, provided the responsibilities of the recipient referred to in paragraph 600.173(a), including those for property management as applicable, are considered and provisions made for continuing responsibilities of the recipient, as appropriate.

### § 600.173 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. If not paid within a reasonable period after the demand for payment, DOE may reduce the debt by paragraph (a) (1), (2) or (3) of this section.

(1) Making an administrative offset against other requests for reimbursements.

(2) Withholding advance payments otherwise due to the recipient.

(3) Taking other action permitted by statute.

(b) Except as otherwise provided by law, DOE shall charge interest on an overdue debt in accordance with 4 CFR Chapter II, ''Federal Claims Collection Standards.''

## ADDITIONAL PROVISIONS

## APPENDIX A TO SUBPART B OF PART 600—CONTRACT PROVISIONS

All contracts, awarded by a recipient including small purchases, shall contain the following provisions as applicable:

1. *Equal Employment Opportunity*—All contracts shall contain a provision requiring compliance with E.O. 11246, ''Equal Employment Opportunity,'' as amended by E.O. 11375, ''Amending Executive Order 11246 Relating to Equal Employment Opportunity,'' and as supplemented by regulations at 41 CFR part 60, ''Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.''

2. *Copeland ''Anti-Kickback'' Act (18 U.S.C. 874 and 40 U.S.C. 276c)*—All contracts and subgrants in excess of $2000 for construction or repair awarded by recipients and subrecipients shall include a provision for compliance with the Copeland ''Anti-Kickback'' Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, ''Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in part by Loans or Grants from the United States''). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to the Federal awarding agency.

3. *Davis-Bacon Act, as amended (40 U.S.C. 276a to a-7)*—When required by Federal program legislation, all construction contracts awarded by the recipients and subrecipients of more than $2000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) and as supplemented by Department of Labor regulations (29 CFR part 5, ''Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction''). Under this Act, contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less than once a week. The recipient shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to the Federal awarding agency.

4. *Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333)*—Where applicable, all contracts awarded by recipients in excess of

$2000 for construction contracts and in excess of $2500 for other contracts that involve the employment of mechanics or laborers shall include a provision for compliance with sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333), as supplemented by Department of Labor regulations (29 CFR part 5). Under section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

5. *Rights to Inventions Made Under a Contract or Agreement*—Contracts or agreements for the performance of experimental, developmental, or research work shall provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,'' and any implementing regulations issued by the awarding agency.

6. *Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), as amended*—Contracts and subgrants of amounts in excess of $100,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 *et seq.*). Violations shall be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

7. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)*— Contractors who apply or bid for an award of $100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

8. *Debarment and Suspension (E.O.s 12549 and 12689)*— Contract awards that exceed the small purchase threshold and certain other contract awards shall not be made to parties listed on the nonprocurement portion of the General Services Administration's List of parties Excluded from Federal Procurement or Nonprocurement Programs in accordance with E.O.s 12549 and 12689, ''Debarment and Suspension.'' This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than E.O. 12549. Contractors with awards that exceed the small purchase threshold shall provide the required certification regarding its exclusion status and that of its principals.

## Subpart C—Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments

SOURCE: 53 FR 8045, 8087, Mar. 11, 1988, unless otherwise noted. Redesignated at 59 FR 53264, Oct. 21, 1994.

GENERAL

### § 600.200 Purpose and scope of this subpart.

This subpart establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

### § 600.201 Scope of §§ 600.200 through 600.205.

This section contains general rules pertaining to this part and procedures for control of exceptions from this subpart.

### § 600.202 Definitions.

As used in this part:

*Accrued expenditures* mean the charges incurred by the grantee during a given period requiring the provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors, subgrantees, subcontractors, and other payees; and (3) other amounts becoming owed under programs for which no

current services or performance is required, such as annuities, insurance claims, and other benefit payments.

*Accrued income* means the sum of: (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

*Acquisition cost* of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

*Administrative* requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from *programmatic* requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

*Awarding agency* means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

*Cash contributions* means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

*Contract* means (except as used in the definitions for *grant* and *subgrant* in this section and except where qualified by *Federal*) a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

*Cost sharing or matching* means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

*Cost-type contract* means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

*Equipment* means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

*Expenditure report* means: (1) For nonconstruction grants, the SF–269 ''Financial Status Report'' (or other equivalent report); (2) for construction grants, the SF–271 ''Outlay Report and Request for Reimbursement'' (or other equivalent report).

*Federally recognized Indian tribal government* means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

*Government* means a State or local government or a federally recognized Indian tribal government.

*Grant* means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

*Grantee* means the government to which a grant is awarded and which is accountable for the use of the funds

provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

*Local government* means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

*Obligations* means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

*OMB* means the United States Office of Management and Budget.

*Outlays* (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of inkind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

*Percentage of completion method* refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

*Prior approval* means documentation evidencing consent prior to incurring specific cost. For the Department of Energy, this must be signed by a Contracting Officer.

*Real property* means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

*Share*, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

*State* means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

*Subgrant* means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of *grant* in this subpart.

*Subgrantee* means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

*Supplies* means all tangible personal property other than ''equipment'' as defined in this subpart.

*Suspension* means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations

implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

*Termination* means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. *Termination* does not include: (1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period; (2) withdrawal of the unobligated balance as of the expiration of a grant; (3) refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or (4) voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

*Terms of a grant or subgrant* mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

*Third party in-kind contributions* mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

*Unliquidated obligations* for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

*Unobligated balance* means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

[53 FR 8087, Mar. 11, 1988, as amended at 53 FR 8047, Mar. 11, 1988; 54 FR 23960, June 5, 1989]

**§ 600.203 Applicability.**

(a) *General.* Sections 600.400 through 600.452 of this subpart apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of § 600.405, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583—the Secretary's discretionary grant program) and Titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and part C of Title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)19(G); HHS grants for WIN are subject to this subpart);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96–422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241–1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs.* Entitlement programs enumerated above in § 600.403(a) (3) through (8) are subject to subpart E.

[53 FR 8045, 8087, Mar. 11, 1988, as amended at 54 FR 23960, June 5, 1989]

### § 600.204 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this subpart are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in § 600.205.

[53 FR 8045, 8087, Mar. 11, 1988. Redesignated at 59 FR 53264, Oct. 21, 1994, as amended at 61 FR 7165, Feb. 26, 1996]

### § 600.205 Additions and exceptions.

(a) For classes of grants and grantees subject to this subpart, Federal agencies may not impose additional administrative requirements except in codified regulations published in the FEDERAL REGISTER.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

(d) The DOE procedural requirements for requesting additions and exceptions are specified in § 600.4.

[53 FR 8087, Mar. 11, 1988, as amended at 53 FR 8047, Mar. 11, 1988]

## PRE-AWARD REQUIREMENTS

### § 600.210 Forms for applying for grants.

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF–424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

### § 600.211 State plans.

(a) *Scope*. The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) *Requirements*. A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances*. In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments*. A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

### § 600.212 Special grant or subgrant conditions for "high-risk" recipients.

(a) A grantee or subgrantee may be considered ''high risk'' if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this subpart, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grantee or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed

and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

[53 FR 8045, 8087, Mar. 11, 1988, as amended at 59 FR 53265, Oct. 21, 1994]

POST-AWARD REQUIREMENTS

*Financial Administration*

**§ 600.220 Standards for financial management systems.**

(a) A State must expend and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting*. Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records*. Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control*. Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control*. Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost*. Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation*. Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management*. Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

[53 FR 8045, 8087, Mar. 11, 1988, as amended at 57 FR 5, Jan. 2, 1992]

**§ 600.221 Payment.**

(a) *Scope*. This section prescribes the basic standard and the methods under

which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 600.243(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances*. Unless there are statutory provisions to the contrary, grantees and subgrantees shall promptly, but at least quarterly, remit to the Federal agency interest earned on advances. The grantee or subgrantee may keep interest amounts up to $100 per year for administrative expenses.

[53 FR 8045, 8087, Mar. 11, 1988, as amended at 57 FR 5, Jan. 2, 1992; 61 FR 7165, Feb. 26, 1996]

### § 600.222 Allowable costs.

(a) *Limitation on use of funds*. Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) *Applicable cost principles*. For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

| For the costs of a— | Use the principles in— |
|---|---|
| State, local or Indian tribal government. | OMB Circular A–87. |
| Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A–122 as not subject to that circular. | OMB Circular A–122. |
| Educational institutions. ..... | OMB Circular A–21. |
| For-profit organization other than a hospital and an organization named in OBM Circular A–122 as not subject to that circular. | 48 CFR part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency. |
| For-profit organization other than a hospital and an organization named in OMB Circular A–122 as not subject to that circular.. | 48 CFR 931.2 |
| Hospitals ..... | 45 CFR part 74, Appendix E |

[53 FR 8087, Mar. 11, 1988, as amended at 53 FR 8047, Mar. 11, 1988]

### § 600.223 Period of availability of funds.

(a) *General*. Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations*. A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF–269). The Federal agency may extend this deadline at the request of the grantee.

### § 600.224 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable*. With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions*—(1) *Costs borne by other Federal grant agreements*. Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing*. For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements*. Neither costs nor the values of third party in-kind contributions may

count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in § 600.425, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in § 600.225(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Cost sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this subpart. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services*—(1) *Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be

valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching,

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in § 600.222, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

[53 FR 8045, 8087, Mar. 11, 1988, as amended at 57 FR 5, Jan. 2, 1992; 61 FR 7165, Feb. 26, 1996]

### § 600.225 Program income.

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. ''During the grant period'' is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by Federal regulations or

the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See § 600.234.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§ 600.231 and 600.232.

(g) *Use of program income.* Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

[53 FR 8045, 8087, Mar. 11, 1988. Redesignated at 59 FR 53264, Oct. 21, 1994, as amended at 61 FR 7165, 7166, Feb. 26, 1996]

### § 600.226 Non-Federal audit.

(a) *Basic rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.'' The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act Amendments of 1996, that provide Federal awards to a subgrantee, which expends $300,000 or more (or other amount as specified by OMB) in Federal awards in a fiscal year, shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A–110, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,'' have met the audit requirements of the Act. Commercial contractors (private for-profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor

has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A–110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection*. In arranging for audit services, § 600.236 shall be followed.

[53 FR 8045, 8087, Mar. 11, 1988. Redesignated at 59 FR 53264, Oct. 21, 1994, as amended at 61 FR 7166, Feb. 26, 1996; 62 FR 45939, 45940, Aug. 29, 1997]

*Changes, Property, and Subawards*

**§ 600.230 Changes.**

(a) *General*. Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles*. The applicable cost principles (see § 600.222) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes*—(1) *Nonconstruction projects*. Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds $100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) *Construction projects*. Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and nonconstruction projects*. When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) *Programmatic changes*. Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of § 600.236 but

does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements*. The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval*. (1) A request for prior approval of any budget revision will be in the same budget formal the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see § 600.222) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

[53 FR 8045, 8087, Mar. 11, 1988. Redesignated at 59 FR 53264, Oct. 21, 1994, as amended at 61 FR 7166, Feb. 26, 1996]

### § 600.231 Real property.

(a) *Title*. Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use*. Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition*. When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title*. Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property*. Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title*. Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

### § 600.232 Equipment.

(a) *Title*. Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States*. A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use*. (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § 600.225(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements*. Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition*. When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment*. In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title*. The Federal awarding agency may reserve the right

to transfer title to the Federal Government or a third party named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instructions within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow § 600.232(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

[53 FR 8045, 8087, Mar. 11, 1988. Redesignated at 59 FR 53264, Oct. 21, 1994, as amended at 61 FR 7166, Feb. 26, 1996]

### § 600.233 Supplies.

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

### § 600.234 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

### § 600.235 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, ''Debarment and Suspension.''

### § 600.236 Procurement.

(a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.* (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The

grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative anaylsis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only—

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition*. (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of § 600.236. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a ''brand name'' product instead of allowing ''an equal'' product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a ''brand name or equal'' description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed*. (1) Procurement by *small purchase procedures*. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in § 600.236(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by *competitive proposals*. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for

pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price resonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see § 600.422). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement

documents, such as requests for proposals or invitations for bids, independent cost estimates, etc. when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a ''brand name'' product; or

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis.

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The ''bid guarantee'' shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A ''performance bond'' is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A ''payment bond'' is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold)

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of $10,000)

(3) Compliance with Executive Order 11246 of September 24, 1965, entitled ''Equal Employment Opportunity,'' as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR chapter 60). (All construction contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees)

(4) Compliance with the Copeland ''Anti-Kickback'' Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3). (All contracts and subgrants for construction or repair)

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a–7) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts in excess of $2000 awarded by grantees and subgrantees when required by Federal grant program legislation)

(6) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–330) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts awarded by grantees and subgrantees in excess of $2000, and in excess of $2500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of $100,000).

(13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94–163, 89 Stat. 871).

[53 FR 8045, 8087, Mar. 11, 1988, as amended at 60 FR 19639, 19641, Apr. 19, 1995; 61 FR 7166, Feb. 26, 1996]

### § 600.237 Subgrants.

(a) *States.* States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with § 600.242 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees.* All other grantees shall follow the provisions of this subpart which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this subpart;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions*. By their own terms, certain provisions of this subpart do not apply to the award and administration of subgrants:

(1) Section 600.210;

(2) Section 600.211;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 205, cited in § 600.221; and

(4) Section 600.250.

[53 FR 8045, 8087, Mar. 11, 1988. Redesignated at 59 FR 53264, Oct. 21, 1994, as amended at 61 FR 7166, Feb. 26, 1996]

*Reports, Records Retention, and Enforcement*

**§ 600.240 Monitoring and reporting program performance.**

(a) *Monitoring by grantees*. Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports*. The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports*. For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments*. Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

**§ 600.241 Financial reporting.**

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extent required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this subpart.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report*—(1) *Form.* Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with § 600.241(e)(2)(iii).

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency.* The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date.* When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report*—(1) *Form.* (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the ''Remarks'' section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement*—(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in § 600.441(b)(3).

(e) *Outlay report and request for reimbursement for construction programs*—(1) *Grants that support construction activities paid by reimbursement method.* (i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in § 600.241(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in § 600.241(b)(3).

(2) *Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.* (i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by § 600.241(b) (3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in § 600.241(d).

(iii) The Federal agency may substitute the Financial Status Report specified in § 600.241(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by § 600.241(b)(2).

[53 FR 8045, 8047, Mar. 11, 1988, as amended at 59 FR 53266, Oct. 21, 1994; 61 FR 7166, Feb. 26, 1996]

### § 600.242 Retention and access requirements for records.

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this subpart, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see § 600.436(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) *Starting date of retention period* (1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records*—(1) *Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must

not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

**§ 600.243 Enforcement.**

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to ''Debarment and Suspension'' under E.O. 12549 (see § 600.235).

[53 FR 8045, 8087, Mar. 11, 1988. Redesignated at 59 FR 53264, Oct. 21, 1994, as amended at 61 FR 7166, Feb. 26, 1996]

**§ 600.244 Termination for convenience.**

Except as provided in § 600.443 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either § 600.243 or paragraph (a) of this section.

[53 FR 8045, 8087, Mar. 11, 1988. Redesignated at 59 FR 53264, Oct. 21, 1994, as amended at 61 FR 7166, Feb. 26, 1996]

*After-the-Grant Requirements*

### § 600.250 Closeout.

(a) *General*. The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports*. Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) *Final performance or progress report*.

(2) *Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF–271) (as applicable)*.

(3) *Final request for payment (SF–270) (if applicable)*.

(4) *Invention disclosure (if applicable)*.

(5) *Federally-owned property report:*

In accordance with § 600.232(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment*. The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments*. (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

[53 FR 8045, 8087, Mar. 11, 1988. Redesignated at 59 FR 53264, Oct. 21, 1994, as amended at 61 FR 7166, Feb. 26, 1996]

### § 600.251 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in § 600.242;

(d) Property management requirements in §§ 600.231 and 600.232; and

(e) Audit requirements in § 600.226.

[53 FR 8045, 8087, Mar. 11, 1988. Redesignated at 59 FR 53264, Oct. 21, 1994, as amended at 61 FR 7166, Feb. 26, 1996]

### § 600.252 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an adminstrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

*Entitlements [Reserved]*

## Subpart D—Administrative Requirements for Grants and Cooperative Agreements With For-Profit Organizations

SOURCE: 68 FR 50650, Aug. 21, 2003, unless otherwise noted.

GENERAL

### § 600.301 Purpose.

(a) This subpart prescribes administrative requirements for awards to for-profit organizations.

(b) Applicability to prime awards and subawards is as follows:

(1) *Prime awards:* DOE contracting officers must apply the provisions of this

part to awards to for-profit organizations. Contracting officers must not impose requirements that are in addition to, or inconsistent with, the requirements provided in this part, except:

(i) In accordance with the deviation procedures or special award conditions in § 600.303 or § 600.304, respectively; or

(ii) As required by Federal statute, Executive order, or Federal regulation implementing a statute or Executive order.

(2) *Subawards.* (i) Any legal entity (including any State, local government, university or other nonprofit organization, as well as any for-profit entity) that receives an award from DOE must apply the provisions of this part to subawards with for-profit organizations.

(ii) For-profit organizations that receive prime awards covered by this part must apply to each subaward the administrative requirements that are applicable to the particular type of subrecipient (*e.g.*, 10 CFR part 600, subpart B, contains requirements for institutions of higher education, hospitals, or other nonprofit organizations and 10 CFR part 600, subpart C, specifies requirements for subrecipients that are States or local governments).

**§ 600.302 Definitions.**

In addition to the definitions used in subpart A of this part, the following are definitions of terms as used in this subpart:

*Advance* means a payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

*Applied research* means efforts that seek to determine and exploit the potential of scientific discoveries or improvements in technology, and is directed toward the development of new materials, devices, methods, and processes.

*Basic research* means efforts directed solely toward increasing knowledge or understanding in science and engineering.

*Cash contributions* means the recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

*Closeout* means the process by which DOE determines that all applicable administrative actions and all required work of the award have been completed by the recipient and DOE.

*Cost sharing or matching* means that portion of project or program costs not borne by the Federal Government.

*Demonstration* means a project designed to determine the technical feasibility and economic potential of a technology on either a pilot plant or a prototype scale.

*Development* means efforts to create or advance new technology or demonstrate the viability of applying existing technology to new products and processes.

*Disallowed costs* means those charges to an award that the DOE contracting officer determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

*DOE* means the Department of Energy, including the National Nuclear Security Administration (NNSA).

*Equipment* means tangible, nonexpendable personal property charged directly to the award having a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

*Excess property* means property under the control of any DOE Headquarters or field office that, as determined by the head thereof, is no longer required for its needs or the discharge of its responsibilities.

*Federal funds authorized:* means the total amount of Federal funds obligated by the Federal Government for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods.

*Federally owned property* means property in the possession of, or directly acquired by, the Government and subsequently made available to the recipient.

*Funding period* means the period of time when Federal funding is available for obligation by the recipient.

*Incremental funding* means a method of funding a grant or cooperative

agreement where the funds initially obligated to the award are less than the total amount of the award, and DOE anticipates making additional obligations of funds when appropriated funds become available.

*Obligations* means the amount of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.

*Outlays or expenditures* means charges made to the project or program. They may be reported on cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied, and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees, and for other amounts becoming owed under programs for which no current services or performance are required.

*Personal property means property of any kind except real property*. It may be:

(1) Tangible, having physical existence (*i.e.*, equipment and supplies); or

(2) Intangible, having no physical existence, such as patents, copyrights, data, and software.

*Prior approval* means written or electronic approval by an authorized official evidencing prior consent.

*Program income* means gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award. Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in program regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

*Project costs* means all allowable costs, as set forth in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

*Property* means real property and personal property (equipment, supplies, and intellectual property), unless otherwise stated.

*Real property* means land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

*Small award* means an award not exceeding the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently $100,000).

*Small business concern* means a small business as defined at section 2 of Pub. L. 85–536 (16 U.S.C. 632) and the implementing regulations of the Administrator of the Small Business Administration. The criteria and size standards for small business concerns are contained in 13 CFR part 121.

*Subaward* means financial assistance in the form of money, or property in lieu of money, provided under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but the term does not include procurement of goods and services or any form of assistance which is not included in the definition of ''award'' in this part.

*Subrecipient* means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds or property provided.

*Supplies* means tangible, expendable personal property that is charged directly to the award and that has a useful life of less than one year or an acquisition cost of less than $5,000 per unit.

*Suspension* means an action by DOE that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by DOE. Suspension of an award is a separate action from suspension of a recipient under 10 CFR part 1036.

*Termination* means the cancellation of an award, in whole or in part, under an agreement at any time prior to either:

(1) The date on which all work under an award is completed; or

(2) The date on which Federal sponsorship ends, as provided in the award document or any supplement or amendment thereto.

*Third party in-kind contributions* means the value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the project or program.

*Unobligated balance* means the portion of the funds authorized by DOE that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

### § 600.303 Deviations.

(a) *Individual deviations.* Individual deviations affecting only one award are subject to the procedures stated in 10 CFR 600.4

(b) *Class deviations.* Class deviations affecting more than one financial assistance transaction are subject to the procedures states in 10 CFR 600.4.

### § 600.304 Special award conditions.

(a) Contracting officers may impose additional requirements as needed, over and above those provided in this subpart, if an applicant or recipient:

(1) Has a history of poor performance;

(2) Is not financially stable;

(3) Has a management system that does not meet the standards prescribed in this subpart;

(4) Has not conformed to the terms and conditions of a previous award; or

(5) Is not otherwise responsible.

(b) Before imposing additional requirements, DOE must notify the applicant or recipient in writing as to:

(1) The nature of the additional requirements;

(2) The reason why the additional requirements are being imposed;

(3) The nature of the corrective action needed;

(4) The time allowed for completing the corrective actions; and

(5) The method for requesting reconsideration of the additional requirements imposed.

(c) The contracting officer must remove any special conditions if the circumstances that prompted them have been corrected.

### § 600.305 Debarment and suspension.

Recipients must comply with the nonprocurement debarment and suspension common rule implemented in 2 CFR 180 and 901. This common rule restricts subawards and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

[68 FR 50650, Aug. 21, 2003, as amended at 74 FR 44278, Aug. 28, 2009]

### § 600.306 Metric system of measurement.

(a) The Metric Conversion Act of 1975, as amended by the Omnibus Trade and Competitiveness Act of 1988 (15 U.S.C. 205) and implemented by Executive Order 12770, states that:

(1) The metric system is the preferred measurement system for U.S. trade and commerce.

(2) The metric system of measurement will be used, to the extent economically feasible, in Federal agencies' procurements, grants, and other business-related activities.

(3) Metric implementation is not required if such use is likely to cause significant inefficiencies or loss of markets to United States firms.

(b) Recipients are encouraged to use the metric system to the maximum extent practicable in measurement-sensitive activities and in measurement-sensitive outputs resulting from DOE funded programs.

POST-AWARD REQUIREMENTS

*Financial and Program Management*

**§ 600.310 Purpose of financial and program management.**

Sections 600.311 through 600.318 prescribe standards for financial management systems; methods for making payments; and rules for cost sharing and matching, program income, revisions to budgets and program plans, audits, allowable costs, and fee and profit.

**§ 600.311 Standards for financial management systems.**

(a) Recipients are encouraged to use existing financial management systems to the extent that the systems comply with Generally Accepted Accounting Principles (GAAP) and the minimum standards in this section. At a minimum, a recipient's financial management system must provide:

(1) Effective control of all funds. Control systems must be adequate to ensure that costs charged to Federal funds and those counted as the recipient's cost share or match are consistent with requirements for cost reasonableness, allowability, and allocability in the applicable cost principles (*see* § 600.317) and in the terms and conditions of the award.

(2) Accurate, current and complete records that document, for each project funded wholly or in part with Federal funds, the source and application of the Federal funds and the recipient's required cost share or match. These records must:

(i) Contain information about receipts, authorizations, assets, expenditures, program income, and interest.

(ii) Be adequate to make comparisons of outlays with amounts budgeted for each award (as required for programmatic and financial reporting under § 600.341). Where appropriate, financial information should be related to performance and unit cost data.

(3) To the extent that advance payments are authorized under § 600.312, procedures that minimize the time elapsing between the transfer of funds to the recipient from the Government and the recipient's disbursement of the funds for program purposes.

(4) A system to support charges to Federal awards for salaries and wages, whether treated as direct or indirect costs. If employees work on multiple activities or cost objectives, a distribution of their salaries and wages must be supported by personnel activity reports which:

(i) Reflect an after the fact distribution of the actual activity of each employee.

(ii) Account for the total activity for which each employee is compensated.

(iii) Are prepared at least monthly, and coincide with one or more pay periods.

(b) If the Federal Government guarantees or insures the repayment of money borrowed by the recipient, DOE, at its discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(c) DOE may require adequate fidelity bond coverage if the recipient lacks sufficient coverage to protect the Federal Government's interest.

(d) If bonds are required in the situations described in paragraphs (b) and (c) of this section, the bonds must be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, ''Surety Companies Doing Business with the United States.''

**§ 600.312 Payment.**

(a) *Methods available.* Payment methods for awards with for-profit organizations are:

(1) *Reimbursement.* Under this method, the recipient requests reimbursement for costs incurred during a particular time period. In cases where the recipient submits requests for payment to the contracting officer, the DOE payment office reimburses the recipient by electronic funds transfer after approval of the request by the designated contracting officer.

(2) *Advance payments.* Under this method, DOE makes a payment to a recipient based upon projections of the recipient's cash needs. The payment generally is made upon the recipient's request, although predetermined payment schedules may be used when the

timing of the recipient's needs to disburse funds can be predicted in advance with sufficient accuracy to ensure compliance with paragraph (b)(2)(iii) of this section.

(b) *Selecting a method.* (1) The preferred payment method is the reimbursement method, as described in paragraph (a)(1) of this section.

(2) Advance payments, as described in paragraph (a)(2) of this section, may be used in exceptional circumstances, subject to the following conditions:

(i) The contracting officer, in consultation with the program official, determines in writing that advance payments are necessary or will materially contribute to the probability of success of the project contemplated under the award (*e.g.,* as startup funds for a project performed by a newly formed company).

(ii) Cash advances must be limited to the minimum amounts needed to carry out the program.

(iii) Recipients and DOE must maintain procedures to ensure that the timing of cash advances is as close as is administratively feasible to the recipients' disbursements of the funds for program purposes, including direct program or project costs and the proportionate share of any allowable indirect costs.

(iv) Recipients must maintain advance payments of Federal funds in interest-bearing accounts, and remit annually the interest earned to the contracting officer for return to the Department of Treasury's miscellaneous receipts account, unless one of the following applies:

(A) The recipient receives less than $120,000 in Federal awards per year.

(B) The best reasonably available interest bearing account would not be expected to earn interest in excess of $250 per year on Federal cash balances.

(C) The depository would require an average or minimum balance so high that establishing an interest bearing account would not be feasible, given the expected Federal and non-Federal cash resources.

(c) *Frequency of payments.* For either reimbursements or advance payments, recipients may submit requests for payment monthly, or more often if authorized by the contracting officer.

(d) *Forms for requesting payment.* DOE may authorize recipients to use the SF–270, ''Request for Advance or Reimbursement;'' the SF–271, ''Outlay Report and Request for Reimbursement for Construction Programs;'' or prescribe other forms or formats as necessary.

(e) *Timeliness of payments.* Payments normally will be made within 30 calendar days of the receipt of a recipient's request for reimbursement or advance by the office designated to receive the request, unless the billing is improper.

(f) *Precedence of other available funds.* Recipients must disburse funds available from program income, rebates, refunds, contract settlements, audit recoveries, credits, discounts, and interest earned on such funds before requesting additional cash payments.

(g) *Withholding of payments.* Unless otherwise required by statute, contracting officers may not withhold payments for proper charges made by recipients during the project period for reasons other than the following:

(1) A recipient failed to comply with project objectives, the terms and conditions of the award, or Federal reporting requirements, in which case the contracting officer may suspend payments in accordance with § 600.352.

(2) The recipient is delinquent on a debt to the United States (*see* definitions of ''debt'' and ''delinquent debt'' in 32 CFR 22.105). In that case, the contracting officer may, upon reasonable notice, withhold payments to the recipient until the debt owed is resolved.

**§ 600.313 Cost sharing or matching.**

(a) *Acceptable contributions.* All contributions, including cash contributions and third party in-kind contributions, must be accepted as part of the recipient's cost sharing or matching if such contributions meet all of the following criteria:

(1) They are verifiable from the recipient's records.

(2) They are not included as contributions for any other federally-assisted project or program.

(3) They are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) They are allowable under § 600.317.

(5) They are not paid by the Federal Government under another award unless authorized by Federal statute to be used for cost sharing or matching.

(6) They are provided for in the approved budget.

(7) They conform to other provisions of this part, as applicable.

(b) *Valuing and documenting contributions*—(1) *Valuing recipient's property or services of recipient's employees.* Values are established in accordance with the applicable cost principles in § 600.317, which means that amounts chargeable to the project are determined on the basis of costs incurred. For real property or equipment used on the project, the cost principles authorize depreciation or use charges. The full value of the item may be applied when the item will be consumed in the performance of the award or fully depreciated by the end of the award. In cases where the full value of a donated capital asset is to be applied as cost sharing or matching, that full value must be the lesser or the following:

(i) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation; or

(ii) The current fair market value. If there is sufficient justification, the contracting officer may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project. The contracting officer may accept the use of any reasonable basis for determining the fair market value of the property.

(2) *Valuing services of others' employees.* If an employer other than the recipient furnishes the services of an employee, those services are valued at the employee's regular rate of pay plus an amount of fringe benefits and overhead (at an overhead rate appropriate for the location where the services are performed), provided these services are in the same skill for which the employee is normally paid.

(3) *Valuing volunteer services.* Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services must be consistent with those paid for similar work in the recipient's organization. In those markets in which the required skills are not found in the recipient organization, rates must be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(4) *Valuing property donated by third parties.* (i) Donated supplies may include such items as office supplies or laboratory supplies. Value assessed to donated supplies included in the cost sharing or matching share must be reasonable and must not exceed the fair market value of the property at the time of the donation.

(ii) Normally only depreciation or use charges for equipment and buildings may be applied. However, the fair rental charges for land and the full value of equipment or other capital assets may be allowed, when they will be consumed in the performance of the award or fully depreciated by the end of the award, provided that the contracting officer has approved the charges. When use charges are applied, values must be determined in accordance with the usual accounting policies of the recipient, with the following qualifications:

(A) The value of donated space must not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(B) The value of loaned equipment must not exceed its fair rental value.

(5) *Documentation.* The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties:

(i) Volunteer services must be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(ii) The basis for determining the valuation for personal services and property must be documented.

**§ 600.314 Program income.**

(a) DOE must apply the standards in this section to the disposition of program income from projects financed in whole or in part with Federal funds.

(b) Unless program regulations or the terms and conditions of the award provide otherwise, recipients, without any further accounting to DOE, may retain program income earned:

(1) From license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award.

(2) After the end of the project period.

(c) Unless program regulations or the terms and conditions of the award provide otherwise, costs incident to the generation of program income for which there is some obligation to the Government may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

(d) Other than any program income excluded pursuant to paragraph (b) and (c) of this section, program income earned during the project period must be retained by the recipient and used in one or more of the following ways, as specified in program regulations or the terms and conditions of the award:

(1) Added to funds committed to the project by DOE and recipient and used to further eligible project or program objectives.

(2) Used to finance the non-Federal share of the project or program.

(3) Deducted from the total project or program allowable cost in determining the net allowable costs on which the Federal share of costs is based.

(e) If the program regulation or terms and conditions of an award authorize the disposition of program income as described in paragraph (d)(1) or (d)(2) of this section, and stipulate a limit on the amounts that may be used in those ways, program income in excess of the stipulated limits must be used in accordance with paragraph (d)(3) of this section.

(f) In the event that the program regulation or terms and conditions of the award do not specify how program income is to be used, paragraph (d)(3) of this section applies automatically to all projects or programs except research. For awards that support basic or applied research, paragraph (d)(1) of this section applies automatically unless the terms and conditions specify another alternative or the recipient is subject to special award conditions, as indicated in § 600.304.

(g) Proceeds from the sale of property that is acquired, rather than fabricated, under an award are not program income and must be handled in accordance with the requirements of §§ 600.320 through 600.325 of this part.

**§ 600.315 Revision of budget and program plans.**

(a) The budget plan is the financial expression of the project or program as approved during the award process. It includes the sum of the Federal and non-Federal shares when there are cost sharing requirements. The budget plan must be related to performance for program evaluation purposes, whenever appropriate.

(b) The recipient must obtain the contracting officer's prior approval if a revision is necessary for either of the following two reasons:

(1) A change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) A need for additional Federal funding.

(c) The recipient must obtain the contracting officer's prior approval if a revision is necessary for any of the following six reasons, unless the requirement for prior approval is specifically waived in the program regulation or terms and conditions of the award:

(1) A change in the approved project director, principal investigator, or other key person specified in the application or award document.

(2) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(3) The inclusion of any additional costs that require prior approval in accordance with the applicable costs principles for Federal funds and the requirements applicable to the recipient's cost share or match, as provided in § 600.313 and § 600.317, respectively.

(4) The inclusion of pre-award costs for periods greater than the 90 calendar days immediately preceding the effective date of the award.

(5) A ''no-cost'' extension of the project period.

(6) Any subaward, transfer, or contracting out of substantive program performance under an award, unless described in the application and funded in the approved awards.

(d) If specifically required in the program regulation or the terms and conditions of the award, the recipient must obtain the contracting officer's prior approval for the following revisions:

(1) The transfer of funds among direct cost categories, functions, and activities for awards in which the Federal share of the project exceeds $100,000 and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by DOE.

(2) For awards that provide support for both construction and nonconstruction work, any fund or budget transfers between the two types of work supported.

(e) Within 30 calendar days from the date of receipt of the recipient's request for budget revisions, the contracting officer must review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the contracting officer must inform the recipient in writing of the date when the recipient may expect the decision.

**§ 600.316 Audits.**

(a) Any recipient that expends $500,000 or more in a year under Federal awards must have an audit made for that year by an independent auditor, in accordance with paragraph (b) of this section. If a recipient is currently performing under a Federal award that requires an audit by its Federal cognizant agency, that auditor must perform the independent audit. The audit generally should be made a part of the regularly scheduled, annual audit of the recipient's financial statements. However, it may be more economical in some cases to have Federal awards separately audited, and a recipient may elect to do so, unless that option is precluded by award terms and conditions or by Federal laws or regulations applicable to the program(s) under which the awards were made.

(b) The auditor must determine and report on whether:

(1) The recipient has an internal control structure that provides reasonable assurance that it is managing Federal awards in compliance with Federal laws and regulations and the terms and conditions of the awards.

(2) Based on a sampling of Federal award expenditures, the recipient has complied with laws, regulations, and award terms that may have a direct and material effect on Federal awards.

(c) The recipient must make the auditor's report available to the DOE contracting officers whose awards are affected.

(d) Before requesting an audit in addition to the independent audit, the contracting officer must:

(1) Consider whether the independent audit satisfies his or her requirements;

(2) Limit the scope of such additional audit to areas not adequately addressed by the independent audit; and

(3) If DOE is not the Federal agency with the predominant fiscal interest in the recipient, coordinate with the agency that has the predominant fiscal interest.

(e) The recipient and its Federal cognizant agency for audit should develop a coordinated audit approach to minimize duplication of audit work.

(f) Audit costs (including a reasonable allocation of the costs of the audit of the recipient's financial statement, based on the relative benefit to the Government and the recipient) are allowable costs of DOE awards.

**§ 600.317 Allowable costs.**

(a) DOE determines allowability of costs in accordance with the cost principles applicable to the type of entity incurring the cost as follows:

(1) *For-profit organizations.* Allowability of costs incurred by for-profit organizations and those nonprofit organizations listed in Attachment C to OMB Circular A–122 is determined in accordance with the for-profit costs

principles in 48 CFR part 31 in the Federal Acquisition Regulation, except that patent prosecution costs are not allowable unless specifically authorized in the award document.

(2) *Other types of organizations.* Allowability of costs incurred by other types of organizations that may be subrecipients under a prime award to a for-profit organization is determined as follows:

(i) *Institutions of higher education.* Allowability is determined in accordance with OMB Circular A–21, ''Cost Principles for Educational Institutions.''

(ii) *Other nonprofit organizations.* Allowability is determined in accordance with OMB Circular A–122, ''Cost Principles for Nonprofit Organizations.''

(iii) *Hospitals.* Allowability is determined in accordance with the provisions of 45 CFR part 74, Appendix E, ''Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.''

(iv) *Governmental organizations.* Allowability for State, local, or federally recognized Indian tribal government is determined in accordance with OMB Circular A–87, ''Cost Principles for State and Local Governments.''

(b) *Pre-award costs.* If a recipient incurs pre-award costs without the prior approval of the contracting officer, DOE may pay those costs incurred within the ninety calendar day period immediately preceding the effective date of the award, if such costs are:

(1) Necessary for the effective and economical conduct of the project;

(2) Otherwise allowable in accordance with the applicable cost principles; and

(3) Less than the total value of the award.

### § 600.318 Fee and profit.

(a) Grants and cooperative agreements may not provide for the payment of fee or profit to recipients or subrecipients, except for awards made pursuant to the Small Business Innovation Research or Small Business Technology Transfer Research programs.

(b) A recipient or subrecipient may pay a fee or profit to a contractor providing goods or services under a contract.

*Property Standards*

### § 600.320 Purpose of property standards.

Sections 600.321 through 600.325 set forth uniform standards for management, use, and disposition of property. DOE encourages recipients to use existing property-management systems to the extent that the systems meet these minimum requirements.

### § 600.321 Real property and equipment.

(a) *Prior approvals for acquisition with Federal funds.* Recipients may purchase real property or equipment in whole or in part with Federal funds under an award only with the prior approval of the contracting officer.

(b) *Title.* Unless a statute specifically authorizes and the award specifies that title to property vests unconditionally in the recipient, title to real property or equipment vests in the recipient subject to the conditions that the recipient:

(1) Use the real property or equipment for the authorized purposes of the project until funding for the project ceases, or until the property is no longer needed for the purposes of the project;

(2) Not encumber the property without approval of the contracting officer; and

(3) Use and dispose of the property in accordance with paragraphs (d) and (e) of this section.

(c) *Federal interest in real property or equipment offered as cost-share.* A recipient may offer the full value of real property or equipment that is purchased with recipient's funds or that is donated by a third party to meet a portion of any required cost sharing or matching, subject to the requirements in § 600.313. If a resulting award includes such property as a portion of the recipient's cost share, the Government has a financial interest in the property, (*i.e.,* a share of the property value equal to the Federal participation in the project). The property is considered as if it had been acquired in part with Federal funds, and is subject to the provisions of paragraphs (b)(1), (b)(2), and (b)(3) of this section and to the provisions of § 600.323.

(d) *Insurance*. Recipients must, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with DOE funds as provided to property owned by the recipient.

(e) *Use*. If real property or equipment is acquired in whole or in part with Federal funds under an award and the award does not specify that title vests unconditionally in the recipient, the real property or equipment is subject to the following:

(1) During the time that the real property or equipment is used on the project or program for which it was acquired, the recipient must make it available for use on other projects or programs, if such other use does not interfere with the work on the project or program for which the real property or equipment was originally acquired. Use of the real property or equipment on other projects is subject to the following order of priority:

(i) Activities sponsored by DOE grants, cooperative agreements, or other assistance awards;

(ii) Activities sponsored by other Federal agencies' grants, cooperative agreements, or other assistance awards;

(iii) Activities under Federal procurement contracts or activities not sponsored by any Federal agency. If so used, use charges must be assessed to those activities. For real property or equipment, the use charges must be at rates equivalent to those for which comparable real property or equipment may be leased.

(2) After Federal funding for the project ceases or if the real property or equipment is no longer needed for the purposes of the project, the recipient may use the real property or equipment for other projects, insofar as:

(i) There are Federally sponsored projects for which the real property or equipment may be used. If the only use for the real property or equipment is for projects that have no Federal sponsorship, the receipt must proceed with disposition of the real property or equipment, in accordance with paragraph (f) of this section.

(ii) The recipient obtains written approval from the contracting officer to do so. The contracting officer must ensure that there is a formal change of accountability for the real property or equipment to a currently funded, Federal award.

(iii) The recipient's use of the real property or equipment for other projects is in the same order of priority as described in paragraph (e)(1) of this section.

(f) *Disposition*. (1) If an item of real property or equipment is no longer needed for Federally sponsored projects, the recipient has the following options:

(i) If the property is equipment with a current per unit fair market value of less than $5,000, it may be retained, sold, or otherwise disposed of with no further obligation to DOE.

(ii) If the property that is no longer needed is equipment (rather than real property), the recipient may wish to replace it with an item that is needed currently for the project by trading in or selling to offset the costs of the replacement equipment, subject to the approval of the contracting officer.

(iii) The recipient may elect to retain title, without further obligation to the Federal Government, by compensating the Federal Government for that percentage of the current fair market value of the real property or equipment that is attributable to the Federal participation in the project.

(iv) If the recipient does not elect to retain title to real property or equipment or does not request approval to use equipment as trade-in or offset for replacement equipment, the recipient must request disposition instructions from the responsible agency.

(2) If a recipient requests disposition instructions, the contracting officer must:

(i) For equipment (but not real property), consult with the DOE Project Director to determine whether the condition and nature of the equipment warrant excess screening within DOE. If screening is warranted, the equipment will be made available for reutilization within DOE through the Energy Asset Disposal System (EADS). If no DOE requirement is identified within a 30-day period, EADS automatically reports the availability of the equipment to the General Services Administration, to determine whether a requirement

for the equipment exists in other Federal agencies.

(ii) For either real property or equipment, issue instructions to the recipient for disposition of the property no later than 120 calendar days after the recipient's request. The contracting officer's options for disposition are to direct the recipient to:

(A) Transfer title to the real property or equipment to the Federal Government or to an eligible third party provided that, in such cases, the recipient is entitled to compensation for its attributable percentage of the current fair market value of the real property or equipment, plus any reasonable shipping or interim storage costs incurred.

(B) Sell the real property or equipment and pay the Federal Government for that percentage of the current fair market value of the property that is attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sale proceeds). If the recipient is authorized or required to sell the real property or equipment, the recipient must use competitive procedures that result in the highest practicable return.

(3) If the responsible agency fails to issue disposition instructions within 120 calendar days of the recipient's request, the recipient must dispose of the real property or equipment through the option described in paragraph (f)(2)(ii)(B) of this section.

### § 600.322 Federally owned property.

(a) *Annual inventory*. The recipient must submit annually to the contracting officer an inventory listing of all Federally owned property in its custody, i.e., property furnished by the Federal Government, rather than acquired by the recipient with Federal funds under the award.

(b) *Insurance*. The recipient may not insure Federally owned property unless required by the terms and conditions of the award.

(c) *Use on other activities*. (1) Use of federally owned property on other activities is permissible, if authorized by the contracting officer responsible for administering the award to which the property currently is charged.

(2) Use on other activities must be in the following order of priority:

(i) Activities sponsored by DOE grants, cooperative agreements, or other assistance awards;

(ii) Activities sponsored by other Federal agencies' grants, cooperative agreements, or other assistance awards;

(iii) Activities under Federal procurement contracts or activities not sponsored by any Federal agency. If so used, use charges must be assessed to those activities. For real property or equipment, the use charges must be at rates equivalent to those for which comparable real property or equipment may be leased.

(d) *Disposition or property*. Upon completion of the award, the recipient must submit to the contracting officer a final inventory of Federal owned property. DOE may:

(1) Use the property to meet another Federal Government need (*e.g.*, by transferring accountability for the property to another Federal award to the same recipient, or by directing the recipient to transfer the property to a Federal agency that needs the property or to another recipient with a currently funded award).

(2) Declare the property to be excess property and either:

(i) Report the property to the General Services Administration through EADS, in accordance with the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483(b)(2)), as implemented by General Services Administration regulations at 41 CFR 101–47.202; or

(ii) Dispose of the property by alternative methods, if there is authority under law, such as 15 U.S.C. 3710(i).

### § 600.323 Property management system.

The recipient's property management system must include the following:

(a) Property records must be maintained, to include the following information for property that is Federally owned, equipment that is acquired in whole or in part with Federal funds, or property or equipment that is used as cost sharing or matching:

(1) A description of the property.

(2) Manufacturer's serial number, model number, Federal stock number, national stock number, or any other identification number.

(3) Source of the property, including the award number.

(4) Whether title vests in the recipient or the Federal Government.

(5) Acquisition date (or date received, if the property was furnished by the Federal Government) and cost.

(6) Information from which one can calculate the percentage of Federal participation in the cost of the property (not applicable to property furnished by the Federal Government).

(7) The location and condition of the property and the date the information was reported.

(8) Ultimate disposition data, including data of disposal and sales price or the method used to determine current fair market value where a recipient compensates the Federal Government for its share.

(b) Federal owned equipment must be marked to indicate Federal ownership.

(c) A physical inventory must be taken and the results reconciled with the property records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records must be investigated to determine the causes of the difference. The recipient must, in connection with the inventory, verify the existence, current utilization, and continued need for the property.

(d) A control system must be in effect to insure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft of property must be investigated and fully documented. If the property is owned by the Federal Government, the recipient must promptly notify the Federal agency responsible for administering the property.

(e) Adequate maintenance procedures must be implemented to keep the property in good condition.

### § 600.324 Supplies.

(a) Title vests in the recipient upon acquisition of supplies acquired with Federal funds under an award.

(b) Upon termination or completion of the project or program, the recipient may retain any unused supplies. If the inventory of unused supplies exceeds $5,000 in total aggregate value and the items are not needed for any other Federally sponsored project or program, the recipient may retain the items for use on non-Federal sponsored activities or sell them, but must, in either case, compensate the Federal Government for its share.

### § 600.325 Intellectual property.

(a) *Scope*. This section sets forth the policies with regard to disposition of rights to data and to inventions conceived or first actually reduced to practice in the course of, or under, a grant or cooperative agreement with DOE.

(b) *Patents right—small business concerns*. In accordance with 35 U.S.C. 202, if the recipient is a small business concern and receives a grant, cooperative agreement, subaward, or contract for research, developmental, or demonstration activities, then, unless there are ''exceptional circumstances'' as described in 35 U.S.C. 202(e), the award must contain the standard clause in appendix A to this subpart, entitled ''Patents Rights (Small Business Firms and Nonprofit Organizations'' which provides to the recipient the right to elect ownership of inventions made under the award.

(c) *Patent rights—other than small business concerns, e.g., large businesses*—(1) *No Patent Waiver*. Except as provided by paragraph (c)(2) of this section, if the recipient is a for-profit organization other than a small business concern, as defined in 35 U.S.C. 201(h) and receives an award or a subaward for research, development, and demonstration activities, then, pursuant to statute, the award must contain the standard clause in appendix A to this subpart, entitled ''Patent Rights (Large Business Firms)—No Waiver'' which provides that DOE owns the patent rights to inventions made under the award.

(2) *Patent Waiver Granted*. Paragraph (c)(1) of this section does not apply if:

(i) DOE grants a class waiver for a particular program under 10 CFR part 784;

(ii) The applicant requests and receives an advance patent waiver under 10 CFR part 784; or

(iii) A subaward is covered by a waiver granted under the prime award.

(3) *Special Provision*. Normally, an award will not include a background patent and data provision. However, under special circumstances, in order to provide heightened assurance of commercialization, a provision providing for a right to require licensing of third parties to background inventions, limited rights data and/or restricted computer software, may be included. Inclusion of a background patent and/or a data provision to assure commercialization will be done only with the written concurrence of the DOE program official setting forth the need for such assurance. An award may include the right to license the Government and third party contractors for special Government purposes when future availability of the technology would also benefit the government, *e.g.*, clean-up of DOE facilities. The scope of any such background patent and/or data licensing provision is subject to negotiation.

(d) *Rights in data—general rule*. (1) Subject to paragraphs (d)(2) and (3) of this section, and except as otherwise provided by paragraphs (e) and (f) of this section or other law, any award under this subpart must contain the standard clause in appendix A to this subpart, entitled ''Rights in Data—General''.

(2) Normally, an award will not require the delivery of limited rights data or restricted computer software. However, if the contracting officer, in consultation with DOE patent counsel and the DOE program official, determines that delivery of limited rights data or restricted computer software is necessary, the contracting officer, after negotiation with the applicant, may insert in the award the standard clause as modified by Alternates I and/or II set forth in appendix A to this subpart.

(3) If software is specified for delivery to DOE, or if other special circumstances exist, *e.g.*, DOE specifying ''open-source'' treatment of software, then the contracting officer, after negotiation with the recipient, may include in the award special provisions requiring the recipient to obtain written approval of the contracting officer prior to asserting copyright in the software, modifying the retained Government license, and/or otherwise altering the copyright provisions.

(e) *Rights in data—programs covered under special protected data statutes*. (1) If a statute, other than those providing for the Small Business Innovation Research (SBIR) and Small Business Technology Transfer Research (STTR) programs, provides for a period of time, typically up to five years, during which data produced under an award for research, development, and demonstration may be protected from public disclosure, then the contracting officer must insert in the award the standard clause in appendix A to this subpart entitled ''Rights in Data—Programs Covered Under Special Protected Data Statutes'' or, as determined in consultation with DOE patent counsel and the DOE program official, a modified version of such clause which may identify data or categories of data that the recipient must make available to the public.

(2) An award under paragraph (e)(1) of this section is subject to the provisions of paragraphs (d)(2) and (3) of this section.

(f) *Rights in data—SBIR/STTR programs*. (1) If an applicant receives an award under the SBIR or STTR program, then the contracting officer must insert in the award the standard data clause in the General Terms and Conditions for SBIR Grants, entitled ''Rights in Data—SBIR Program''.

(2) The data rights provisions for SBIR/STTR grants are contained in the award terms and conditions for SBIR grants located at *http://e-center.doe.gov* on the Professionals Homepage under Financial Assistance, Regulations and Guidance.

(g) *Authorization and consent*. (1) Work performed by a recipient under a grant is not subject to authorization and consent to the use of a patented invention, and the Government assumes no liability for patent infringement by the recipient under 28 U.S.C. 1498.

(2) Work performed by a recipient under a cooperative agreement is subject to authorization and consent to

the use of a patented invention consistent with the principles set forth in 48 CFR 27.201–1.

(3) The contracting officer, in consultation with patent counsel, may also include clauses in the cooperative agreement addressing other patent matters related to authorization and consent, such as patent indemnification of the Government by recipient and notice and assistance regarding patent and copyright infringement. The policies and clauses for these other patent matters will be the same or consistent with those in 48 CFR part 927.

*Procurement Standards*

### § 600.330 Purpose of procurement standards.

Section 600.331 sets forth requirements necessary to ensure:

(a) Recipients' procurements that use Federal funds comply with applicable Federal statutes, regulations, and executive orders.

(b) Proper stewardship of Federal funds used in recipients' procurements.

### § 600.331 Requirements.

The following requirements pertain to recipients' procurements funded in whole or in part with Federal funds or with recipients' cost-share or match:

(a) *Reasonable cost.* Recipients' procurement procedures must use best commercial practices to ensure reasonable cost for procured goods and services. Recipients are encouraged to buy commercial items, if practicable.

(b) *Pre-award review of certain procurements.* If the contracting officer determines that there is a compelling need to perform a pre-award review of a specific transaction and the terms of the award identify the specific transaction and provide for such a review, then the recipient must obtain the contracting officer's approval prior to awarding the transaction and must provide the contracting officer the following documents to review:

(1) Request for proposals or invitation to bid, if any;

(2) Cost estimate;

(3) Proposal/bid;

(4) Proposed award document; and

(5) Summary of negotiations or justification for award.

(c) *Contract provisions.* (1) Contracts in excess of the simplified acquisition threshold must contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(2) All contracts in excess of the simplified acquisition threshold must contain suitable provisions for termination for default by the recipient and for termination due to circumstances beyond the control of the contractor.

(3) All negotiated contracts in excess of the simplified acquisition threshold must include a provision permitting access of DOE, the Inspector General, the Comptroller General of the United States, or any of their duly authorized representatives, to any books, documents, papers, and records of the contractor that are directly pertinent to a specific programs, for the purpose of making audits, examinations, excerpts, transcriptions, and copies of such documents.

(4) All contracts, including those for amounts less than the simplified acquisition threshold, awarded by recipients and their contractors must contain the procurement provisions of Appendix B to this subpart, as applicable.

(d) *Recipient responsibilities.* The recipient is the responsible authority, without recourse to DOE, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award. This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature. The recipient should refer matters concerning violations of statutes to such Federal, State or local authority as may have proper jurisdiction.

*Reports and Records*

### § 600.340 Purpose of reports and records.

Sections 600.341 and 600.342 prescribe requirements for monitoring and reporting financial and program performance and for records retention.

**§ 600.341 Monitoring and reporting program and financial performance.**

(a) The terms and conditions of the award prescribe the reporting requirements, the frequency, and the due dates for reports. At a minimum, requirements must include:

(1) Periodic progress reports (at least annually, but no more frequently than quarterly) addressing both program status and business status, as follows:

(i) The program portions of the reports must address progress toward achieving program performance goals and milestones, including current issues, problems, or developments.

(ii) The business portions of the reports must provide summarized details on the status of resources (Federal funds and non-Federal cost sharing or matching), including an accounting of expenditures for the period covered by the report. The report should compare the resource status with any payment and expenditure schedules or plans provided in the original award, explain any major deviations from those schedules, and discuss actions that will be taken to address the deviations.

(2) A final technical report if the award is for research and development.

(b) If the contracting officer previously authorized advance payments, pursuant to § 600.312(a)(2), he/she should consult with the DOE project director and consider whether program progress reported in the periodic progress report, in relation to reported expenditures, is sufficient to justify continued authorization of advance payments.

**§ 600.342 Retention and access requirements for records.**

(a) This section sets forth requirements for records retention and access to records for awards to recipients and subrecipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award must be retained for a period of three years from the date of submission of the final expenditure report. The only exceptions are the following.

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records must be retained until all litigation, claims, or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds must be retained for 3 years after final disposition.

(3) If records are transferred to or maintained by DOE, the 3-year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocation plans, and related records must be retained in accordance with the requirements specified in paragraph (g) of this section.

(c) Copies of original records may be substituted for the original records if authorized by the contracting officer.

(d) The contracting officer may request that recipients transfer certain records to DOE custody if he or she determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, a contracting officer may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) DOE, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but must last as long as records are retained.

(f) Unless required by statute, DOE must not place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when DOE can demonstrate that such records would be kept confidential and would be exempt from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records belonged to DOE.

(g) Indirect cost proposals, cost allocation plans, and other cost accounting

documents (such as documents related to computer usage chargeback rates), along with their supporting records, must be retained for a 3-year period, as follows:

(1) If the recipient or the subrecipient is required to submit an indirect-cost proposal, cost allocation plan, or other computation to the cognizant Federal agency for purposes of negotiating an indirect cost rate or other rates, the 3-year retention period starts on the date of the submission.

(2) If the recipient or the subrecipient is not required to submit the documents or supporting records for negotiating an indirect cost rate or other rates, the 3-year retention period for the documents and records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(h) If the information described in this section is maintained on a computer, recipients must retain the computer data on a reliable medium for the time periods prescribed. Recipients may transfer computer data in machine readable form from one reliable computer medium to another. Recipients' computer data retention and transfer procedures must maintain the integrity, reliability, and security of the original computer data. Recipients must also maintain an audit trail describing the data transfer. For the record retention time periods prescribed in this section, recipients must not destroy, discard, delete, or write over such computer data.

*Termination and Enforcement*

### § 600.350 Purpose of termination and enforcement.

Sections 600.351 through 600.353 set forth uniform procedures for suspension, termination, enforcement, and disputes.

### § 600.351 Termination.

(a) Awards may be terminated in whole or in part only in accordance with one of the following:

(1) By the contracting officer, if a recipient materially fails to comply with the terms and conditions of an award.

(2) By the contracting officer with the consent of the recipient, in which case the two parties must agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the recipient upon sending to the contracting officer written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. The recipient must provide such notice at least 30 calendar days prior to the effective date of the termination. However, if the contracting officer determines in the case of partial termination that the reduced or modified portion of the award will not accomplish the purposes for which the award was made, he or she may terminate the award in its entirety.

(b) If the recipient incurred allowable costs prior to the termination, the responsibilities of the recipient referred to in § 600.361(b), including those related to property, apply to the termination of the award, and provision must be made for continuing responsibilities of the recipient after termination, as appropriate.

### § 600.352 Enforcement.

(a) *Remedies for noncompliance.* If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, the contracting officer may, in addition to imposing any of the special conditions outlined in § 600.304, take one or more of the following actions, as appropriate:

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by the contracting officer.

(2) Disallow (that is, deny both the use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award.

(4) Withhold further awards for the project or program.

(5) Apply other remedies that may be legally available.

(b) *Hearings and appeals*. In taking an enforcement action, DOE must provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination*. Costs resulting from obligations incurred by the recipient during a suspension or after termination of an award are not allowable, unless the contracting officer expressly authorizes them in the notice of suspension or termination or subsequently authorizes such costs. Other recipient costs during suspension or after termination, which are necessary and not reasonably avoidable, are allowable if the costs:

(1) Result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable; and

(2) Would be allowable if the award expired normally at the end of the funding period.

(d) *Relationship to debarment and suspension*. The enforcement remedies identified in this section, including suspension and termination, do not preclude a recipient from being subject to debarment and suspension under 10 CFR part 1036.

### § 600.353 Disputes and appeals.

Consistent with 10 CFR 600.22 and part 1024, recipients have the right to appeal certain decisions by contracting officers.

## AFTER-THE-AWARD REQUIREMENTS

### § 600.360 Purpose.

Sections 600.361 through 600.363 contain procedures for closeout and for subsequent disallowances and adjustments.

### § 600.361 Closeout procedures.

(a) Recipients must submit, within 90 calendar days after the date of completion of the award, all reports required by the terms and conditions of the award. DOE may approve extensions when requested by the recipient.

(b) The following provisions must apply to the closeout:

(1) Unless DOE authorizes an extension, a recipient must liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion of the award as specified in the terms and conditions of the award or in agency implementing instructions.

(2) DOE must make prompt, final payments to a recipient for allowable reimbursable costs under the award being closed out.

(3) The recipient must promptly refund any unobligated balances of cash that DOE has advanced or paid and that are not authorized to be retained by the recipient for use in other projects. OMB Circular A–129 governs unreturned amounts that become delinquent debts.

(4) When authorized by the terms and conditions of the award, the contracting officer must make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(5) The recipient must account for any real property and equipment acquired with Federal funds or received from the Federal Government in accordance with §§ 600.321 through 600.325.

(6) If a final audit is required and has not been performed prior to the closeout of an award, DOE retains the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

### § 600.362 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following:

(1) The right of DOE to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in § 600.316.

(4) Property management requirements in §§ 600.321 through 600.325.

(5) Records retention requirements in § 600.342.

(b) After closeout of an award, the continuing responsibilities under an award may be modified or ended in whole or in part with the consent of

the contracting officer and the recipient, provided property management requirements are considered and provisions made for the continuing responsibilities of the recipient, as appropriate.

### § 600.363 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. If not paid within 30 days after the demand for payment, DOE may reduce the debt in accordance with the procedures and techniques described in 10 CFR part 1015 and OMB Circular A–129, including:

(1) Making an administrative offset against other requests for reimbursements.

(2) Withholding advance payments otherwise due to the recipient.

(3) Taking other action permitted by statute or regulation.

(b) Except as otherwise provided by law, DOE may charge interest and administrative fees on an overdue debt in accordance with 31 CFR Chapter IX, parts 900–904, ''Federal Claims Collection Standards.''

ADDITIONAL PROVISIONS

### § 600.380 Purpose.

The purpose of ''Additional Provisions'' is to provide alternative requirements for recipients otherwise covered by this subpart D, when they are performing under Small Business Innovation Research grants.

### § 600.381 Special provisions for Small Business Innovation Research Grants.

(a) *General*. This section contains provisions applicable to the Small Business Innovation Reserach (SBIR) Program.

(b) *Provisions Applicable to Phase I SBIR Awards:* Phase I SBIR awards may be made on a fixed obligation basis, subject to the following requirements.

(1) While proposed costs must be analyzed in detail to ensure consistency with applicable cost principles, incurred costs are not subject to review under the standards of cost allowability.

(2) Although detailed budgets are submitted by a recipient and reviewed by DOE for purposes of establishing the amount to be awarded, budget categories are not stipulated in making an award;

(3) Prior approval from the DOE for rebudgeting among categories by the recipient is not required. Prior approval from DOE is required for any variation from the requirement that no more than one-third of Phase I work can be done by subcontractors or consortium partners;

(4) Pre-award expenditure approval is not required;

(5) Payments are to be made in the same manner as other financial assistance (*see* § 600.312), except that, when determined appropriate by the cognizant program official and contracting officer, a lump sum payment may be made. If a lump sum payment is made, the award must contain a condition that requires the recipient to return to DOE amounts remaining unexpended at the end of the project if those amounts exceed $500;

(6) Recipients will certify in writing to the Contracting Officer at the end of the project that the activity was completed or the level of effort was expended. Should the activity or effort not be carried out, the recipeint would be expected to make appropriate reimbursements;

(7) Requirements for periodic reports may be established for each award so long as they are consistent with § 600.341;

(8) Changes in principal investigator or project leader, scope of effort, or institution, require the prior approval of DOE.

(c) *Provision Applicable to Phase II SBIR Awards*. Phase II SBIR awards may be made for a single budget period of 24 months.

(d) *Provisions Applicable to Phase I and Phase II SBIR Awards*. (1) The prior approval of the cognizant DOE Contracting Officer is required before the final budget period of the project period may be extended without additional funds.

(2) A fee or profit may be paid to SBIR recipients.

## APPENDIX A TO SUBPART D OF PART 600—PATENT AND DATA PROVISIONS

1. Patent Rights (Small Business Firms and Nonprofit Organizations)
2. Patent Rights (Large Business Firms)—No Waiver
3. Rights in Data—General
4. Rights in Data—Programs Covered Under Special Protected Data Statutes

### PATENT RIGHTS (SMALL BUSINESS FIRMS AND NONPROFIT ORGANIZATIONS)

#### (a) Definitions

*Invention* means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321 *et seq.*).

*Made* when used in relation to any invention means the conception or first actual reduction to practice of such invention.

*Nonprofit organization* means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)) or any nonprofit scientific or educational organization qualified under a State nonprofit organization statute.

*Practical application* means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are to the extent permitted by law or Government regulations available to the public on reasonable terms.

*Small business firm* means a small business concern as defined at section 2 of Public Law 85–536 (16 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.3 through 121.8 and 13 CFR 121.3 through 121.12, respectively, will be used.

*Subject invention* means any invention of the Recipient conceived or first actually reduced to practice in the performance of work under this award, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d) must also occur during the period of award performance.

#### (b) Allocation of Principal Rights

The Recipient may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this Patent Rights clause and 35 U.S.C. 203. With respect to any subject invention in which the Recipient retains title, the Federal Government shall have a non-exclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the U.S. the subject invention throughout the world.

#### (c) Invention Disclosure, Election of Title and Filing of Patent Applications by Recipient

(1) The Recipient will disclose each subject invention to DOE within two months after the inventor discloses it in writing to Recipient personnel responsible for the administration of patent matters. The disclosure to DOE shall be in the form of a written report and shall identify the award under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding to the extent known at the time of disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to DOE, the Recipient will promptly notify DOE of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Recipient.

(2) The Recipient will elect in writing whether or not to retain title to any such invention by notifying DOE within two years of disclosure to DOE. However, in any case where publication, on sale, or public use has initiated the one-year statutory period wherein valid patent protection can still be obtained in the U.S., the period for election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Recipient will file its initial patent application on an invention to which it elects to retain title within one year after election of title or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the U.S. after a publication, on sale, or public use. The Recipient will file patent applications in additional countries or international patent offices within either ten months of the corresponding initial patent application, or six months from the date when permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications when such filing has been prohibited by a Secrecy Order.

(4) Requests for extension of the time for disclosure to DOE, election, and filing under

subparagraphs (c)(1), (2), and (3) of this clause may, at the discretion of DOE, be granted.

(d) Conditions When the Government May Obtain Title

The Recipient will convey to DOE, upon written request, title to any subject invention:

(1) If the Recipient fails to disclose or elect the subject invention within the times specified in paragraph (c) of this patent rights clause, or elects not to retain title; provided that DOE may only request title within 60 days after learning of the failure of the Recipient to disclose or elect within the specified times;

(2) In those countries in which the Recipient fails to file patent applications within the times specified in paragraph (c) of this Patent Rights clause; provided, however, that if the Recipient has filed a patent application in a country after the times specified in paragraph (c) of this Patent Rights clause, but prior to its receipt of the written request of DOE, the Recipient shall continue to retain title in that country; or

(3) In any country in which the Recipient decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in a reexamination or opposition proceeding on, a patent on a subject invention.

(e) Minimum Rights to Recipient and Protection of the Recipient Right To File

(1) The Recipient will retain a non-exclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the Recipient fails to disclose the subject invention within the times specified in paragraph (c) of this Patent Rights clause. The Recipient's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Recipient is a party and includes the right to grant sublicenses of the same scope of the extent the Recipient was legally obligated to do so at the time the award was awarded. The license is transferable only with the approval of DOE except when transferred to the successor of that part of the Recipient's business to which the invention pertains.

(2) The Recipient's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 CFR part 404 and the agency's licensing regulation, if any. This license will not be revoked in that field of use or the geographical areas in which the Recipient has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at discretion of the funding Federal agency to the extent the Recipient, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, the funding Federal agency will furnish the Recipient a written notice of its intention to revoke or modify the license, and the Recipient will be allowed thirty days (or such other time as may be authorized by DOE for good cause shown by the Recipient) after the notice to show cause why the license should not be revoked or modified. The Recipient has the right to appeal, in accordance with applicable regulations in 37 CFR part 404 and the agency's licensing regulations, if any, concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of its license.

(f) Recipient Action To Protect Government's Interest

(1) The Recipient agrees to execute or to have executed and promptly deliver to DOE all instruments necessary to:

(i) Establish or confirm the rights the Government has throughout the world in those subject inventions for which the Recipient retains title; and

(ii) Convey title to DOE when requested under paragraph (d) of this Patent Rights clause, and to enable the government to obtain patent protection throughout the world in that subject invention.

(2) The Recipient agrees to require, by written agreement, its employees, other than clerical and non-technical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Recipient each subject invention made under this award in order that the Recipient can comply with the disclosure provisions of paragraph (c) of this Patent Rights clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. The disclosure format should require, as a minimum, the information requested by paragraph (c)(1) of this Patent Rights clause. The Recipient shall instruct such employees through the employee agreements or other suitable educational programs on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) The Recipient will notify DOE of any decision not to continue prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less

than 30 days before the expiration of the response period required by the relevant patent office.

(4) The Recipient agrees to include, within the specification of any U.S. patent application and any patent issuing thereon covering a subject invention, the following statement: ''This invention was made with Government support under (identify the award) awarded by (identify DOE). The Government has certain rights in this invention.''

(g) Subaward/Contract

(1) The Recipient will include this Patent Rights clause, suitably modified to identify the parties, in all subawards/contracts, regardless of tier, for experimental, developmental or research work to be performed by a small business firm or nonprofit organization. The subrecipient/contractor will retain all rights provided for the Recipient in this Patent Rights clause, and the Recipient will not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractors' subject inventions.

(2) The Recipient will include in all other subawards/contracts, regardless of tier, for experimental, developmental or research work, the patent rights clause required by 10 CFR 600.325(c).

(3) In the case of subawards/contracts at any tier, DOE, the Recipient, and the subrecipient/contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subrecipient/contractor and DOE with respect to those matters covered by the clause.

(h) Reporting on Utilization of Subject Inventions

The Recipient agrees to submit on request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Recipient or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Recipient and such other data and information as DOE may reasonably specify. The Recipient also agrees to provide additional reports in connection with any march-in proceeding undertaken by DOE in accordance with paragraph (j) of this Patent Rights clause. As required by 35 U.S.C. 202(c)(5), DOE agrees it will not disclose such information to persons outside the Government without the permission of the Recipient.

(i) Preference for United States Industry.

Notwithstanding any other provision of this Patent Rights clause, the Recipient agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the U.S. unless such person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the U.S. However, in individual cases, the requirement for such an agreement may be waived by DOE upon a showing by the Recipient or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the U.S. or that under the circumstances domestic manufacture is not commercially feasible.

(j) March-in-Rights

The Recipient agrees that with respect to any subject invention in which it has acquired title, DOE has the right in accordance with procedures at 37 CFR 401.6 and any supplemental regulations of the Agency to require the Recipient, an assignee or exclusive licensee of a subject invention to grant a non-exclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances and if the Recipient, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if DOE determines that:

(1) Such action is necessary because the Recipient or assignee has not taken or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(2) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Recipient, assignee, or their licensees;

(3) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Recipient, assignee, or licensee; or

(4) Such action is necessary because the agreement required by paragraph (i) of this Patent Rights clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the U.S. is in breach of such agreement.

(k) Special Provisions for Awards With Nonprofit Organizations

If the Recipient is a nonprofit organization, it agrees that:

(1) Rights to a subject invention in the U.S. may not be assigned without the approval of DOE, except where such assignment is made to an organization which has as one of its primary functions the management of inventions, provided that such assignee will be subject to the same provisions as the Recipient;

(2) The Recipient will share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (when DOE deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;

(3) The balance of any royalties or income earned by the Recipient with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions, will be utilized for the support of scientific or engineering research or education; and

(4) It will make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms and that it will give preference to a small business firm if the Recipient determines that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; provided that the Recipient is also satisfied that the small business firm has the capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the Recipient. However, the Recipient agrees that the Secretary of Commerce may review the Recipient's licensing program and decisions regarding small business applicants, and the Recipient will negotiate changes to its licensing policies, procedures or practices with the Secretary when the Secretary's review discloses that the Recipient could take reasonable steps to implement more effectively the requirements of this paragraph (k)(4).

(l) Communications

All communications required by this Patent Rights clause should be sent to the DOE Patent Counsel address listed in the Award Document.

(m) Electronic Filing

Unless otherwise Specified in the award, the information identified in paragraphs (f)(2) and (f)(3) may be electronically filed.

(End of clause)

PATENT RIGHTS (LARGE BUSINESS FIRMS)—NO WAIVER

(a) Definitions

*DOE patent waiver regulations,* as used in this clause, means the Department of Energy patent waiver regulations in effect on the date of award. See 10 CFR part 784.

*Invention,* as used in this clause, means any invention or discovery which is or may be patentable of otherwise protectable under title 35 of the United States Code or any novel variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*).

*Patent Counsel,* as used in this clause, means the Department of Energy Patent Counsel assisting the awarding activity.

*Subject invention,* as used in this clause, means any invention of the Recipient conceived or first actually reduced to practice in the course of or under this agreement.

(b) Allocations of Principal Rights

(1) Assignment to the Government. The Recipient agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention, except to the extent that rights are retained by the Recipient under subparagraph (b)(2) and paragraph (d) of this clause.

(2) Greater rights determinations. The Recipient, or an employee-inventor after consultation with the Recipient, may request greater rights than the nonexclusive license and the foreign patent rights provided in paragraph (d) of this clause on identified inventions in accordance with the DOE patent waiver regulation. Each determination of greater rights under this agreement shall be subject to paragraph (c) of this clause, unless otherwise provided in the greater rights determination, and to the reservations and conditions deemed to be appropriate by the Secretary of Energy or designee.

(c) Minimum Rights Acquired by the Government

With respect to each subject invention to which the Department of Energy grants the Recipient principal or exclusive rights, the Recipient agrees to grant to the Government: A nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced each subject invention throughout the world by or on behalf of the Government of the United States (including any Government agency); ''march-in rights'' as set forth in 37 CFR 401.14(a)(J)); preference for U.S. industry as set forth in 37 CFR 401.14(a)(I); periodic reports upon request, no more frequently than annually, on the utilization or intent of utilization of a subject invention in a manner consistent with 35 U.S.C. 202(c)(50; and such Government rights in any instrument transferring rights in a subject invention.

(d) Minimum Rights to the Recipient

(1) The Recipient is hereby granted a revocable, nonexclusive, royalty-free license in each patent application filed in any country on a subject invention and any resulting patent in which the Government obtains title, unless the Recipient fails to disclose the subject invention within the times specified in subparagraph (e)(2) of this clause. The Recipient's license extends to its domestic subsidiaries and affiliates, if any, within the

corporate structure of which the Recipient is a part and includes the right to grant sublicenses of the same scope to the extent the Recipient was legally obligated to do so at the time the agreement was awarded. The license is transferable only with the approval of DOE except when transferred to the successor of that part of the Recipient's business to which the invention pertains.

(2) The Recipient may request the right to acquire patent rights to a subject invention in any foreign country where the Government has elected not to secure such rights, subject to the minimum rights acquired by the Government similar to paragraph (c) of this clause. Such request must be made in writhing to the Patent Counsel as part of the disclosure required by subparagraph (e)(2) of this clause, with a copy to the DOE Contracting Officer. DOE approval, if given, will be based on a determination that this would best serve the national interest.

(e) Invention Identification, Disclosures, and Reports

(1) The Recipient shall establish and maintain active and effective procedures to assure that subject inventions are promptly identified and disclosed to Recipient personnel responsible for patent matters within 6 months of conception and/or first actual reduction to practice, whichever occurs first in the performance of work under this agreement. These procedures shall include the maintenance of laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions, and records that show that the procedures for identifying and disclosing the inventions are followed. Upon request, the Recipient shall furnish the Contracting Officer a description of such procedures for evaluation and for determination as to their effectiveness.

(2) The Recipient shall disclose each subject invention to the DOE Patent Counsel with a copy to the Contracting Officer within 2 months after the inventor discloses it in writing to Recipient personnel responsible for patent matters or, if earlier, within 6 months after the Recipient becomes aware that a subject invention has been made, but in any event before any on sale, public use, or publication of such invention known to the Recipient. The disclosure to DOE shall be in the form of a written report and shall identify the agreement under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and physical, chemical, biological, or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale, or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to DOE, the Recipient shall promptly notify Patent Counsel of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Recipient. The report should also include any request for a greater rights determination in accordance with subparagraph (b)(2) of this clause. When an invention is disclosed to DOE under this paragraph, it shall be deemed to have been made in the manner specified in Sections (a)(1) and (a)(2) of 42 U.S.C. 5908, unless the Recipient contends in writing at the time the invention is disclosed that it was not so made.

(3) The Recipient shall furnish the Contracting Officer a final report, within 3 months after completion of the work listing all subject inventions or containing a statement that there were no such inventions, and listing all subawards/contracts at any tier containing a patent rights clause or containing a statement that there were no such subawards/contracts.

(4) The Recipient agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Recipient each subject invention made under subaward/contract in order that the Recipient can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by subparagraph (e)(2) of this clause.

(5) The Recipient agrees, subject to FAR 27.302(j), that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause.

(f) Examination of Records Relating to Inventions

(1) The Contracting Officer or any authorized representative shall, until 3 years after final payment under this agreement, have the right to examine any books (including laboratory notebooks), records, and documents of the Recipient relating to the conception or first actual reduction to practice of inventions in the same field of technology as the work under this agreement to determine whether—

(i) Any such inventions are subject inventions;

(ii) The Recipient has established and maintains the procedures required by subparagraphs (e)(1) and (4) of this clause;

(iii) The Recipient and its inventors have complied with the procedures.

(2) If the Contracting Officer learns of an unreported Recipient invention which the Contracting Officer believes may be a subject invention, the Recipient may be required to disclose the invention to DOE for a determination of ownership rights.

(3) Any examination of records under this paragraph will be subject to appropriate conditions to protect the confidentiality of the information involved.

(g) Subaward/Contract

(1) The recipient shall include the clause PATENT RIGHTS (SMALL BUSINESS FIRMS AND NONPROFIT ORGANIZATIONS) (suitably modified to identify the parties) in all subawards/contracts, regardless of tier, for experimental, developmental, demonstration, or research work to be performed by a small business firm or domestic nonprofit organization, except where the work of the subaward/contract is subject to an Exceptional Circumstances Determination by DOE. In all other subawards/contracts, regardless of tier, for experimental, developmental, demonstration, or research work, the Recipient shall include this clause (suitably modified to identify the parties), or an alternate clause as directed by the contracting officer. The Recipient shall not, as part of the consideration for awarding the subaward/contract, obtain rights in the subrecipient's/contractor's subject inventions.

(2) In the event of a refusal by a prospective subrecipient/contractor to accept such a clause the Recipient:

(i) Shall promptly submit a written notice to the Contracting Officer setting forth the subrecipient/contractor's reasons for such refusal and other pertinent information that may expedite disposition of the matter; and

(ii) Shall not proceed with such subaward/contract without the written authorization of the Contracting Officer.

(3) In the case of subawards/contracts at any tier, DOE, the subrecipient/contractor, and Recipient agree that the mutual obligations of the parties created by this clause constitute a contract between the subrecipient/contractor and DOE with respect to those matters covered by this clause.

(4) The Recipient shall promptly notify the Contracting Officer in writing upon the award of any subaward/contract at any tier containing a patent rights clause by identifying the subrecipient/contractor, the applicable patent rights clause, the work to be performed under the subaward/contract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Recipient shall furnish a copy of such subaward/contract, and, no more frequently than annually, a listing of the subawards/contracts that have been awarded.

(5) The Recipient shall identify all subject inventions of a subrecipient/contractor of which it acquires knowledge in the performance of this agreement and shall notify the Patent Counsel, with a copy to the contracting officer, promptly upon identification of the inventions.

(h) Atomic Energy

(1) No claim for pecuniary award of compensation under the provisions of the Atomic Energy Act of 1954, as amended, shall be asserted with respect to any invention or discovery made or conceived in the course of or under this agreement.

(2) Except as otherwise authorized in writing by the Contracting Officer, the Recipient will obtain patent agreements to effectuate the provisions of subparagraph (h)(1) of this clause from all persons who perform any part of the work under this agreement, except nontechnical personnel, such as clerical employees and manual laborers.

(i) Publication

It is recognized that during the course of the work under this agreement, the Recipient or its employees may from time to time desire to release or publish information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this agreement. In order that public disclosure of such information will not adversely affect the patent interests of DOE or the Recipient, patent approval for release of publication shall be secured from Patent Counsel prior to any such release or publication.

(j) Forfeiture of Rights in Unreported Subject Inventions

(1) The Recipient shall forfeit and assign to the Government, at the request of the Secretary of Energy or designee, all rights in any subject invention which the Recipient fails to report to Patent Counsel within six months after the time the Recipient:

(i) Files or causes to be filed a United States or foreign patent application thereon; or

(ii) Submits the final report required by subparagraph (e)(3) of this clause, whichever is later.

(2) However, the Recipient shall not forfeit rights in a subject invention if, within the time specified in subparagraph (e)(2) of this clause, the Recipient:

(i) Prepares a written decision based upon a review of the record that the invention was neither conceived nor first actually reduced to practice in the course of or under the agreement and delivers the decision to Patent Counsel, with a copy to the Contracting Officer, or

(ii) Contending that the invention is not a subject invention, the Recipient nevertheless discloses the invention and all facts pertinent to this contention to the Patent Counsel, with a copy of the Contracting Officer; or

(iii) Establishes that the failure to disclose did not result from the Recipient's fault or negligence.

(3) Pending written assignment of the patent application and patents on a subject invention determined by the Secretary of Energy or designee to be forfeited (such determination to be a final decision under the Disputes clause of this agreement), the Recipient shall be deemed to hold the invention and the patent applications and patents pertaining thereto in trust for the Government. The forfeiture provision of this paragraph (j) shall be in addition to and shall not supersede other rights and remedies which the Government may have with respect to subject inventions.

(End of clause)

RIGHTS IN DATA—GENERAL

(a) Definitions

*Computer Data Bases,* as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

*Computer software,* as used in this clause, means (i) computer programs which are data comprising a series of instructions, rules, routines or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations and (ii) data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created or compiled. The term does not include computer data bases.

*Data,* as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to administration, such as financial, administrative, cost or pricing, or management information.

*Form, fit, and function data,* as used in this clause, means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, mating, and attachment characteristics, functional characteristics, and performance requirements; except that for computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.

*Limited rights,* as used in this clause, means the rights of the Government in limited rights data as set forth in the Limited Rights Notice of subparagraph (g)(2) if included in this clause.

*Limited rights data,* as used in this clause, means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

*Restricted computer software,* as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software; including minor modifications of such computer software.

*Restricted rights,* as used in this clause, means the rights of the Government in restricted computer software, as set forth in a Restricted Rights Notice of subparagraph (g)(3) if included in this clause, or as otherwise may be provided in a collateral agreement incorporated in and made part of this contract, including minor modifications of such computer software.

*Technical data,* as used in this clause, means data (other than computer software) which are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

*Unlimited rights,* as used in this clause, means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

(b) Allocations of Rights

(1) Except as provided in paragraph (c) of this clause regarding copyright, the Government shall have unlimited rights in—

(i) Data first produced in the performance of this agreement;

(ii) Form, fit, and function data delivered under this agreement;

(iii) Data delivered under this agreement (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this agreement; and

(iv) All other data delivered under this agreement unless provided otherwise for limited rights data or restricted computer software in accordance with paragraph (g) of this clause.

(2) The Recipient shall have the right to—

(i) Use, release to others, reproduce, distribute, or publish any data first produced or

specifically used by the Recipient in the performance of this agreement, unless provided otherwise in paragraph (d) of this clause;

(ii) Protect from unauthorized disclosure and use those data which are limited rights data or restricted computer software to the extent provided in paragraph (g) of this clause;

(iii) Substantiate use of, add or correct limited rights, restricted rights, or copyright notices and to take over appropriate action, in accordance with paragraphs (e) and (f) of this clause; and

(iv) Establish claim to copyright subsisting in data first produced in the performance of this agreement to the extent provided in subparagraph (c)(1) of this clause.

(c) Copyright

(1) Data first produced in the performance of this agreement. Unless provided otherwise in paragraph (d) of this clause, the Recipient may establish, without prior approval of the Contracting Officer, claim to copyright subsisting in data first produced in the performance of this agreement. When claim to copyright is made, the Recipient shall affix the applicable copyright notices of 17 U.S.C. 401 or 402 and acknowledgement of Government sponsorship (including agreement number) to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For such copyrighted data, including computer software, the Recipient grants to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

(2) Data not first produced in the performance of this agreement. The Recipient shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this agreement any data not first produced in the performance of this agreement and which contains the copyright notice of 17 U.S.C. 401 or 402, unless the Recipient identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (c)(1) of this clause; provided, however, that if such data are computer software the Government shall acquire a copyright license as set forth in subparagraph (g)(3) of this clause if included in this agreement or as otherwise may be provided in a collateral agreement incorporated in or made part of this agreement.

(3) Removal of copyright notices. The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph (c), and to include such notices on all reproductions of the data.

(d) Release, Publication and Use of Data

(1) The Recipient shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Recipient in the performance of this agreement, except to the extent such data may be subject to the Federal export control or national security laws or regulations, or unless otherwise provided in this paragraph of this clause or expressly set forth in this agreement.

(2) The Recipient agrees that to the extent it receives or is given access to data necessary for the performance of this award, which contain restrictive markings, the Recipient shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the contracting officer.

(e) Unauthorized Marking of Data

(1) Notwithstanding any other provisions of this agreement concerning inspection or acceptance, if any data delivered under this agreement are marked with the notices specified in subparagraph (g)(2) or (g)(3) of this clause and use of such is not authorized by this clause, or if such data bears any other restrictive or limiting markings not authorized by this agreement, the Contracting Officer may at any time either return the data to the Recipient or cancel or ignore the markings. However, the following procedures shall apply prior to canceling or ignoring the markings.

(i) The Contracting Officer shall make written inquiry to the Recipient affording the Recipient 30 days from receipt of the inquiry to provide written justification to substantiate the propriety of the markings;

(ii) If the Recipient fails to respond or fails to provide written justification to substantiate the propriety of the markings within the 30-day period (or a longer time not exceeding 90 days approved in writing by the Contracting Officer for good cause shown), the Government shall have the right to cancel or ignore the markings at any time after said period and the data will no longer be made subject to any disclosure prohibitions.

(iii) If the Recipient provides written justification to substantiate the propriety of the markings within the period set in subparagraph (e)(1)(i) of this clause, the Contracting Officer shall consider such written justification and determine whether or not the markings are to be cancelled or ignored. If the Contracting Officer determines that the markings are authorized, the Recipient shall be so notified in writing. If the Contracting Officer determines, with concurrence of the head of the contracting activity, that the markings are not authorized, the

Contracting Officer shall furnish the Recipient a written determination, which determination shall become the final agency decision regarding the appropriateness of the markings unless the Recipient files suit in a court of competent jurisdiction within 90 days of receipt of the Contracting Officer's decision. The Government shall continue to abide by the markings under this subparagraph (e)(1)(iii) until final resolution of the matter either by the Contracting Officer's determination becoming final (in which instance the Government shall thereafter have the right to cancel or ignore the markings at any time and the data will no longer be made subject to any disclosure prohibitions), or by final disposition of the matter by court decision if suit is filed.

(2) The time limits in the procedures set forth in subparagraph (e)(1) of this clause may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request thereunder.

(f) Omitted or Incorrect Markings

(1) Data delivered to the Government without either the limited rights or restricted rights notice as authorized by paragraph (g) of this clause, or the copyright notice required by paragraph (c) of this clause, shall be deemed to have been furnished with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of such data. However, to the extent the data has not been disclosed without restriction outside the Government, the Recipient may request, within 6 months (or a longer time approved by the Contracting Officer for good cause shown) after delivery or such data, permission to have notices placed on qualifying data at the Recipient's expense, and the Contracting Officer may agree to do so if the Recipient:

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent;

(iii) Establishes that the use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to the disclosure, use, or reproduction of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The Contracting Officer may also:

(i) Permit correction at the Recipient's expense of incorrect notices if the Recipient identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized, or

(ii) Correct any incorrect notices.

(g) Protection of Limited Rights Data and Restricted Computer Software

When data other than that listed in subparagraphs (b)(1)(i), (ii), and (iii) of this clause are specified to be delivered under this agreement and qualify as either limited rights data or restricted computer software, if the Recipient desires to continue protection of such data, the Recipient shall withhold such data and not furnish them to the Government under this agreement. As a condition to this withholding, the Recipient shall identify the data being withheld and furnish form, fit, and function data in lieu thereof. Limited rights data that are formatted as a computer data base for delivery to the Government are to be treated as limited rights data and not restricted computer software.

(h) Subaward/Contract

The Recipient has the responsibility to obtain from its subrecipients/contractors all data and rights therein necessary to fulfill the Recipient's obligations to the Government under this agreement. If a subrecipient/contractor refuses to accept terms affording the Government such rights, the Recipient shall promptly bring such refusal to the attention of the Contracting Officer and not proceed with the subaward/contract award without further authorization.

(i) Additional Data Requirements

In addition to the data specified elsewhere in this agreement to be delivered, the Contracting Officer may, at anytime during agreement performance or within a period of 3 years after acceptance of all items to be delivered under this agreement, order any data first produced or specifically used in the performance of this agreement. This clause is applicable to all data ordered under this subparagraph. Nothing contained in this subparagraph shall require the Recipient to deliver any data the withholding of which is authorized by this clause, or data which are specifically identified in this agreement as not subject to this clause. When data are to be delivered under this subparagraph, the Recipient will be compensated for converting the data into the prescribed form, for reproduction, and for delivery.

(j) The recipient agrees, except as may be otherwise specified in this award for specific data items listed as not subject to this paragraph, that the Contracting Officer or an authorized representative may, up to three years after acceptance of all items to be delivered under this award, inspect at the Recipient's facility any data withheld pursuant to paragraph (g) of this clause, for purposes of verifying the Recipient's assertion pertaining to the limited rights or restricted rights status of the data or for evaluating work performance. Where the Recipient

whose data are to be inspected demonstrates to the Contracting Officer that there would be a possible conflict of interest if the inspection were made by a particular representative, the Contracting Officer shall designate an alternate inspector.

As prescribed in 600.325(d)(1), the following Alternate I and/or II may be inserted in the clause in the award instrument.

Alternate I:

(g)(2) Notwithstanding subparagraph (g)(1) of this clause, the agreement may identify and specify the delivery of limited rights data, or the Contracting Officer may require by written request the delivery of limited rights data that has been withheld or would otherwise be withholdable. If delivery of such data is so required, the Recipient may affix the following ''Limited Rights Notice'' to the data and the Government will thereafter treat the data, in accordance with such Notice:

LIMITED RIGHTS NOTICE

(a) These data are submitted with limited rights under Government agreement No. _____ (and subaward/contract No. _____, if appropriate). These data may be reproduced and used by the Government with the express limitation that they will not, without written permission of the Recipient, be used for purposes of manufacture nor disclosed outside the Government; except that the Government may disclose these data outside the Government for the following purposes, if any, provided that the Government makes such disclosure subject to prohibition against further use and disclosure:

(1) Use (except for manufacture) by Federal support services contractors within the scope of their contracts;

(2) This ''limited rights data'' may be disclosed for evaluation purposes under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed;

(3) This ''limited rights data'' may be disclosed to other contractors participating in the Government's program of which this Recipient is a part for information or use (except for manufacture) in connection with the work performed under their awards and under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed;

(4) This ''limited rights data'' may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed; and

(5) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such government. This Notice shall be marked on any reproduction of this data in whole or in part.

(b) This Notice shall be marked on any reproduction of these data, in whole or in part.

(End of notice)

Alternate II:

(g)(3)(i) Notwithstanding subparagraph (g)(1) of this clause, the agreement may identify and specify the delivery of restricted computer software, or the Contracting Officer may require by written request the delivery of restricted computer software that has been withheld or would otherwise be withholdable. If delivery of such computer software is so required, the Recipient may affix the following ''Restricted Rights Notice'' to the computer software and the Government will thereafter treat the computer software, subject to paragraphs (e) and (f) of this clause, in accordance with the Notice.

RESTRICTED RIGHTS NOTICE

(a) This computer software is submitted with restricted rights under Government Agreement No. _____ (and subaward/contract _____, if appropriate). It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this Notice or as otherwise expressly stated in the agreement.

(b) This computer software may be—

(1) Used or copies for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(2) Used or copied for use in a backup computer if any computer for which it was acquired is inoperative;

(3) Reproduced for safekeeping (archiv3es) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software are made subject to the same restricted rights;

(5) Disclosed to and reproduced for use by support service Recipients in accordance with subparagraph (b)(1) through (4) of this clause, provided the Government makes such disclosure or reproduction subject to these restricted rights; and

(6) Used or copied for use in or transferred to a replacement computer.

(c) Notwithstanding the foregoing, if this computer software is published copyrighted computer software, it is licensed to the Government, without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause.

(d) Any other rights or limitations regarding the use, duplication, or disclosure of this computer software are to be expressly stated, in, or incorporated in, the agreement.

(e) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of notice)

(ii) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

RESTRICTED RIGHTS NOTICE

Use, reproduction, or disclosure is subject to restrictions set forth in agreement No. _____ (and subaward/contract _____, If appropriate) with _____ (name of Recipient and subrecipient/contractor).

(End of notice)

(iii) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, it will be presumed to be published copyrighted computer software licensed to the government without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause, unless the Recipient includes the following statement with such copyright notice: ''Unpublished—rights reserved under the Copyright Laws of the United States.''

(End of clause)

RIGHTS IN DATA—PROGRAMS COVERED UNDER SPECIAL DATA STATUTES

(a) Definitions

*Computer Data Bases,* as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

*Computer software,* as used in this clause, means (i) computer programs which are data comprising a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations and (ii) data comprising source code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the computer program to be produced, created or compiled. The term does not include computer data bases.

*Data,* as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to administration, such as financial, administrative, cost or pricing or management information.

*Form, fit, and function data,* as used in this clause, means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements except that for computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.

*Limited rights data,* as used in this clause, means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

*Restricted computer software,* as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and confidential or privileged; or is published copyrighted computer software; including modifications of such computer software.

*Protected data,* as used in this clause, means technical data or commercial or financial data first produced in the performance of the award which, if it had been obtained from and first produced by a non-federal party, would be a trade secret or commercial or financial information that is privileged or confidential under the meaning of 5 U.S.C. 552(b)(4) and which data is marked as being protected data by a party to the award.

*Protected rights,* as used in this clause, mean the rights in protected data set forth in the Protected Rights Notice of paragraph (g) of this clause.

*Technical data,* as used in this clause, means that data which are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

*Unlimited rights,* as used in this clause, means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) Allocation of Rights

(1) Except as provided in paragraph (c) of this clause regarding copyright, the Government shall have unlimited rights in—

(i) Data specifically identified in this agreement as data to be delivered without restriction;

(ii) Form, fit, and function data delivered under this agreement;

(iii) Data delivered under this agreement (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this agreement; and

(iv) All other data delivered under this agreement unless provided otherwise for protected data in accordance with paragraph (g) of this clause or for limited rights data or restricted computer software in accordance with paragraph (h) of this clause.

(2) The Recipient shall have the right to—

(i) Protect rights in protected data delivered under this agreement in the manner and to the extent provided in paragraph (g) of this clause;

(ii) Withhold from delivery those data which are limited rights data or restricted computer software to the extent provided in paragraph (h) of this clause;

(iii) Substantiate use of, add, or correct protected rights or copyrights notices and to take other appropriate action, in accordance with paragraph (e) of this clause; and

(iv) Establish claim to copyright subsisting in data first produced in the performance of this agreement to the extent provided in subparagraph (c)(1) of this clause.

(c) Copyright

(1) Data first produced in the performance of this agreement. Except as otherwise specifically provided in this agreement, the Recipient may establish, without the prior approval of the Contracting Officer, claim to copyright subsisting in any data first produced in the performance of this agreement. If claim to copyright is made, the Recipient shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including agreement number) to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For such copyrighted data, including computer software, the Recipient grants to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government, for all such data.

(2) Data not first produced in the performance of this agreement. The Recipient shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this agreement any data that are not first produced in the performance of this agreement and that contain the copyright notice of 17 U.S.C. 401 or 402, unless the Recipient identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (c)(1) of this clause; provided, however, that if such data are computer software, the Government shall acquire a copyright license as set forth in subparagraph (h)(3) of this clause if included in this agreement or as otherwise may be provided in a collateral agreement incorporated or made a part of this agreement.

(3) Removal of copyright notices. The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph (c), and to include such notices on all reproductions of the data.

(d) Release, Publication and Use of Data

(1) The Receipt shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Recipient in the performance of this contract, except to the extent such data may be subject to the Federal export control or national security laws or regulations, or unless otherwise provided in this paragraph of this clause or expressly set forth in this contract.

(2) The Recipient agrees that to the extent it receives or is given access to data necessary for the performance of this agreement which contain restrictive markings, the Recipient shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the Contracting Officer.

(e) Unauthorized Marking of Data

(1) Notwithstanding any other provisions of this agreement concerning inspection or acceptance, if any data delivered under this agreement are marked with the notices specified in subparagraph (g)(2) or (g)(3) of this clause and use of such is not authorized by this clause, or if such data bears any other restrictive or limiting markings not authorized by this agreement, the Contracting Officer may at any time either return the data to the Recipient or cancel or ignore the markings. However, the following procedures shall apply prior to canceling or ignoring the markings.

(i) The Contracting Officer shall make written inquiry to the Recipient affording the Recipient 30 days from receipt of the inquiry to provide written justification to substantiate the propriety of the markings;

(ii) If the Recipient fails to respond or fails to provide written justification to substantiate the propriety of the markings within the 30-day period (or a longer time not exceeding 90 days approved in writing by the Contracting Officer for good cause shown), the Government shall have the right to cancel or ignore the markings at any time after said period and the data will no longer be made subject to any disclosure prohibitions.

(iii) If the Recipient provides written justification to substantiate the propriety of the markings within the period set in subdivision (e)(1)(i) of this clause, the Contracting Officer shall consider such written justification and determine whether or not the markings are to be cancelled or ignored. If the Contracting Officer determines that

the markings are authorized, the Recipient shall be so notified in writing. If the Contracting Officer determines, with concurrence of the head of the contracting activity, that the markings are not authorized, the Contracting Officer shall furnish the Recipient a written determination, which determination shall become the final agency decision regarding the appropriateness of the markings unless the Recipient files suit in a court of competent jurisdiction within 90 days of receipt of the Contracting Officer's decision. The Government shall continue to abide by the markings under this subdivision (e)(1)(iii) until final resolution of the matter either by the Contracting Officer's determination become final (in which instance the Government shall thereafter have the right to cancel or ignore the markings at any time and the data will no longer be made subject to any disclosure prohibitions), or by final disposition of the matter by court decision if suit is filed.

(2) The time limits in the procedures set forth in subparagraph (e)(1) of this clause may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request thereunder.

(f) Omitted or Incorrect Markings

(1) Data delivered to the Government without either the limited rights or restricted rights notice as authorized by paragraph (*g*) of this clause, or the copyright notice required by paragraph (c) of this clause, shall be deemed to have been furnished with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of such data. However, to the extent the data has not been disclosed without restriction outside the Government, the Recipient may request, within 6 months (or a longer time approved by the Contracting Officer for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Recipient's expense, and the Contracting Officer may agree to do so if the Recipient—

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent;

(iii) Establishes that the use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to the disclosure, use, or reproduction of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The Contracting Officer may also:

(i) Permit correction at the Recipient's expense of incorrect notices if the Recipient identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized; or

(ii) Correct any incorrect notices.

(g) Rights to Protected Data

(1) The Recipient may, with the concurrence of DOE, claim and mark as protected data, any data first produced in the performance of this award that would have been treated as a trade secret if developed at private expense. Any such claimed ''protected data'' will be clearly marked with the following Protected Rights Notice, and will be treated in accordance with such Notice, subject to the provisions of paragraphs (e) and (f) of this clause.

PROTECTED RIGHTS NOTICE

These protected data were produced under agreement no. _____ with the U.S. Department of Energy and may not be published, disseminated, or disclosed to others outside the Government until (NOTE:) The period of protection of such data is fully negotiable, but cannot exceed the applicable statutorily authorized maximum), unless express written authorization is obtained from the recipient. Upon expiration of the period of protection set forth in this Notice, the Government shall have unlimited rights in this data. This Notice shall be marked on any reproduction of this data, in whole or in part.

(End of notice)

(2) Any such marked Protected Data may be disclosed under obligations of confidentiality for the following purposes:

(a) For evaluation purposes under the restriction that the ''Protected Data'' be retained in confidence and not be further disclosed; or

(b) To subcontractors or other team members performing work under the Government's (insert name of program or other applicable activity) program of which this award is a part, for information or use in connection with the work performed under their activity, and under the restriction that the Protected Data be retained in confidence and not be further disclosed.

(3) The obligations of confidentiality and restrictions on publication and dissemination shall end for any Protected Data.

(a) At the end of the protected period;

(b) If the data becomes publicly known or available from other sources without a breach of the obligation of confidentiality with respect to the Protected Data;

(c) If the same data is independently developed by someone who did not have access to the Protected Data and such data is made available without obligations of confidentiality; or

(d) If the Recipient disseminates or authorizes another to disseminate such data without obligations of confidentiality.

(4) However, the Recipient agrees that the following types of data are not considered to be protected and shall be provided to the Government when required by this award

without any claim that the data are Protected Data. The parties agree that notwithstanding the following lists of types of data, nothing precludes the Government from seeking delivery of additional data in accordance with this award, or from making publicly available additional non-protected data, nor does the following list constitute any admission by the Government that technical data not on the list is Protected Data. (NOTE: It is expected that this paragraph will specify certain types of mutually agreed upon data that will be available to the public and will not be asserted by the recipient/contractor as limited rights or protected data).

(5) The Government's sole obligation with respect to any protected data shall be as set forth in this paragraph (g).

(h) Protection of Limited Rights Data

When data other than that listed in subparagraphs (b)(1)(i), (ii), and (iii) of this clause are specified to be delivered under this agreement and such data qualify as either limited rights data or restricted computer software, the Recipient, if the Recipient desires to continue protection of such data, shall withhold such data and not furnish them to the Government under this agreement. As a condition to this withholding the Recipient shall identify the data being withheld and furnish form, fit, and function data in lieu thereof.

(i) Subaward/Contract

The Recipient has the responsibility to obtain from its subrecipients/contractors all data and rights therein necessary to fulfill the Recipient's obligations to the Government under this agreement. If a subrecipient/contractor refuses to accept terms affording the Government such rights, the Recipient shall promptly bring such refusal to the attention of the Contracting Officer and not proceed with subaward/contract award without further authorization.

(j) Additional Data Requirements

In addition to the data specified elsewhere in this agreement to be delivered, the Contracting Officer may, at anytime during agreement performance or within a period of 3 years after acceptance of all items to be delivered under this agreement, order any data first produced or specifically used in the performance of this agreement. This clause is applicable to all data ordered under this subparagraph. Nothing contained in this subparagraph shall require the Recipient to deliver any data the withholding of which is authorized by this clause or data which are specifically identified in this agreement as not subject to this clause. When data are to be delivered under this subparagraph, the Recipient will be compensated for converting the data into the prescribed form, for reproduction, and for delivery.

(k) The Recipient agrees, except as may be otherwise specified in this agreement for specific data items listed as not subject to this paragraph, that the Contracting Officer or an authorized representative may, up to three years after acceptance of all items to be delivered under this contract, inspect at the Recipient's facility any data withheld pursuant to paragraph (h) of this clause, for purposes of verifying the Recipient's assertion pertaining to the limited rights or restricted rights status of the data or for evaluating work performance. Where the Recipient whose data are to be inspected demonstrates to the Contracting Officer that there would be a possible conflict of interest if the inspection were made by a particular representative, the Contracting Officer shall designate an alternate inspector.

As prescribed in 600.325(e)(2), the following Alternate I and/or II may be inserted in the clause in the award instrument.

Alternate I:

(h)(2) Notwithstanding subparagraph (h)(1) of this clause, the agreement may identify and specify the delivery of limited rights data, or the Contracting Officer may require by written request the delivery of limited rights data that has been withheld or would otherwise be withholdable. If delivery of such data is so required, the Recipient may affix the following ''Limited Rights Notice'' to the data and the Government will thereafter treat the data, in accordance with such Notice:

LIMITED RIGHTS NOTICE

(a) These data are submitted with limited rights under Government agreement No. _____ (and subaward/contract No. _____, if appropriate). These data may be reproduced and used by the Government with the express limitation that they will not, without written permission of the Recipient, be used for purposes of manufacture nor disclosed outside the Government; except that the Government may disclose these data outside the Government for the following purposes, if any, provided that the Government makes such disclosure subject to prohibition against further use and disclosure:

(1) Use (except for manufacture) by Federal support services contractors within the scope of their contracts;

(2) This ''limited rights data'' may be disclosed for evaluation purposes under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed;

(3) This ''limited rights data'' may be disclosed to other contractors participating in the Government's program of which this Recipient is a part for information or use (except for manufacture) in connection with the

work performed under their awards and under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed;

(4) This ''limited rights data'' may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed; and

(5) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such government. This Notice shall be marked on any reproduction of this data in whole or in part.

(b) This Notice shall be marked on any reproduction of these data, in whole or in part.

(End of notice)

Alternate II:

(h)(3)(i) Notwithstanding subparagraph (h)(1) of this clause, the agreement may identify and specify the delivery of restricted computer software, or the Contracting Officer may require by written request the delivery of restricted computer software that has been withheld or would otherwise be withholdable. If delivery of such computer software is so required, the Recipient may affix the following ''Restricted Rights Notice'' to the computer software and the Government will thereafter treat the computer software, subject to paragraphs (d) and (e) of this clause, in accordance with the Notice:

RESTRICTED RIGHTS NOTICE

(a) This computer software is submitted with restricted rights under Government Agreement No. _____ (and subaward/contract _____, if appropriate). It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (c) of this Notice or as otherwise expressly stated in the agreement.

(b) This computer software may be—

(1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(2) Used or copies for use in a backup computer if any computer for which it was acquired is inoperative;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software are made subject to the same restricted rights;

(5) Disclosed to and reproduced for use by Federal support service Contractors in accordance with subparagraphs (b)(1) through (4) of this clause, provided the Government makes such disclosure or reproduction subject to these restricted rights; and

(6) Used or copies for use in or transferred to a replacement computer.

(c) Notwithstanding the foregoing, if this computer software is published copyrighted computer software, it is licensed to the Government, without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause.

(d) Any other rights or limitations regarding the use, duplication, or disclosure of this computer software are to be expressly stated in, or incorporated in, the agreement.

(e) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of notice)

(ii) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

RESTRICTED RIGHTS NOTICE

Use, reproduction, or disclosure is subject to restrictions set forth in Agreement No. _____ (and subaward/contract _____, if appropriate) with _____ (name of Recipient and subrecipient/contractor).

(End of notice)

(iii) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, it will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause, unless the Recipient includes the following statement with such copyright notice: ''Unpublished—rights reserved under the Copyright Laws of the United States.''

(End of clause)

## APPENDIX B TO SUBPART D OF PART 600—CONTRACT PROVISIONS

All contracts awarded by a recipient, including those for amounts less than the simplified acquisition threshold, must contain the following provisions as applicable:

1. *Equal Employment Opportunity*—All contracts must contain a provision requiring compliance with E.O. 11246 (3 CFR, 1964–1965 Comp., p. 339), ''Equal Employment Opportunity,'' as amended by E.O. 11375 (3 CFR, 1966–1970 Comp., p. 684), ''Amending Executive Order 11246 Relating to Equal Employment Opportunity,'' and as supplemented by regulations at 41 CFR chapter 60, ''Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.''

2. *Copeland ''Anti-Kickback'' Act (18 U.S.C. 874 and 40 U.S.C. 276c)*—All contracts and subawards in excess of $2,000 for construction or repair awarded by recipients and subrecipients must include a provision for compliance with the Copeland ''Anti-Kickback'' Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, ''Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States''). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient must report all suspected or reported violations to the responsible DOE contracting officer.

3. *Contact Work Hours and Safety Standards Act (40 U.S.C. 327–333)*—Where applicable, all contracts awarded by recipients in excess of $100,000 for construction and other purposes that involve the employment of mechanics or laborers must include a provision for compliance with Sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333), as supplemented by Department of Labor regulations (29 CFR part 5). Under Section 102 of the Act, each contractor is required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic is required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

4. *Rights to Inventions and Data Made Under a Contract or Agreement*—Contracts or agreements for the performance of experimental, development, or research work must provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 10 CFR 600.325 and Appendix A—Patent and Data Rights to Subpart D, Part 600.

5. *Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), as amended*—Contracts and subawards of amounts in excess of $100,000 must contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (41 U.S.C. 7401 *et seq.*) and the Federal Water Pollution control act as amended (33 U.S.C. 1251 *et seq.*). Violations must be reported to the responsible DOE contracting officer and the Regional Office of the Environmental Protection Agency (EPA).

6. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)*—Contractors who apply or bid for an award of $100,000 or more must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C.1352. Each tier must also disclose any lobbing with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

7. *Debarment and Suspension (E.O.s 12549 and 12689*—Contract awards that exceed the simplified acquisition threshold and certain other contract awards must not be made to parties listed on nonprocurement portion of the General Services Administration's Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs in accordance with E.O.s 12549 (3 CFR, 1986 Comp., p. 189) and 12689 (3 CFR, 1989 Comp., p. 235),''Debarment and Suspension.'' This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than E.O. 12549. Contractors with awards that exceed the small purchase threshold must provide the required certification regarding its exclusion status and that of its principals.

8. *Davis-Bacon Act (40 U.S.C. 276a)*—As a general rule, it is unlikely that the Davis-Bacon Act, which among other things requires payment of prevailing wages on projects for the construction of public works, would apply to financial assistance awards. However, the presence of certain factors (*e.g.*, requirement of particular program statutes; title to a construction facility resting in the Government) might necessitate a closer analysis of the award, to determine if the Davis-Bacon Act would apply in the particular factual situation presented.

## Subpart E [Reserved]

## Subpart F—Eligibility Determination for Certain Financial Assistance Programs—General Statement of Policy

SOURCE: 60 FR 65514, Dec. 20, 1995, unless otherwise noted.

### § 600.500 Purpose and scope.

This subpart implements section 2306 of the Energy Policy Act of 1992, 42 U.S.C. 13525, and sets forth a general statement of policy, including procedures and interpretations, for the guidance of implementing DOE officials in making mandatory pre-award determinations of eligibility for financial assistance under Titles XX through XXIII of that Act.

### § 600.501 Definitions.

The definitions in § 600.3 of this part, including the definition of the term ''financial assistance,'' are applicable to this subpart. In addition, as used in this subpart:

*Act* means the Energy Policy Act of 1992.

*Company* means any business entity other than an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. § 501 (c)(3)).

*Covered program* means a program under Titles XX through XXIII of the Act. (A list of covered programs, updated periodically as appropriate, is maintained and published by the Department of Energy.)

*Parent company* means a company that:

(1) Exercises ultimate ownership of the applicant company either directly, by ownership of a majority of that company's voting securities, or indirectly, by control over a majority of that company's voting securities through one or more intermediate subsidiary companies or otherwise, and

(2) Is not itself subject to the ultimate ownership control of another company.

*United States* means the several States, the District of Columbia, and all commonwealths, territories, and possessions of the United States.

*United States-owned company* means:

(1) A company that has majority ownership by individuals who are citizens of the United States, or

(2) A company organized under the laws of a State that either has no parent company or has a parent company organized under the laws of a State.

*Voting security* has the meaning given the term in the Public Utility Holding Company Act (15 U.S.C. 15b(17)).

### § 600.502 What must DOE determine.

A company shall be eligible to receive an award of financial assistance under a covered program only if DOE finds that—

(a) Consistent with § 600.503, the company's participation in a covered program would be in the economic interest of the United States; and

(b) The company is either—

(1) A United States-owned company; or

(2) Incorporated or organized under the laws of any State and has a parent company which is incorporated or organized under the laws of a country which—

(i) Affords to the United States-owned companies opportunities, comparable to those afforded to any other company, to participate in any joint venture similar to those authorized under the Act;

(ii) Affords to United States-owned companies local investment opportunities comparable to those afforded to any other company; and

(iii) Affords adequate and effective protection for the intellectual property rights of United States-owned companies.

### § 600.503 Determining the economic interest of the United States.

In determining whether participation of an applicant company in a covered program would be in the economic interest of the United States under § 600.502(a), DOE may consider any evidence showing that a financial assistance award would be in the economic interest of the United States including, but not limited to—

(a) Investments by the applicant company and its affiliates in the United States in research, development, and manufacturing (including, for example, the manufacture of major

components or subassemblies in the United States);

(b) Significant contributions to employment in the United States by the applicant company and its affiliates; and

(c) An agreement by the applicant company, with respect to any technology arising from the financial assistance being sought—

(1) To promote the manufacture within the United States of products resulting from that technology (taking into account the goals of promoting the competitiveness of United States industry); and

(2) To procure parts and materials from competitive suppliers.

### § 600.504 Information an applicant must submit.

(a) Any applicant for financial assistance under a covered program shall submit with the application for financial assistance, or at such later time as may be specified by DOE, evidence for DOE to consider in making findings required under § 600.502(a) and findings concerning ownership status under § 600.502(b).

(b) If an applicant for financial assistance is submitting evidence relating to future undertakings, such as an agreement under § 600.503(c) to promote manufacture in the United States of products resulting from a technology developed with financial assistance or to procure parts and materials from competitive suppliers, the applicant shall submit a representation affirming acceptance of these undertakings. The applicant should also briefly describe its plans, if any, for any manufacturing of products arising from the program-supported research and development, including the location where such manufacturing is expected to occur.

(c) If an applicant for financial assistance is claiming to be a United States-owned company, the applicant must submit a representation affirming that it falls within the definition of that term provided in § 600.501.

(d) DOE may require submission of additional information deemed necessary to make any portion of the determination required by § 600.502.

### § 600.505 Other information DOE may consider.

In making the determination under § 600.502(b)(2), DOE may—

(a) consider information on the relevant international and domestic law obligations of the country of incorporation of the parent company of an applicant;

(b) consider information relating to the policies and practices of the country of incorporation of the parent company of an applicant with respect to:

(1) The eligibility criteria for, and the experience of United States-owned company participation in, energy-related research and development programs;

(2) Local investment opportunities afforded to United States-owned companies; and

(3) Protection of intellectual property rights of United States-owned companies;

(c) Seek and consider advice from other federal agencies, as appropriate; and

(d) Consider any publicly available information in addition to the information provided by the applicant.

## APPENDIX A TO PART 600—GENERALLY APPLICABLE REQUIREMENTS

*Socioeconomic Policy Requirements*

Nondiscrimination in Federally Assisted Programs, 10 CFR part 1040 (45 FR 40514, June 13, 1980), as proposed to be amended by 46 FR 49546 (October 6, 1981).

Nondiscrimination Provisions in Federally Assisted Construction Contracts, Part III of Executive Order 11246 (September 24, 1965), 3 CFR 1964—65 Comp., p. 345.

Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, as amended (42 U.S.C. 4581).

Drug Abuse Office and Treatment Act of 1972, as amended (21 U.S.C. 1174).

Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 *et seq.*).

National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), 40 CFR part 1500, as implemented by (45 FR 20694, March 28, 1980).

Sec. 306, Clean Air Act, as amended (42 U.S.C. 7606c).

Sec. 508, Federal Water Pollution Control Act of 1972 (33 U.S.C. 1251 *et seq.*); Executive Order 11738, September 12, 1973.

Title XIV, Public Health Service Act, as amended (42 U.S.C. 300f—*et seq.*).

Sec. 102(a), Flood Disaster Protection Act of 1973 (Pub. L. 93–234, 87 Stat. 975).

10 CFR part 1022, ''Protection of Wetlands and Floodplains.''

Uniform Relocation Assistance and Land Acquisition Policies Act of 1970 (42 U.S.C. 4601 *et seq.*).

Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451 *et seq.*) (15 CFR part 930).

Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*).

Sec. 106, National Historic Preservation Act of 1966, as amended (16 U.S.C. 470f); Executive Order 11593, ''Protection and Enhancement of the Cultural Environment,'' May 13, 1971, 3 CFR 1971 Comp., p. 154; Archaeological and Historic Preservation Act of 1966 (16 U.S.C. 469 *et seq.*); Protection of Historic and Cultural Properties, 36 CFR part 800.

Wild and Scenic Rivers Act of 1968, as amended (16 U.S.C. 1271 *et seq.*).

Protection of Human Subjects, 10 CFR part 745.

Federal Laboratory Animal Welfare Act (7 U.S.C. 2131 *et seq.*) (9 CFR parts 1, 2, and 3).

Lead-Based Paint Prohibition (42 U.S.C. 4831(b)).

Sec. 7(b), Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)).

Cargo Preference Act of 1954 (46 U.S.C. 1241(b)) (46 CFR §381.7).

International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 1517).

Executive Order 12138, ''Creating a National Women's Business Enterprise Policy and Prescribing Arrangements for Developing, Coordinating, and Implementing a National Program for Women's Business Enterprise,'' (May 18, 1979) 3 CFR 1979 Comp., p. 393.

Sec. 403(b), Power Plant and Industrial Fuel Use Act of 1978, (42 U.S.C. 8373(b)); Executive Order 12185 (December 17, 1979, 3 CFR 1979 Comp., p. 474).

*Administrative and Fiscal Policy Requirements*

The Hatch Act (5 U.S.C. 1501–1508).

Federal Reports Act, as amended by the Paperwork Reduction Act of 1980, Pub. L. 96–511 (44 U.S.C. 3501 *et seq.*).

OMB Circular A–111, Jointly Funded Assistance to State and Local Governments and Nonprofit Organizations—Policies and Procedures.

Federal Claims Collection Act of 1966, Pub. L. 89–508, 89 Stat. 309 (31 U.S.C. 951 *et seq.*).

OMB Circular A–88, Coordinating Indirect Cost Rates and Audit at Educational Institutions.

OMB Circular A–73, Audit of Federal Operations and Programs.

Single Audit Act of 1984, Pub. L. 98–502.

OMB Circular A–128, Audits of State and Local Governments.

[47 FR 44108, Oct. 5, 1982, as amended at 50 FR 42361, Oct. 18, 1985; 51 FR 4297, Feb. 4, 1986]

### APPENDIX B TO PART 600—AUDIT REPORT DISTRIBUTEES

*Distributee:* Manager, Eastern Region, Office of Inspector General, U.S. Department of Energy, P.O. Box 1328, Oak Ridge, Tennessee 37831–1328.

*For recipients in:* Alabama, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Vermont, Virgin Islands, Virginia, West Virginia, Wisconsin.

*Distributee:* Manager, Western Region, Office of Inspector General, U.S. Department of Energy, P.O. Box 5400, Albuquerque, New Mexico 87115.

*For recipients in:* Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wyoming.

[50 FR 42361, Oct. 18, 1985; 51 FR 4297, Feb. 4, 1986]

# PART 601—NEW RESTRICTIONS ON LOBBYING

## Subpart A—General

Sec.
601.100 Conditions on use of funds.
601.105 Definitions.
601.110 Certification and disclosure.

## Subpart B—Activities by Own Employees

601.200 Agency and legislative liaison.
601.205 Professional and technical services.
601.210 Reporting.

## Subpart C—Activities by Other Than Own Employees

601.300 Professional and technical services.

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APPENDIX A TO PART 601—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 601—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: 31 U.S.C. 1352; 42 U.S.C. 7254 and 7256; 31 U.S.C. 6301–6308; 28 U.S.C. 2461 note.

SOURCE: 55 FR 6737, 6746, Feb. 26, 1990, unless otherwise noted.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, Dec. 20, 1989.

## Subpart A—General

### § 601.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative ageement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

### § 601.105 Definitions.

For purposes of this part:

(a) *Agency*, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any

other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to perfessional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for

receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

### § 601.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000,

unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement,

shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or

commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either subpart B or C.

## Subpart B—Activities by Own Employees

### § 601.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 601.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95–507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

### § 601.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 601.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, ''professional and technical services'' shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or

technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

### § 601.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

## Subpart C—Activities by Other Than Own Employees

### § 601.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 601.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § 601.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, ''professional and technical services'' shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

## Subpart D—Penalties and Enforcement

### § 601.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $19,246 and not more than $192,459 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B to this part) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $19,246 and not more than $192,459 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $19,246, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $19,246 and $192,459, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

[55 FR 6737, 6746, Feb. 26, 1990, as amended at 62 FR 46183, Sept. 2, 1997; 74 FR 66032, Dec. 14, 2009; 79 FR 19, Jan. 2, 2014; 81 FR 41794, June 28, 2016; 81 FR 96352, Dec. 30, 2016]

### § 601.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

### § 601.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

## Subpart E—Exemptions

### § 601.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

## Subpart F—Agency Reports

### § 601.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to

the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

### § 601.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

## APPENDIX A TO PART 601—CERTIFICATION REGARDING LOBBYING

*Certification for Contracts, Grants, Loans, and Cooperative Agreements*

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the

extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $19,246 and not more than $192,459 for each such failure.

*Statement for Loan Guarantees and Loan Insurance*

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $19,246 and not more than $192,459 for each such failure.

[55 FR 6737, 6746, Feb. 26, 1990, as amended at 62 FR 46184, Sept. 2, 1997; 74 FR 66032, Dec. 14, 2009; 79 FR 19, Jan. 2, 2014; 81 FR 41794, June 28, 2016; 81 FR 96352, Dec. 30, 2016]

APPENDIX B TO PART 601—DISCLOSURE FORM TO REPORT LOBBYING

## DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

**1. Type of Federal Action:**
☐ a. contract
b. grant
c. cooperative agreement
d. loan
e. loan guarantee
f. loan insurance

**2. Status of Federal Action:**
☐ a. bid/offer/application
b. initial award
c. post-award

**3. Report Type:**
☐ a. initial filing
b. material change
**For Material Change Only:**
year _____ quarter _____
date of last report _____

**4. Name and Address of Reporting Entity:**
☐ Prime ☐ Subawardee
Tier _____, *if known*:

**Congressional District,** *if known*:

**5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:**

**Congressional District,** *if known*:

**6. Federal Department/Agency:**

**7. Federal Program Name/Description:**

CFDA Number, *if applicable*: _____

**8. Federal Action Number,** *if known*:

**9. Award Amount,** *if known*:
$

**10. a. Name and Address of Lobbying Entity**
*(if individual, last name, first name, MI)*:

**b. Individuals Performing Services** *(including address if different from No. 10a)*
*(last name, first name, MI)*:

*(attach Continuation Sheet(s) SF-LLL-A, if necessary)*

**11. Amount of Payment** *(check all that apply)*:
$ _____ ☐ actual ☐ planned

**12. Form of Payment** *(check all that apply)*:
☐ a. cash
☐ b. in-kind; specify: nature _____
value _____

**13. Type of Payment** *(check all that apply)*:
☐ a. retainer
☐ b. one-time fee
☐ c. commission
☐ d. contingent fee
☐ e. deferred
☐ f. other; specify: _____

**14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:**

*(attach Continuation Sheet(s) SF-LLL-A, if necessary)*

**15. Continuation Sheet(s) SF-LLL-A attached:** ☐ Yes ☐ No

**16.** Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

**Signature:** _____
**Print Name:** _____
**Title:** _____
**Telephone No.:** _____ **Date:** _____

**Federal Use Only:**

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Standard Form - LLL

## DISCLOSURE OF LOBBYING ACTIVITIES
### CONTINUATION SHEET

Approved by OMB
0348-0046

**Reporting Entity:** _____ **Page** _____ **of** _____

**Authorized for Local Reproduction**
**Standard Form - LLL-A**

**INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES**

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 mintues per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

# PART 602—EPIDEMIOLOGY AND OTHER HEALTH STUDIES FINANCIAL ASSISTANCE PROGRAM

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APPENDIX A TO PART 602—SCHEDULE OF RENEWAL APPLICATIONS AND REPORTS

AUTHORITY: 42 U.S.C. 2051; 42 U.S.C. 5817; 42 U.S.C. 5901–5920; 42 U.S.C. 7254 and 7256; 31 U.S.C. 6301–6308.

SOURCE: 60 FR 5841, Jan. 31, 1995, unless otherwise noted.

### § 602.1 Purpose and scope.

This part sets forth the policies and procedures applicable to the award and administration of grants and cooperative agreements by DOE (through the Office of Environment, Health Safety and Security or any office to which its functions are subsequently redelegated) for health related research, education/training, conferences, communication, and related activities.

[60 FR 5841, Jan. 31, 1995, as amended at 71 FR 68729, Nov. 28, 2006; 79 FR 76046, Dec. 19, 2014; 80 FR 5007, Jan. 30, 2015]

### § 602.2 Applicability.

(a) This part applies to all grants and cooperative agreements awarded after the effective date of this rule.

(b) Except as otherwise provided by this part, the award and administration of grants and cooperative agreements shall be governed by 2 CFR part 200 as amended by 2 CFR part 910 (DOE Financial Assistance Regulation).

[60 FR 5841, Jan. 31, 1995, as amended at 79 FR 76046, Dec. 19, 2014]

### § 602.3 Definitions.

In addition to the definitions provided in 2 CFR part 200 and 2 CFR part 910, the following definitions are provided for purposes of this part:

*Conference and communication activities* means scientific or technical conferences, symposia, workshops, seminars, public meetings, publications, video or slide shows, and other presentations for the purpose of communicating or exchanging information or views pertinent to DOE.

*DOE* means the United States Department of Energy.

*Education/Training* means support for education or related activities for an individual or organization that will enhance educational levels and skills, in particular, scientific or technical areas of interest to DOE.

*Epidemiology and Other Health Studies* means research pertaining to potential health effects resulting from DOE or predecessor agency operations or from any aspect of energy production, transmission, or use (including electromagnetic fields) in the United States and abroad. Related systems or activities to enhance these areas, as well as other program areas that may be described by notice published in the FEDERAL REGISTER, are also included.

*Principal investigator* means the scientist or other individual designated by the recipient to direct the project.

*Research* means basic and applied research and that part of development not related to the development of specific systems or products. The primary aim of research is scientific study and experimentation directed toward advancing the state of the art or increasing knowledge or understanding rather than focusing on a specific system or product.

[60 FR 5841, Jan. 31, 1995, as amended at 79 FR 76046, Dec. 19, 2014]

### § 602.4 Exceptions.

(a) Single-case exceptions from this part may be authorized in writing by the Associate Under Secretary for Environment, Health, Safety and Security, the Head of the Contracting Activity, or their designees, upon the written request of DOE staff, an applicant for award, or a recipient. A request from an applicant or a recipient must be submitted to or through the cognizant contracting officer.

(b) Whenever a proposed deviation from this part would be a deviation from 2 CFR part 200 as amended by 2 CFR part 910, the deviation must also be authorized in accordance with the procedures prescribed in that part.

[60 FR 5841, Jan. 31, 1995, as amended at 71 FR 68729, Nov. 28, 2006; 79 FR 76046, Dec. 19, 2014; 80 FR 5007, Jan. 30, 2015]

### § 602.5 Epidemiology and Other Health Studies Financial Assistance Program.

(a) DOE may issue under this part awards for research, education/training, conferences, communication, and related activities in the Office of Environment, Health, Safety and Security program areas set forth in paragraph (b) of this section.

(b) The program areas are:

(1) Health experience of DOE and DOE contractor workers;

(2) Health experience of populations living near DOE facilities;

(3) Workers exposed to toxic substances, such as beryllium;

(4) Use of biomarkers to recognize exposure to toxic substances;

(5) Epidemiology and other health studies relating to energy production, transmission, and use (including electromagnetic fields) in the United States and abroad;

(6) Compilation, documentation, management, use, and analysis of data for the DOE Comprehensive Epidemiologic Data Resource; and

(7) Other systems or activities enhancing these areas, as well as other program areas as may be described by notice published in the FEDERAL REGISTER.

[60 FR 5841, Jan. 31, 1995, as amended at 71 FR 68729, Nov. 28, 2006; 79 FR 76046, Dec. 19, 2014; 80 FR 5007, Jan. 30, 2015]

### § 602.6 Eligibility.

Any individual or entity other than a Federal agency is eligible for a grant or cooperative agreement. An unaffiliated individual is also eligible for a grant or cooperative agreement.

### § 602.7 Solicitation.

(a) The Catalog of Federal Domestic Assistance number for 10 CFR part 602 is 81.108 and its solicitation control number is EOHSFAP 10 CFR part 602.

(b) An application for a new or renewal award under this solicitation may be submitted at any time to DOE at the address specified in paragraph (c) of this section. New or renewal applications shall receive consideration for funding generally within 6 months but, in any event, no later than 12 months from the date of receipt by DOE.

(c) Except as otherwise provided in a notice of availability, applicants may obtain application forms, described in 602.8(b) of this part, and additional information from the Office of Domestic and International Health Studies, AU–13, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, 301–903–2340, and shall submit applications to the same address.

(d) DOE will publish program notices in the FEDERAL REGISTER regarding the availability of epidemiology and other health studies financial assistance. DOE may also use other means of communication, as appropriate, such as the publication of notices of availability in trade and professional journals and news media.

(1) Each notice of availability shall cite this part and shall include:

(i) The Catalog of Federal Domestic Assistance number and solicitation control number of the program;

(ii) The amount of money available or estimated to be available for award;

(iii) The name of the responsible DOE program official to contact for additional information and an address where application forms may be obtained;

(iv) The address for submission of applications; and

(v) Any evaluation criteria in addition to those set forth in § 602.9 of this part.

(2) The notice of availability may also include any other relevant information helpful to applicants such as:

(i) Program objectives;

(ii) A project agenda or potential area of project initiatives;

(iii) Problem areas requiring additional effort; and

(iv) Any other information that identifies areas in which grants or cooperative agreements may be made.

(e) DOE is under no obligation to pay for any costs associated with the preparation or submission of applications.

(f) DOE reserves the right to fund, in whole or in part, any, all, or none of the applications submitted.

(g) To be considered for a renewal award under this part, an incumbent recipient shall submit a continuation

or renewal application, as provided in § 602.8 (c) and (h) of this part.

[60 FR 5841, Jan. 31, 1995, as amended at 71 FR 68729, Nov. 28, 2006; 80 FR 5007, Jan. 30, 2015]

### § 602.8 Application requirements.

(a) An original and seven copies of the application for initial support must be submitted, except that State and local governments and Indian tribal governments shall not be required to submit more than the original and two copies of the application.

(b) Each new or renewal application in response to this part must include:

(1) An application face page, DOE Form 4650.2 (approved by OMB under OMB Control No. 1910–1400). However, the face page of an application submitted by a State or local government or an Indian tribal government shall be the face page of Standard Form 424 (approved by OMB under OMB Control Number 0348–0043).

(2) A detailed description of the proposed project, including its objectives, its relationship to DOE's program, its impact on the environment, if any, and the applicant's plan for carrying it out.

(3) Detailed information about the background and experience of the recipients of funds or, as appropriate, the principal investigator(s) (including references to publications), the facilities and experience of the applicant, and the cost-sharing arrangements, if any.

(4) A detailed budget for the entire proposed period of support with written justification sufficient to evaluate the itemized list of costs provided on the entire project. Applicants should note the following when preparing budgets:

(i) Numerical details on items of cost provided by State and local government and Indian tribal government applicants shall be on Standard Form 424A, ''Budget Information for Non-Construction Programs'' (approved under OMB Control No. 0348–0044). All other applicants shall use budget forms ERF 4620.1 (approved by OMB under Control No. 1910–1400).

(ii) DOE may, subsequent to receipt of an application, request additional budgetary information from an applicant when necessary for clarification or make informed pre-award determinations under 2 CFR part 200 as amended by 2 CFR part 910.

(5) Any pre-award assurances required pursuant to 10 CFR parts 600 and 602.

(c) Applications for a renewal award must be submitted with an original and seven copies, except that State and local governments and Indian tribal government applicants are required to submit only an original and two copies (Approved by OMB under OMB Control Numbers 0348–00050348–0009)

(d) The application must be signed by an official who is authorized to act for the applicant organization and to commit the applicant to comply with the terms and conditions of the award, if one is issued, or if unaffiliated, by the individual applicant. (See § 602.17(a)(1) for requirements on continuation awards.)

(e) DOE may return an application that does not include all information and documentation required by statute, this part, 10 CFR part 600, or the notice of availability, when the nature of the omission precludes review of the application.

(f) During the review of a complete application, DOE may request the submission of additional information only if the information is essential to evaluate the application.

(g) In addition to including the information described in paragraphs (b), (c), and (d) of this section, an application for a renewal award must be submitted no later than 6 months before the expiration of the project period and must be on the same forms as required for initial applications. The renewal application must outline and justify a program and budget for the proposed project period, showing in detail the estimated cost of the proposed project, together with an indication of the amount of cost sharing, if any. The application shall also describe and explain the reasons for any change in the scope or objectives of the proposed project and shall compare and explain any difference between the estimates in the proposed budget and actual costs experienced as of the date of the application.

(h) DOE is not required to return an application to the applicant.

(i) Renewal applications must include a separate section that describes the results of work accomplished through the date of the renewal application and how such results relate to the activities proposed to be undertaken in the renewal period.

[60 FR 5841, Jan. 31, 1995, as amended at 79 FR 76046, Dec. 19, 2014]

### § 602.9 Application evaluation and selection.

(a) Applications shall be evaluated for funding generally within 6 months, but in any event no later than 12 months, from the date of receipt by DOE. After DOE has held an application for 6 months, the applicant may, in response to DOE's request, be required to revalidate the terms of the original application.

(b) DOE shall perform an initial evaluation of all applications to ensure that the information required by this part is provided, that the proposed effort is technically sound and feasible, and that the effort is consistent with program funding priorities. For applications that pass the initial evaluation, DOE shall review and evaluate each application received based on the criteria set forth below and in accordance with the Office of Environment, Health, Safety, and Security Merit Review System developed, as required, under DOE Financial Assistance Regulations, 2 CFR 200 as amended by 2 CFR 910.

(c) DOE shall select evaluators on the basis of their professional qualifications and expertise. To ensure credible and inclusive peer review of applications, every effort will be made to select evaluators apart from DOE employees and contractors. Evaluators shall be required to comply with all applicable DOE rules or directives concerning the use of outside evaluators.

(d) DOE shall evaluate new and renewal applications based on the following criteria that are listed in descending order of importance:

(1) The scientific and technical merit of the proposed research;

(2) The appropriateness of the proposed method or approach;

(3) Competency of research personnel and adequacy of proposed resources;

(4) Reasonableness and appropriateness of the proposed budget; and

(5) Other appropriate factors consistent with the purpose of this part established and set forth in a Notice of Availability or in a specific solicitation.

(e) DOE shall also consider as part of the evaluation other available advice or information, as well as program policy factors, such as ensuring an appropriate balance among the program areas listed in § 602.5 of this part.

(f) In addition to the evaluation criteria set forth in paragraphs (d) and (e) of this section, DOE shall consider the recipient's performance under the existing award during the evaluation of a renewal application.

(g) Selection of applications for award will be based upon the findings of the technical evaluations (including peer reviews, as specified in the Office of Environment, Health, Safety and Security Merit Review System), the importance and relevance of the proposal to the Office of Environment, Health, Safety and Security's mission, and the availability of funds. Cost reasonableness and realism will also be considered.

(h) After the selection of an application, DOE may, if necessary, enter into negotiations with an applicant. Such negotiations are not a commitment that DOE will make an award.

[60 FR 5841, Jan. 31, 1995, as amended at 71 FR 68729, Nov. 28, 2006; 79 FR 76046, Dec. 19, 2014; 80 FR 5007, Jan. 30, 2015]

### § 602.10 Additional requirements.

(a) A recipient performing research or related activities involving the use of human subjects must comply with DOE regulations in 10 CFR part 745, ''Protection of Human Subjects,'' and any additional provisions that may be included in the special terms and conditions of an award.

(b) A recipient performing research involving recombinant DNA molecules and/or organisms and viruses containing recombinant DNA molecules shall comply with the National Institutes of Health ''Guidelines for Research Involving Recombinant DNA Molecules'' (51 FR 16958, May 7, 1986),

or such later revision of those guidelines, as may be published in the FEDERAL REGISTER. (The guidelines are available from the Office of Recombinant DNA Activities, National Institutes of Health, Building 31, Room BBB, Bethesda, MD 20892, or from the Office of Domestic and International Health Studies, AU–13, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585.

(c) A recipient performing research on warm-blooded animals shall comply with the Federal Laboratory Animal Welfare Act of 1966, as amended (7 U.S.C. 2131 *et seq.*), and the regulations promulgated thereunder by the Secretary of Agriculture at 9 CFR chapter I, subchapter A, pertaining to the care, handling, and treatment of warm-blooded animals held or used for research, teaching, or other activities supported by Federal awards. The recipient shall comply with the guidelines described in the Department of Health and Human Services Publication No. [NIH] 86–23, ''Guide for the Care and Use of Laboratory Animals,'' or succeeding revised editions. (This guide is available from the Office for Protection from Research Risks, Office of the Director, National Institutes of Health, Building 31, Room 4B09, Bethesda, MD 20892, or from the Office of Domestic and International Health Studies, AU–13, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585.

[60 FR 5841, Jan. 31, 1995, as amended at 71 FR 68730, Nov. 28, 2006; 80 FR 5007, Jan. 30, 2015]

### § 602.11 Funding.

(a) The project period during which DOE expects to provide support for an approved project under this part shall generally not exceed 3 years and may exceed 5 years only if DOE makes a renewal award or otherwise extends the award. The project period shall be specified on the Notice of Financial Assistance Grant (DOE Form 4600.1).

(b) Each budget period of an award under this part shall generally be 12 months and may be as much as 24 months, as DOE deems appropriate.

### § 602.12 Cost sharing.

Cost sharing is not required, nor will it be considered, as a criterion in the evaluation and selection process unless otherwise provided under § 602.9(d)(5).

### § 602.13 Limitation of DOE liability.

Awards made under this part are subject to the requirement that the maximum DOE obligation to the recipient is the amount shown in the Notice of Financial Assistance Award as the amount of DOE funds obligated. DOE shall not be obligated to make any additional, supplemental, continuation, renewal, or other award for the same or any other purpose.

### § 602.14 Fee.

(a) Notwithstanding 2 CFR part 200 as amended by 2 CFR part 910, a fee may be paid, in appropriate circumstances, to a recipient that is a small business concern, as qualified under the criteria and size standards of 13 CFR part 121, in order to permit the concern to participate in the Epidemiology and Other Health Studies Financial Assistance Program. Whether or not it is appropriate to pay a fee shall be determined by the contracting officer, who shall, at a minimum, apply the following guidelines:

(1) Whether the acceptance of an award will displace other work that the small business is currently engaged in or committed to assume in the near future; or

(2) Whether the acceptance of an award will, in the absence of paying a fee, cause substantial financial distress to the business. In evaluating financial distress, the contracting officer shall balance current displacement against reasonable future benefit to the company. (If the award will result in the beneficial expansion of the existing business base of the company, then no fee would generally be appropriate.) Fees shall not be paid to other entities except as a deviation from 2 CFR part 200 as amended by 2 CFR part 910, nor shall fees be paid under awards in support of conferences.

(b) To request a fee, a small business concern shall submit with its application a written self-certification that it is a small business concern qualified under the criteria and size standards in

13 CFR part 121. In addition, the application must state the amount of fee requested for the entire project period and the basis for requesting the amount and must also state why payment of a fee by DOE would be appropriate.

(c) If the contracting officer determines that payment of a fee is appropriate under paragraph (a) of this section, the amount of fee shall be that determined to be reasonable by the contracting officer. The contracting officer shall, at a minimum, apply the following guidelines in determining the fee amount:

(1) The fee base shall include the estimated allowable cost of direct salaries and wages and allocable fringe benefits. This fee base shall exclude all other direct and indirect costs.

(2) The fee amount expressed as a percentage of the appropriate fee base, pursuant to paragraph (c)(1) of this section, shall not exceed the percentage rate of fee that would result if a Federal agency contracted for the same amount of salaries, wages, and allocable fringe benefits under a cost reimbursement contract.

(3) Fee amounts, determined pursuant to paragraphs (c)(1) and (c)(2) of this section, shall be appropriately reduced when:

(i) Advance payments are provided; and/or

(ii) Title to property acquired with DOE funds vests in the recipient (2 CFR part 200 as amended by 2 CFR part 910).

(d) Notwithstanding 2 CFR part 200 as amended by 2 CFR part 910, any fee awarded shall be a fixed fee and shall be payable on an annual basis in proportion to the work completed, as determined by the contracting officer, upon satisfactory submission and acceptance by DOE of the progress report. If the project period is shortened due to termination, or the project period is not fully funded, the fee shall be reduced by an appropriate amount.

[60 FR 5841, Jan. 31, 1995, as amended at 79 FR 76046, Dec. 19, 2014]

### § 602.15 Indirect cost limitations.

Awards issued under this part for conferences and scientific/technical meetings will not include payment for indirect costs.

### § 602.16 National security.

Activities under the Epidemiology and Other Health Studies Financial Assistance Program are not expected to involve classified information (i.e., Restricted Data, Formerly Restricted Data, National Security Information). However, if in the opinion of the recipient or DOE such involvement becomes expected prior to the closeout of the award, the recipient or DOE shall notify the other in writing immediately. If the recipient believes any information developed or acquired may be classified, the recipient shall not provide the potentially classified information to anyone, including DOE officials with whom the recipient normally communicates, except the Director, Office of Classification, and shall protect such information as if it were classified until notified by DOE that a determination has been made that it does not require such handling. Correspondence that includes the specific information in question shall be sent by registered mail to the U.S. Department of Energy, Attn: Director, Office of Classification, AU–60, P.O. Box A, Germantown, MD 20875. If the information is determined to be classified, the recipient may wish to discontinue the project, in which case the recipient and DOE shall terminate the award by mutual agreement. If the award is to be terminated, all material deemed by DOE to be classified shall be forwarded to DOE in a manner specified by DOE for proper disposition. If the recipient and DOE wish to continue the award, even though classified information is involved, the recipient shall be requested to obtain both personnel and facility security clearances through the Office of Headquarters Security Operations awards or from the cognizant field office for awards obtained through DOE field organizations. Costs associated with handling and protecting any such classified information shall be negotiated at the time that the determination to proceed is made.

[60 FR 5841, Jan. 31, 1995, as amended at 71 FR 68730, Nov. 28, 2006; 80 FR 5008, Jan. 30, 2015]

**§ 602.17 Continuation funding and reporting requirements.**

(a) A recipient shall periodically report to DOE on the project's progress in meeting the project objectives of the award. The following types of reports shall be used:

(1) *Progress Reports.* After issuance of an initial award, recipients must submit a satisfactory progress report to receive a continuation award for the remainder of the project period. The original and two copies of the required report must be submitted to the Office of Environment, Health, Safety and Security program manager 90 days prior to the anticipated continuation funding date. The report should include results of work to date and emphasize findings and their significance to the field, and any real or anticipated problems. The report also should contain the following information: On the first page, provide the project title, principal investigator/project director name, period of time the report covers, name and address of recipient organization, DOE award number, the amount of unexpended funds, if any, that are anticipated to be left at the end of the current budget period. If the amount exceeds 10 percent of the funds available for the budget period, provide information as to why the excess funds are anticipated to be available and how they will be used in the next budget period. The report should state whether the aims have changed from the original application, and if they have, provide revised aims. A completed budget page must be submitted with the continuation progress report when a change to anticipated future costs will exceed 25 percent of the original recommended future budget.

(2) *Notice of Energy Research and Development (R&D) Project.* A Notice of Energy R&D Project, DOE Form 1430.22, which summarizes the purpose and scope of the project, must be submitted in accordance with the Distribution and Schedule of Documents set forth in appendix A to this part, Schedule of Renewal Applications and Reports. Copies of the form may be obtained from a DOE contracting office.

(3) *Special Reports.* The recipient shall report the following events to DOE as soon after they occur as possible:

(i) Problems, delays, or adverse conditions that will materially affect the ability to attain project objectives or prevent the meeting of time schedules and goals. The report must describe remedial action that the recipient has taken, or plans to take, and any action DOE should take to alleviate the problems.

(ii) Favorable developments or events that enable meeting time schedules and goals sooner, or a lower cost than anticipated, or producing more beneficial results than originally projected.

(4) *Final Report.* A final report covering the entire project must be submitted by the recipient within 90 days after the project period ends or the award is terminated. Satisfactory completion of an award will be contingent upon the receipt of this report. The final report shall follow the same outline as progress reports. Recipients will provide, as part of the final report, a description of records and data compiled during the project, along with a plan for its preservation or disposition (see § 602.19 of this part). All manuscripts prepared for publication should be appended to the final report.

(5) *Financial Status Report (FSR) (OMB No. 0348–0039).* The FSR is required within 90 days after completion of each budget period. For budget periods exceeding 12 months, an FSR is also required within 90 days after this first 12 months unless waived by the contracting officer.

(b) DOE may extend the deadline date for any report if the recipient submits a written request before the deadline, that adequately justifies an extension.

(c) A table summarizing the various types of reports, time for submission, and number of copies is set forth in appendix A to this part. The schedule of reports shall be as prescribed in this table, unless the award document specifies otherwise. These reports shall be submitted by the recipient to the awarding office.

(d) DOE, or its authorized representatives, may make site visits, at any reasonable time, to review the project. DOE may provide such technical assistance as may be requested.

(e) Recipients may place performance reporting requirements on a subrecipient consistent with the provisions of this section.

[60 FR 5841, Jan. 31, 1995, as amended at 71 FR 68730, Nov. 28, 2006; 80 FR 5008, Jan. 30, 2015]

### § 602.18 Dissemination of results.

(a) Recipients are encouraged to disseminate research results promptly. DOE reserves the right to utilize, and have others utilize to the extent it deems appropriate, the reports resulting from research awards.

(b) DOE may waive the technical reporting requirement of progress reports set forth in § 602.17, if the recipient submits to DOE a copy of its own report that is published or accepted for publication in a recognized scientific or technical journal and that satisfies the information requirements of the program.

(c) Recipients are urged to publish results through normal publication channels.

(d) The article shall include an acknowledgement that the project was supported, in whole or in part, by a DOE award, and specify the award number, but state that such support does not constitute an endorsement by DOE of the views expressed in the article.

[60 FR 5841, Jan. 31, 1995, as amended at 79 FR 76046, Dec. 19, 2014]

### § 602.19 Records and data.

(a) In some cases, DOE will require submission of certain project records or data to facilitate mission-related activities. Recipients, therefore, must take adequate steps to ensure proper management, control, and preservation of all project records and data.

(b) Awardees must ensure that all project data is adequately documented. Documentation shall:

(1) Reference software used to compile, manage, and analyze data;

(2) Define all technical characteristics necessary for reading or processing the records;

(3) Define file and record content and codes;

(4) Describe update cycles or conditions and rules for adding or deleting information; and

(5) Detail instrument calibration effects, sampling and analysis, space and time coverage, quality control measures, data algorithms and reduction methods, and other activities relevant to data collection and assembly.

(c) Recipients agree to comply with designated DOE records and data management requirements, including providing electronic data in prescribed formats and retention of specified records and data for eventual transfer to the Comprehensive Epidemiologic Data Resource or to another repository, as directed by DOE. Recipients will provide, as part of the final report, a description of records and data compiled during the project along with a plan for its preservation or disposition.

(d) Recipients agree to make project records and data available as soon as possible when requested by DOE.

## APPENDIX A TO PART 602—SCHEDULE OF RENEWAL APPLICATIONS AND REPORTS

| Type | When due | Number of copies for awarding office |
|---|---|---|
| 1. Summary: 200 words on scope and purpose (Notice of Energy R&D Project). | Immediately after a grant is awarded and with each application for renewal. | 3 |
| 2. Renewal period ends | 6 months before the budget | 8 |
| 3. Progress Report period (or as part of a renewal application). | 90 days prior to the next budget period | 3 |
| 4. Other progress reports, brief topical reports, etc. (Designated when significant results develop or when work has direct programmatic impact). | As deemed appropriate by DOE or the recipient | 3 |
| 5. Reprints, Conference | Same as 4. above | 3 |
| 6. Final report of the project | Within 90 days after completion | 3 |

| Type | When due | Number of copies for awarding office |
|---|---|---|
| 7. Financial Status Report (FSR) | Within 90 days after completion of the project period; for budget periods exceeding 12 months an FSR is also required within 90 days after the first 12-month period. | 3 |

NOTE: Report types 5 and 6 require with submission two copies of DOE Form 1332.16, University-Type Contractor and Grantee Recommendations for Disposition of Scientific and Technical Document.

# PART 603—TECHNOLOGY INVESTMENT AGREEMENTS

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## Subpart A—General

### § 603.100 Purpose.

This part establishes uniform policies and procedures for the implementation of DOE's ''other transactions'' authority and for award and administration of a technology investment agreement (TIA).

### § 603.105 Description.

(a) A TIA is a special type of assistance instrument used to increase involvement of commercial firms in the Department of Energy's (DOE) research, development and demonstration (RD&D) programs. A TIA, like a cooperative agreement, requires substantial Federal involvement in the technical or management aspects of the project. A TIA may be either a type of cooperative agreement or a type of assistance transaction other than a cooperative agreement, depending on the intellectual property provisions. A TIA is either:

(1) A type of cooperative agreement with more flexible provisions tailored for commercial firms (as distinct from a cooperative agreement subject to all of the requirements in 10 CFR 600), but with intellectual property provisions in full compliance with the DOE intellectual property statutes (*i.e.*, Bayh-Dole statute and 42 U.S.C. 2182 and 5908, as implemented in 10 CFR 600.325). The authority to award this type of TIA is 42 U.S.C. 7256(a), as well as any program-specific statute that provides authority to award cooperative agreements; or

(2) An assistance transaction other than a cooperative agreement, if its intellectual property provisions vary from the Bayh-Dole statute and 42 U.S.C. 2182 and 5908, which require the Government to retain certain intellectual property rights and require differing treatment between large businesses and nonprofit organizations or small businesses. The authority to award this type of TIA is 42 U.S.C. 7256(g), as well as any program-specific statute that provides authority to award assistance agreements.

(b) The two types of TIAs have similar requirements, except for the intellectual property requirements. If the contracting officer determines there is a unique, exceptional need to vary from the standard intellectual property requirements in 10 CFR 600.325, the TIA becomes an assistance transaction other than a cooperative agreement.

### § 603.110 Use of TIAs.

The ultimate goal for using a TIA is to broaden the technology base available to meet DOE mission requirements and foster within the technology base new relationships and practices to advance the national economic and energy security of the United States, to promote scientific and technological innovation in support of that mission, and to ensure the environmental cleanup of the national nuclear weapons complex. A TIA therefore is designed to:

(a) Reduce barriers to participation in RD&D programs by commercial firms that deal primarily in the commercial marketplace. A TIA allows contracting officers to tailor Government requirements and lower or remove barriers if it can be done with proper stewardship of Federal funds.

(b) Promote new relationships among performers in the technology base. Collaborations among commercial firms that deal primarily in the commercial marketplace, firms that regularly perform on the DOE RD&D programs and nonprofit organizations can enhance overall quality and productivity.

(c) Stimulate performers to develop and use new business practices and disseminate best practices throughout the technology base.

### § 603.115 Approval requirements.

An officer of the Department who has been appointed by the President by and

with the advice and consent of the Senate and who has been delegated the authority from the Secretary must approve the award of a TIA and may perform other functions of the Secretary as set forth in 42 U.S.C. 7256(g). This authority may not be re-delegated. The DOE or National Nuclear Security Administration (NNSA) Senior Procurement Executive also must concur in the award of a TIA.

### § 603.120 Contracting officer warrant requirements.

A contracting officer may award or administer a TIA only if the contracting officer's warrant authorizes the award or administration of a TIA.

### § 603.125 Applicability of other parts of the DOE Assistance Regulations.

(a) TIAs are explicitly covered in this part and 10 CFR part 600, subpart A—General. 10 CFR part 600, subpart A, addresses general matters that relate to assistance instruments.

(b) Three additional parts of the DOE Assistance Regulations apply to TIAs, although they do not mention a TIA explicitly. They are:

(1) 10 CFR part 601—lobbying restrictions apply by law (31 U.S.C. 1352) to a TIA that is a cooperative agreement and as a matter of DOE policy to a TIA that is an assistance transaction other than a cooperative agreement.

(2) 10 CFR part 606—debarment and suspension requirements apply because they cover nonprocurement instruments in general; and

(3) 10 CFR part 607—drug-free workplace (financial assistance) requirements apply because they cover all assistance instruments.

(c) Other portions of 10 CFR part 600 apply to a TIA as referenced in part 603.

## Subpart B—Appropriate Use of Technology Investment Agreements

### § 603.200 Contracting officer responsibilities.

Contracting officers may use a TIA only in appropriate situations. To do so, the use of a TIA must be justified based on:

(a) The nature of the project, as discussed in § 603.205;

(b) The type of recipient, addressed in § 603.210;

(c) The recipient's commitment and cost sharing, as described in § 603.215;

(d) The degree of involvement of the Government program official, as discussed in § 603.220; and

(e) The contracting officer's judgment that the use of a TIA could benefit the RD&D objectives in ways that likely would not happen if another type of instrument were used (i.e., a contract, grant or cooperative agreement is not feasible or appropriate). Answers to the four questions in § 603.225 form the basis for the contracting officer's judgment.

### § 603.205 Nature of the project.

Judgments relating to the nature of the project include:

(a) The principal purpose of the project is to carry out a public purpose of support or stimulation of RD&D (i.e., assistance), rather than acquiring goods or services for the benefit of the Government (i.e., acquisition);

(b) To the maximum extent practicable, the TIA does not support RD&D that duplicates other RD&D being conducted under existing programs carried out by the DOE; and

(c) The use of a standard contract, grant or cooperative agreement for the project is not feasible or appropriate (see questions in § 603.225).

### § 603.210 Recipients.

(a) A TIA requires one or more for-profit firms, not acting in their capacity as the contractor of a FFRDC, to be involved either in the:

(1) Performance of the RD&D project; or

(2) The commercial application of the results.

(i) In those cases where there is only a non-profit performer or a consortium of non-profit performers or non-profit performers and FFRDC contractors, if and as authorized, the performers must have at least a tentative agreement with a specific for-profit partner or partners who plan on being involved in the commercial application of the results.

(ii) In consultation with legal counsel, the contracting officer should review the agreement between the performers and their for-profit partner to ensure that the for-profit partner is committed to being involved in the commercial application of the results.

(b) A TIA may be particularly useful for awards to consortia (a consortium may include one or more for-profit firms, as well as State or local government agencies, institutions of higher education, other nonprofit organizations, or FFRDC contractors, if and as authorized) because:

(1) If multiple performers are participating as a consortium, they may be more equal partners in the performance of the project than usually is the case with a prime recipient and subrecipients. All of the performers are more likely to be directly involved in developing and revising plans for the RD&D effort, reviewing technical progress, and overseeing financial and other business matters. That feature makes consortia well suited to building new relationships among performers in the technology base, a principal objective for the use of a TIA.

(2) In addition, interactions among the participants within a consortium potentially provide a self-governance mechanism. The potential for additional self-governance is particularly good when a consortium includes multiple for-profit participants that normally are competitors within an industry.

(c) A TIA may be used for carrying out RD&D performed by single firms or multiple performers (e.g., a teaming arrangement) in prime award-subaward relationships. In awarding a TIA in those cases, however, consideration should be given to providing for greater involvement of the program official or a way to increase self-governance (e.g., a prime award with multiple subawards arranged so as to give the subrecipients more insight into and authority and responsibility for the programmatic and business aspects of the overall project than they usually have).

### § 603.215 Recipient's commitment and cost sharing.

(a) The contracting officer should evaluate whether the recipient has a strong commitment to and self-interest in the success of the project and incorporating the technology into products and processes for the commercial marketplace. Evidence of that commitment and interest should be found in the proposal, in the recipient's management plan, or through other means.

(b) The contracting officer must seek cost sharing. The purpose of cost sharing is to ensure that the recipient incurs real risk that gives it a vested interest in the project's success; the willingness to commit to meaningful cost sharing is a good indicator of a recipient's self-interest. The requirements are that:

(1) To the maximum extent practicable, the non-Federal parties carrying out a RD&D project under a TIA are to provide at least half of the costs of the project; and

(2) The parties must provide the cost sharing from non-Federal resources unless otherwise provided by law.

(c) The contracting officer may consider whether cost sharing is impracticable in a given case, unless there is a statutory requirement for cost sharing that applies to the particular program under which the award is to be made. Before deciding that cost sharing is impracticable, the contracting officer should carefully consider if there are other factors that demonstrate the recipient's self-interest in the success of the current project.

### § 603.220 Government participation.

A TIA is used to carry out cooperative relationships between the Federal Government and the recipient(s) which require substantial involvement of the Government in the execution of the RD&D. For example, program officials will participate in recipients' periodic reviews of progress and may be substantially involved with the recipients in the resulting revisions of plans for future effort.

### § 603.225 Benefits of using a TIA.

Before deciding that a TIA is appropriate, the contracting officer also must judge that using a TIA could benefit the RD&D objectives in ways that likely would not happen if another type of assistance instrument were used (e.g., a cooperative agreement

subject to all of the requirements of 10 CFR part 600). The contracting officer, in conjunction with Government program officials, must consider the questions in paragraphs (a) through (d) of this section, to help identify the benefits that may justify using a TIA and reducing some of the usual requirements. The contracting officer must report the answers to these questions to help the DOE measure the benefits of using a TIA. Note full concise answers are required only to questions that relate to the benefits perceived for using the TIA, rather than another type of funding instrument, for the particular project. A simple ''no'' or ''not applicable'' is a sufficient response for other questions. The questions are:

(a) Will the use of a TIA permit the involvement of any commercial firms or business units of firms that would not otherwise participate in the project? If so:

(1) What are the expected benefits of those firms' or divisions' participation (e.g., is there a specific technology that could be better, more readily available, or less expensive)?

(2) Why would they not participate if an instrument other than a TIA were used? The contracting officer should identify specific provisions of the TIA or features of the TIA award process that enable their participation. For example, if the RD&D effort is based substantially on a for-profit firm's privately developed technology and the Government may be a major user of any commercial product developed as a result of the award, a for-profit firm may not participate unless the Government's intellectual property rights in the technology are modified.

(b) Will the use of a TIA allow the creation of new relationships among participants in a consortium, at the prime or subtier levels, among business units of the same firm, or between non-Federal participants and the Federal Government that will foster better technology? If so:

(1) Why do these new relationships have the potential for fostering technology that is better, more affordable, or more readily available?

(2) Are there provisions of the TIA or features of the TIA award process that enable these relationships to form? If so, the contracting officer should be able to identify specifically what they are. If not, the contracting officer should be able to explain specifically why the relationships could not be created if another type of assistance instrument were used. For example, a large business firm may not be willing to participate in a consortium or teaming arrangement with small business firms and nonprofit firms under a standard cooperative agreement because those entities have invention rights under the Bayh-Dole statute that are not available to large businesses. A large business firm may be willing to participate in a consortium or teaming arrangement only if all partners are substantially equal with regard to the allocation of intellectual property rights.

(c) Will the use of a TIA allow firms or business units of firms that traditionally accept Government awards to use new business practices in the execution of the RD&D project that will foster better technology, new technology more quickly or less expensively, or facilitate partnering with commercial firms? If so:

(1) What specific benefits result from the use of these new practices? The contracting officer should be able to explain specifically the potential for those benefits.

(2) Are there provisions of the TIA or features of the TIA award process that enable the use of the new practices? If so, the contracting officer should be able to identify those provisions or features and explain why the practices could not be used if the award were made using another type of assistance instrument.

(d) Are there any other benefits of the use of a TIA that could help DOE meet its objectives in carrying out the project? If so, the contracting officer should be able to identify specifically what they are, how they can help meet the objectives, what features of the TIA or award process enable DOE to realize them, and why the benefits likely would not be realized if an assistance instrument other than a TIA were used.

### § 603.230 Fee or profit.

The contracting officer may not use a TIA if any participant is to receive fee or profit. Note that this policy extends to all performers of the project, including any subawards for substantive program performance, but it does not preclude participants' or subrecipients' payment of reasonable fee or profit when making purchases from suppliers of goods (e.g., supplies and equipment) or services needed to carry out the RD&D.

## Subpart C—Requirements for Expenditure-Based and Fixed-Support Technology Investment Agreements

### § 603.300 Difference between an expenditure-based and a fixed-support TIA.

The contracting officer may negotiate expenditure-based or fixed-support award terms for either types of TIA subject to the requirements in this subpart. The fundamental difference between an expenditure-based and a fixed-support TIA is:

(a) For an expenditure-based TIA, the amounts of interim payments or the total amount ultimately paid to the recipient are based on the amounts the recipient expends on project costs. If a recipient completes the project specified at the time of award before it expends all of the agreed-upon Federal funding and recipient cost sharing, the Federal Government may recover its share of the unexpended balance of funds or, by mutual agreement with the recipient, amend the agreement to expand the scope of the RD&D project. An expenditure-based TIA, therefore, is analogous to a cost-type procurement contract or grant.

(b) For a fixed-support TIA, the amount of assistance is established at the time of award and is not meant to be adjusted later. In that sense, a fixed-support TIA is somewhat analogous to a fixed-price procurement contract.

### § 603.305 Use of a fixed-support TIA.

The contracting officer may use a fixed-support TIA if:

(a) The agreement is to support or stimulate RD&D with outcomes that are well defined, observable, and verifiable;

(b) The resources required to achieve the outcomes can be estimated well enough to ensure the desired level of cost sharing (see example in § 603.560(b)); and

(c) The agreement does not require a specific amount or percentage of recipient cost sharing. In cases where the agreement does require a specific amount or percentage of cost sharing, a fixed-support TIA is not practicable because the agreement has to specify cost principles or standards for costs that may be charged to the project; require the recipient to track the costs of the project; and provide access for audit to allow verification of the recipient's compliance with the mandatory cost sharing. A fixed-support TIA may not be used if there is:

(1) A requirement (e.g., in statute or policy determination) for a specific amount or percentage of recipient cost sharing; or

(2) The contracting officer, in consultation with the program official, otherwise elects to include in the TIA a requirement for a specific amount or percentage of cost sharing.

### § 603.310 Use of an expenditure-based TIA.

In general, the contracting officer must use an expenditure-based TIA under conditions other than those described in § 603.305. Reasons for any exceptions to this general rule must be documented in the award file and must be consistent with the policy in § 603.230 that precludes payment of fee or profit to participants.

### § 603.315 Advantages of a fixed-support TIA.

In situations where the use of a fixed-support TIA is permissible (see §§ 603.305 and 603.310), its use may encourage some commercial firms' participation in the RD&D. With a fixed-support TIA, the contracting officer can eliminate or reduce some post-award requirements that sometimes are cited as disincentives for those firms to participate. For example, a fixed-support TIA need not:

(a) Specify minimum standards for the recipient's financial management system;

(b) Specify cost principles or standards stating the types of costs the recipient may charge to the project;

(c) Provide for financial audits by Federal auditors or independent public accountants of the recipient's books and records;

(d) Set minimum standards for the recipient's purchasing system; or

(e) Require the recipient to prepare financial reports for submission to the Federal Government.

## Subpart D—Competition Phase

### § 603.400 Competitive procedures.

DOE policy is to award a TIA using competitive procedures and a merit-based selection process, as described in 10 CFR 600.6 and 600.13, respectively:

(a) In every case where required by statute; and

(b) To the maximum extent feasible, in all other cases. If it is not feasible to use competitive procedures, the contracting officer must comply with the requirements in 10 CFR 600.6(c).

### § 603.405 Announcement format.

If the contracting officer, in consultation with the program official, decides that a TIA is among the types of instruments that may be awarded, the additional elements described in §§ 603.410 through 603.420 should be included in the announcement.

### § 603.410 Announcement content.

Once the contracting officer, in consultation with the program official, considers the factors described in Subpart B of this part and decides that a TIA is among the types of instruments that may be awarded pursuant to a program announcement, it is important to state that fact in the announcement. The announcement also should state that a TIA is more flexible than a traditional financial assistance agreement and that requirements are negotiable in areas such as audits and intellectual property rights that may cause concern for commercial firms. Doing so should increase the likelihood that commercial firms will be willing to submit proposals.

### § 603.415 Cost sharing.

To help ensure a competitive process that is fair and equitable to all potential proposers, the announcement should state clearly:

(a) That, to the maximum extent practicable, the non-Federal parties carrying out a RD&D project under a TIA are to provide at least half of the costs of the project (see § 603.215(b));

(b) The types of cost sharing that are acceptable;

(c) How any in-kind contributions will be valued, in accordance with §§ 603.530 through 603.555; and

(d) Whether any consideration will be given to alternative approaches a proposer may offer to demonstrate its strong commitment to and self-interest in the project's success, in accordance with § 603.215.

### § 603.420 Disclosure of information.

The announcement should tell potential proposers that:

(a) For all TIAs, information described in paragraph (b) of this section is exempt from disclosure requirements of the Freedom of Information Act (FOIA)(codified at 5 U.S.C. 552) for a period of five years after the date on which the DOE receives the information from them; and

(b) As provided in 42 U.S.C. 7256(g) incorporating certain provisions of 10 U.S.C. 2371, disclosure is not required, and may not be compelled, under FOIA during that period if:

(1) A proposer submits the information in a competitive or noncompetitive process that could result in the award of a TIA; and

(2) The type of information is among the following types that are exempt:

(i) Proposals, proposal abstracts, and supporting documents; and

(ii) Business plans and technical information submitted on a confidential basis.

(c) If proposers desire to protect business plans and technical information for five years from FOIA disclosure requirements, they must mark them with a legend identifying them as documents submitted on a confidential basis. After the five-year period, information may be protected for longer periods if it meets any of the criteria in 5 U.S.C. 552(b) (as implemented by the

DOE in 10 CFR part 1004) for exemption from FOIA disclosure requirements.

## Subpart E—Pre-Award Business Evaluation

### § 603.500 Pre-award business evaluation.

(a) The contracting officer must determine the qualification of the recipient, as described in §§ 603.510 and 603.515.

(b) As the business expert working with the program official, the contracting officer also must address the financial aspects of the proposed agreement. The contracting officer must:

(1) Determine that the total amount of funding for the proposed effort is reasonable, as addressed in § 603.520.

(2) Assess the value and determine the reasonableness of the recipient's proposed cost sharing contribution, as discussed in §§ 603.525 through 603.555.

(3) If contemplating the use of a fixed-support rather than expenditure-based TIA, ensure that its use is justified, as explained in §§ 603.560 and 603.565.

(4) Determine amounts for milestone payments, if used, as discussed in § 603.570.

### § 603.505 Program resources.

Program officials can be a source of information for determining the reasonableness of proposed funding (e.g., on labor rates, as discussed in § 603.520) or establishing observable and verifiable technical milestones for payments (see § 603.570).

RECIPIENT QUALIFICATION

### § 603.510 Recipient qualifications.

Prior to award of a TIA, the contracting officer's responsibilities for determining that the recipient is qualified are the same as those for awarding a grant or cooperative agreement. If the recipient is a consortium that is not formally incorporated, the contracting officer has the additional responsibility described in § 603.515.

### § 603.515 Qualification of a consortium.

(a) A consortium that is not formally incorporated must provide a collaboration agreement, commonly referred to as the articles of collaboration, which sets out the rights and responsibilities of each consortium member. This agreement binds the individual consortium members together and should discuss, among other things, the consortium's

(1) Management structure;

(2) Method of making payments to consortium members;

(3) Means of ensuring and overseeing members' efforts on the project;

(4) Provisions for members' cost sharing contributions; and

(5) Provisions for ownership and rights in intellectual property developed previously or under the agreement.

(b) If the prospective recipient of a TIA is a consortium that is not formally incorporated, the contracting officer must, in consultation with legal counsel, review the management plan in the consortium's collaboration agreement to ensure that the management plan is sound and that it adequately addresses the elements necessary for an effective working relationship among the consortium members. An effective working relationship is essential to increase the project's chances of success.

TOTAL FUNDING

### § 603.520 Reasonableness of total project funding.

In cooperation with the program official, the contracting officer must assess the reasonableness of the total estimated budget to perform the RD&D that will be supported by the agreement.

(a) *Labor*. Much of the budget likely will involve direct labor and associated indirect costs, which may be represented together as a ''loaded'' labor rate. The program official is an essential advisor on reasonableness of the overall level of effort and its composition by labor category. The contracting officer also may rely on experience with other awards as the basis for determining reasonableness.

(b) *Real property and equipment*. In almost all cases, the project costs should normally include only depreciation or use charges for real property and

equipment of for-profit participants, in accordance with § 603.680. Remember that the budget for an expenditure-based TIA may not include depreciation of a participant's property as a direct cost of the project if that participant's practice is to charge the depreciation of that type of property as an indirect cost, as many organizations do.

COST SHARING

**§ 603.525 Value and reasonableness of the recipient's cost sharing contribution.**

The contracting officer must:

(a) Determine that the recipient's cost sharing contributions meet the criteria for cost sharing and determine values for them, in accordance with §§ 603.530 through 603.555. In doing so, the contracting officer must:

(1) Ensure that there are affirmative statements from any third parties identified as sources of cash contributions, and

(2) Include in the award file an evaluation that documents how the values of the recipient's contributions to the funding of the project were determined.

(b) Judge that the recipient's cost sharing contribution, as a percentage of the total budget, is reasonable. To the maximum extent practicable, the recipient must provide at least half of the costs of the project, in accordance with § 603.215.

**§ 603.530 Acceptable cost sharing.**

The contracting officer may accept any cash or in-kind contributions that meet all of the following criteria.

(a) In the contracting officer's judgment, they represent meaningful cost sharing that demonstrates the recipient's commitment to the success of the RD&D project. Cash contributions clearly demonstrate commitment and they are strongly preferred over in-kind contributions.

(b) They are necessary and reasonable for accomplishment of the RD&D project's objectives.

(c) They are costs that may be charged to the project under § 603.625 and § 603.635, as applicable to the participant making the contribution.

(d) They are verifiable from the recipient's records.

(e) They are not included as cost sharing contributions for any other Federal award.

(f) They are not paid by the Federal Government under another award, except:

(1) Costs that are authorized by Federal statute to be used for cost sharing.

(2) Independent research and development (IR&D) costs, as described in 48 CFR part 31.208–18, that meet all of the criteria in paragraphs (a) through (e) of this section. IR&D is acceptable as cost sharing, even though it may be reimbursed by the Government through other awards. It is standard business practice for all for-profit firms, including commercial firms, to recover their IR&D costs through prices charged to their customers. Thus, the cost principles at 48 CFR part 31 allow a for-profit firm that has expenditure-based, Federal procurement contracts to recover through those procurement contracts the allocable portion of its research and development costs associated with a technology investment agreement. Contracting officers should note that in accordance with section 603.545, they may not count participant's costs of prior research, including IR&D, as a cost sharing contribution.

**§ 603.535 Value of proposed real property or equipment.**

The contracting officer rarely should accept values for cost sharing contributions of real property or equipment that are in excess of depreciation or reasonable use charges, as discussed in § 603.680 for for-profit participants. The contracting officer may accept the full value of a donated capital asset if the real property or equipment is to be dedicated to the project and the contracting officer expects that it will have a fair market value that is less than $5,000 at the project's end. In those cases, the contracting officer should value the donation at the lesser of:

(a) The value of the property as shown in the recipient's accounting records (*i.e.*, purchase price less accumulated depreciation); and

(b) The current fair market value. The contracting officer may accept the

use of any reasonable basis for determining the fair market value of the property. If there is a justification to do so, the contracting officer may accept the current fair market value even if it exceeds the value in the recipient's records.

**§ 603.540 Acceptability of fully depreciated real property or equipment.**

The contracting officer should limit the value of any contribution of a fully depreciated asset to a reasonable use charge. In determining what is reasonable, the contracting officer must consider:

(a) The original cost of the asset;

(b) Its estimated remaining useful life at the time of the negotiations;

(c) The effect of any increased maintenance charges or decreased performance due to age; and

(d) The amount of depreciation that the participant previously charged to Federal awards.

**§ 603.545 Acceptability of costs of prior RD&D.**

The contracting officer may not count any participant's costs of prior RD&D as a cost sharing contribution. Only the additional resources that the recipient will provide to carry out the current project (which may include pre-award costs for the current project, as described in § 603.830) are to be counted.

**§ 603.550 Acceptability of intellectual property.**

(a) In most instances, the contracting officer should not count costs of patents and other intellectual property (*e.g.*, copyrighted material, including software) as cost sharing because:

(1) It is difficult to assign values to these intangible contributions;

(2) Their value usually is a manifestation of prior research costs, which are not allowed as cost share under § 603.545; and

(3) Contributions of intellectual property rights generally do not represent the same cost of lost opportunity to a recipient as contributions of cash or tangible assets. The purpose of cost share is to ensure that the recipient incurs real risk that gives it a vested interest in the project's success.

(b) The contracting officer may include costs associated with intellectual property if the costs are based on sound estimates of market value of the contribution. For example, a for-profit firm may offer the use of commercially available software for which there is an established license fee for use of the product. The costs of the development of the software would not be a reasonable basis for valuing its use.

**§ 603.555 Value of other contributions.**

For types of participant contributions other than those addressed in §§ 603.535 through 603.550, the general rule is that the contracting officer is to value each contribution consistently with the cost principles or standards in § 603.625 and § 603.635 that apply to the participant making the contribution. When valuing services and property donated by parties other than the participants, the contracting officer may use as guidance the provisions of 10 CFR 600.313(b)(2) through (b)(5).

FIXED-SUPPORT OR EXPENDITURE-BASED APPROACH

**§ 603.560 Estimate of project expenditures.**

(a) To use a fixed-support TIA, rather than an expenditure-based TIA, the contracting officer must have confidence in the estimate of the expenditures required to achieve well-defined outcomes. Therefore, the contracting officer must work carefully with program officials to select outcomes that, when the recipient achieves them, are reliable indicators of the amount of effort the recipient expended. However, the estimate of the required expenditures need not be a precise dollar amount, as illustrated by the example in paragraph (b) of this section, if:

(1) The recipient is contributing a substantial share of the costs of achieving the outcomes, which must meet the criteria in § 603.305(a); and

(2) The contracting officer is confident that the costs of achieving the outcomes will be at least a minimum amount that can be specified and the recipient is willing to accept the possibility that its cost sharing percentage ultimately will be higher if the costs exceed that minimum amount.

(b) To illustrate the approach, consider a project for which the contracting officer is confident that the recipient will have to expend at least $800,000 to achieve the specified outcomes. The contracting officer must determine, in conjunction with program officials, the minimum level of recipient cost sharing required to demonstrate the recipient's commitment to the success of the project. For purposes of this illustration, let that minimum recipient cost sharing be 60% of the total project costs. In that case, the Federal share should be no more than 40% and the contracting officer could set a fixed level of Federal support at $320,000 (40% of $800,000). With that fixed level of Federal support, the recipient would be responsible for the balance of the costs needed to complete the project.

(c) Note, however, that the level of recipient cost sharing negotiated should be based solely on the level needed to demonstrate the recipient's commitment. The contracting officer may not use a shortage of Federal Government funding for the program as a reason to try to persuade a recipient to accept a fixed-support TIA, rather than an expenditure-based instrument, or to accept responsibility for a greater share of the total project costs than it otherwise is willing to offer. If there is insufficient funding to provide an appropriate Federal Government share for the entire project, the contracting officer should re-scope the effort covered by the agreement to match the available funding.

### § 603.565 Use of a hybrid instrument.

For a RD&D project that is to be carried out by a number of participants, the contracting officer may award a TIA that provides for some participants to perform under fixed-support arrangements and others to perform under expenditure-based arrangements. This approach may be useful, for example, if a commercial firm that is a participant will not accept an agreement with all of the post-award requirements of an expenditure-based award. Before using a fixed-support arrangement for that firm's portion of the project, the agreement must meet the criteria in § 603.305.

## ACCOUNTING, PAYMENTS, AND RECOVERY OF FUNDS

### § 603.570 Determining milestone payment amounts.

(a) If the contracting officer selects the milestone payment method (see § 603.805), the contracting officer must assess the reasonableness of the estimated amount for reaching each milestone. This assessment enables the contracting officer to set the amount of each milestone payment to approximate the Federal share of the anticipated resource needs for carrying out that phase of the RD&D effort.

(b) The Federal share at each milestone need not be the same as the Federal share of the total project. For example, the contracting officer might deliberately set payment amounts with a larger Federal share for early milestones if a project involves a start-up company with limited resources.

(c) For an expenditure-based TIA, if the contracting officer establishes minimum cost sharing percentages for each milestone, those percentages should be indicated in the agreement.

(d) For a fixed-support TIA, the milestone payments should be associated with the well-defined, observable, and verifiable technical outcomes (*e.g.*, demonstrations, tests, or data analysis) that are established for the project in accordance with §§ 603.305(a) and 603.560(a).

### § 603.575 Repayment of Federal cost share.

In accordance with the Energy Policy Act of 2005 (Public Law 109–58), section 988(e), the contracting officer may not require repayment of the Federal share of a cost-shared TIA as a condition of making an award, unless otherwise authorized by statute.

## Subpart F—Award Terms Affecting Participants' Financial, Property, and Purchasing Systems

### § 603.600 Administrative matters.

This subpart addresses ''systemic'' administrative matters that place requirements on the operation of a participant's financial management, property management, or purchasing system. Each participant's systems are organization-wide and do not vary with each agreement. Therefore, a TIA should address systemic requirements in a uniform way for each type of participant organization.

### § 603.605 General policy.

The general policy for an expenditure-based TIA is to avoid requirements that would force participants to use different financial management, property management, and purchasing systems than they currently use for:

(a) Expenditure-based Federal procurement contracts and assistance awards in general, if they receive them; or

(b) Commercial business, if they have no expenditure-based Federal procurement contracts and assistance awards.

### § 603.610 Flow down requirements.

If it is an expenditure-based award, the TIA must require participants to provide the same financial management, property management, and purchasing systems requirements to a subrecipient that would apply if the subrecipient were a participant. For example, a for-profit participant would require a university subrecipient to comply with requirements that apply to a university participant and would require a GOCO or FFRDC subrecipient to comply with standards that conform as much as practicable with the requirements in the GOCO/FFRDC procurement contract. Note that this policy applies to subawards for substantive performance of portions of the RD&D project supported by the TIA and not to participants' purchases of goods or services needed to carry out the RD&D.

FINANCIAL MATTERS

### § 603.615 Financial management standards for-profit firms.

(a) To avoid causing needless changes in participants' financial management systems, an expenditure-based TIA will make for-profit participants that currently perform under other expenditure-based Federal procurement contracts or assistance awards subject to the same standards for financial management systems that apply to those other awards. Therefore, if a for-profit participant has expenditure-based DOE assistance awards other than a TIA, the TIA must apply the standards in 10 CFR 600.311. The contracting officer may grant an exception and allow a for-profit participant that has other expenditure-based Federal Government awards to use an alternative set of standards that meets the minimum criteria in paragraph (b) of this section, if there is a compelling programmatic or business reason to do so. For each case in which an exception is granted, the contracting officer must document the reason in the award file.

(b) For an expenditure-based TIA, the contracting officer is to allow and encourage each for-profit participant that does not currently perform under expenditure-based Federal procurement contracts or assistance awards (other than a TIA) to use its existing financial management system as long as the system, as a minimum:

(1) Complies with Generally Accepted Accounting Principles.

(2) Effectively controls all project funds, including Federal funds and any required cost share. The system must have complete, accurate, and current records that document the sources of funds and the purposes for which they are disbursed. It also must have procedures for ensuring that project funds are used only for purposes permitted by the agreement (see § 603.625).

(3) Includes, if advance payments are authorized under § 603.805, procedures to minimize the time elapsing between the payment of funds by the Government and the firm's disbursement of the funds for program purposes.

**§ 603.620 Financial management standards for nonprofit participants.**

So as not to force system changes for any State, local government, institution of higher education, or other nonprofit organization, expenditure-based TIA requirements for the financial management system of any nonprofit participant are to be the same as those that apply to the participant's other Federal assistance awards. Specifically, the requirements are those in:

(a) 10 CFR 600.220 for State and local governments; and

(b) 10 CFR 600.121(b) for other nonprofit organizations, with the exception of nonprofit Government-owned, contractor-operated (GOCO) facilities and Federally Funded Research and Development Centers (FFRDCs) that are excepted from the definition of ''recipient'' in 10 CFR 600.101. If a GOCO or FFRDC is a participant, the contracting officer must specify appropriate standards that conform as much as practicable with requirements in their procurement contract.

**§ 603.625 Cost principles or standards applicable to for-profit participants.**

(a) So as not to require any firm to needlessly change its cost accounting system, an expenditure-based TIA is to apply the Government cost principles in 48 CFR part 31 to for-profit participants that currently perform under expenditure-based Federal procurement contracts or assistance awards (other than a TIA) and therefore have existing systems for identifying allowable costs under those principles. If there are programmatic or business reasons to do otherwise, the contracting officer may grant an exception from this requirement and use alternative standards as long as the alternative satisfies the conditions described in paragraph (b) of this section; if an exception is granted the reasons must be documented in the award file.

(b) For other for-profit participants, the contracting officer may establish alternative standards in the agreement as long as that alternative provides, as a minimum, that Federal funds and funds counted as recipients' cost sharing will be used only for costs that:

(1) A reasonable and prudent person would incur in carrying out the RD&D project contemplated by the agreement. Generally, elements of cost that appropriately are charged are those identified with RD&D activities under the Generally Accepted Accounting Principles (see Statement of Financial Accounting Standards Number 2, ''Accounting for Research and Development Costs,'' October 1974). Moreover, costs must be allocated to DOE and other projects in accordance with the relative benefits the projects receive. Costs charged to DOE projects must be given consistent treatment with costs allocated to the participants' other RD&D activities (e.g., activities supported by the participants themselves or by non-Federal sponsors).

(2) Are consistent with the purposes stated in the governing Congressional authorizations and appropriations. The contracting officer is responsible for ensuring that provisions in the award document address any requirements that result from authorizations and appropriations.

**§ 603.630 Use Federally approved indirect cost rates for for-profit firms.**

In accordance with the general policy in § 603.605, the contracting officer must require a for-profit participant that has federally approved indirect cost rates for its Federal procurement contracts to use those rates to accumulate and report costs under an expenditure-based TIA. This includes both provisional and final rates that are approved up until the time that the TIA is closed out.

**§ 603.635 Cost principles for nonprofit participants.**

So as not to force financial system changes for any nonprofit participant, an expenditure-based TIA will provide that costs to be charged to the RD&D project by any nonprofit participant must be determined to be allowable in accordance with:

(a) OMB Circular A–87, if the participant is a State or local governmental organization;

(b) OMB Circular A–21, if the participant is an institution of higher education;

(c) 45 CFR Part 74, Appendix E, if the participant is a hospital; or

(d) OMB Circular A–122, if the participant is any other type of nonprofit organization (the cost principles in 48 CFR parts 31 and 231 are to be used by any nonprofit organization that is identified in Circular A–122 as being subject to those cost principles).

**§ 603.640 Audits of for-profit participants.**

If the TIA is an expenditure-based award, the contracting officer must include in it an audit provision that addresses, for each for-profit participant:

(a) Whether the for-profit participant must have periodic audits, in addition to any award-specific audits, as described in § 603.645;

(b) Whether the Defense Contract Audit Agency (DCAA) or an independent public accountant (IPA) will perform required audits, as discussed in § 603.650;

(c) How frequently any periodic audits are to be performed, addressed in § 603.655; and

(d) Other matters described in § 603.660, such as audit coverage, allowability of audit costs, auditing standards, and remedies for noncompliance.

**§ 603.645 Periodic audits and award-specific audits of for-profit participants.**

The contracting officer needs to consider requirements for both periodic audits and award-specific audits (as defined in § 603.1295 and § 603.1220, respectively). The way that an expenditure-based TIA addresses the two types of audits will vary, depending upon the type of for-profit participant.

(a) For for-profit participants that are audited by the DCAA or other Federal auditors, as described in §§ 603.650(b) and 603.655, specific requirements for periodic audits need not be added because the Federal audits should be sufficient to address whatever may be needed. The inclusion in the TIA of the standard access-to-records provision for those for-profit participants, as discussed in § 603.910(a), gives the necessary access in the event that the contracting officer later needs to request audits to address award-specific issues that arise.

(b) For each other for-profit participant, the contracting officer:

(1) Should require that the participant have an independent auditor (i.e., the DCAA or an independent public accountant (IPA)) conduct periodic audits of its systems if it expends $500,000 or more per year in TIAs and other Federal assistance awards. A prime reason for including this requirement is that the Federal Government, for an expenditure-based award, necessarily relies on amounts reported by the participant's systems when it sets payment amounts or adjusts performance outcomes. The periodic audit provides some assurance that the reported amounts are reliable.

(2) Must ensure that the award provides an independent auditor the access needed for award-specific audits, to be performed at the request of the contracting officer if issues arise that require audit support. However, consistent with the government-wide policies on single audits that apply to nonprofit participants (see § 603.665), the contracting officer should rely on periodic audits to the maximum extent possible to resolve any award-specific issues.

**§ 603.650 Designation of auditor for for-profit participants.**

The auditor identified in an expenditure-based TIA to perform periodic and award-specific audits of a for-profit participant depends on the circumstances, as follows:

(a) The Federal cognizant agency or an IPA will be the auditor for a for-profit participant that does not meet the criteria in paragraph (b) of this section. Note that the allocable portion of the costs of the IPA's audit may be reimbursable under the TIA, as described in § 603.660(b). The IPA should be the one that the participant uses to perform other audits (e.g., of its financial statement), to minimize added burdens and costs.

(b) Except as provided in paragraph (c) of this section, the Federal cognizant agency (e.g., DCAA) must be identified as the auditor for a GOCO or FFRDC and for any for-profit participant that is subject to Federal audits because it is currently performing under a Federal award that is subject to the:

(1) Cost principles in 48 CFR part 31 of the Federal Acquisition Regulation (FAR); or

(2) Cost Accounting Standards in 48 CFR Chapter 99.

(c) If there are programmatic or business reasons that justify the use of an auditor other than the Federal cognizant agency for a for-profit participant that meets the criteria in paragraph (b) of this section, the contracting officer may provide that an IPA will be the auditor for that participant in which case the reasons for this decision must be documented in the award file.

### § 603.655 Frequency of periodic audits of for-profit participants.

If an expenditure-based TIA provides for periodic audits of a for-profit participant by an IPA, the contracting officer must specify the frequency for those audits. The contracting officer should consider having an audit performed during the first year of the award, when the participant has its IPA do its next financial statement audit, unless the participant already had a systems audit due to other Federal awards within the past two years. The frequency thereafter may vary depending upon the dollars the participant is expending annually under the award, but it is not unreasonable to require an updated audit every two to three years to verify that the participant's systems continue to be reliable (the audit then would cover the two or three-year period between audits).

### § 603.660 Other audit requirements.

If an expenditure-based TIA provides for audits of a for-profit participant by an IPA, the contracting officer also must specify:

(a) What periodic audits are to cover. It is important to specify audit coverage that is only as broad as needed to provide reasonable assurance of the participant's compliance with award terms that have a direct and material effect on the RD&D project.

(b) Who will pay for periodic and award-specific audits. The allocable portion of the costs of any audits by IPAs may be reimbursable under the TIA. The costs may be direct charges or allocated indirect costs, consistent with the participant's accounting system and practices.

(c) The auditing standards that the IPA will use. The contracting officer must provide that the IPA will perform the audits in accordance with the Generally Accepted Government Auditing Standards.

(d) The available remedies for noncompliance. The agreement must provide that the participant may not charge costs to the award for any audit that the contracting officer determines was not performed in accordance with the Generally Accepted Government Auditing Standards or other terms of the agreement. It also must provide that the Government has the right to require the participant to have the IPA take corrective action and, if corrective action is not taken, that the agreements officer has recourse to any of the remedies for noncompliance identified in 10 CFR 600.352(a).

(e) Where the IPA is to send audit reports. The agreement must provide that the IPA is to submit audit reports to the contracting officer. It also must require that the IPA report instances of fraud directly to the Office of Inspector General (OIG), DOE.

(f) The retention period for the IPA's working papers. The contracting officer must specify that the IPA is to retain working papers for a period of at least three years after the final payment, unless the working papers relate to an audit whose findings are not fully resolved within that period or to an unresolved claim or dispute (in which case, the IPA must keep the working papers until the matter is resolved and final action taken).

(g) Who will have access to the IPA's working papers. The agreement must provide for Government access to working papers.

### § 603.665 Periodic audits of nonprofit participants.

An expenditure-based TIA is an assistance instrument subject to the Single Audit Act (31 U.S.C. 7501–7507), so nonprofit participants are subject to the requirements under that Act and OMB Circular A–133. Specifically, the requirements are those in:

(a) 10 CFR 600.226 for State and local governments; and

(b) 10 CFR 600.126 for other nonprofit organizations.

**§ 603.670 Flow down audit requirements to subrecipients.**

(a) In accordance with § 603.610, an expenditure-based TIA must require participants to flow down the same audit requirements to a subrecipient that would apply if the subrecipient were a participant.

(b) For example, a for-profit participant that is audited by the DCAA:

(1) Would flow down to a university subrecipient the Single Audit Act requirements that apply to a university participant;

(2) Could enter into a subaward allowing a for-profit participant, under the circumstances described in § 603.650(a), to use an IPA to do its audits.

(c) This policy applies to subawards for substantive performance of portions of the RD&D project supported by the TIA, and not to participants' purchases of goods or services needed to carry out the RD&D.

**§ 603.675 Reporting use of IPA for subawards.**

An expenditure-based TIA should require participants to report to the contracting officer when they enter into any subaward allowing a for-profit subawardee to use an IPA, as described in § 603.670(b)(2).

PROPERTY

**§ 603.680 Purchase of real property and equipment by for-profit firms.**

(a) With the two exceptions described in paragraph (b) of this section, the contracting officer must require a for-profit firm to purchase real property or equipment with its own funds that are separate from the RD&D project. The contracting officer should allow the firm to charge to an expenditure-based TIA only depreciation or use charges for real property or equipment (and the cost estimate for a fixed-support TIA only would include those costs). Note that the firm must charge depreciation consistently with its usual accounting practice. Many firms treat depreciation as an indirect cost. Any firm that usually charges depreciation indirectly for a particular type of property must not charge depreciation for that property as a direct cost to the TIA.

(b) In two situations, the contracting officer may grant an exception and allow a for-profit firm to use project funds, which includes both the Federal Government and recipient shares, to purchase real property or equipment (i.e., to charge to the project the full acquisition cost of the property). The two circumstances, which should be infrequent for equipment and extremely rare for real property, are those in which either:

(1) The real property or equipment will be dedicated to the project and has a current fair market value that is less than $5,000 by the time the project ends; or

(2) The contracting officer gives prior approval for the firm to include the full acquisition cost of the real property or equipment as part of the cost of the project (see § 603.535).

(c) If the contracting officer grants an exception in either of the circumstances described in paragraphs (b)(1) and (2) of this section, the real property or equipment must be subject to the property management standards in 10 CFR 600.321(b) through (e). As provided in those standards, the title to the real property or equipment will vest conditionally in the for-profit firm upon acquisition. A TIA, whether it is a fixed-support or expenditure-based award, must specify that any item of equipment that has a fair market value of $5,000 or more at the conclusion of the project also will be subject to the disposition process in 10 CFR 600.321(f), whereby the Federal Government will recover its interest in the property at that time.

**§ 603.685 Management of real property and equipment by nonprofit participants.**

For nonprofit participants, a TIA's requirements for vesting of title, use, management, and disposition of real property or equipment acquired under the award are the same as those that apply to the participant's other Federal assistance awards. Specifically, the requirements are those in:

(a) 10 CFR 600.231 and 600.232, for participants that are States and local governmental organizations; and

(b) 10 CFR 600.132 and 600.134, for other nonprofit participants, with the exception of nonprofit GOCOs and FFRDCs that are exempted from the definition of ''recipient'' in 10 CFR 600.101. If a GOCO or FFRDC is a participant, the contracting officer must specify appropriate standards that conform as much as practicable with the requirements in its procurement contract. Note also that:

(1) If the TIA is a cooperative agreement, 31 U.S.C. 6306 provides authority to vest title to tangible personal property in a nonprofit institution of higher education or in a nonprofit organization whose primary purpose is conducting scientific research, without further obligation to the Federal Government; and

(2) A TIA therefore must specify any conditions on the vesting of title to real property or equipment acquired by any such nonprofit participant.

### § 603.690 Requirements for Federally-owned property.

If DOE provides Federally-owned property to any participant for the performance of RD&D under a TIA, the contracting officer must require that participant to account for, use, and dispose of the property in accordance with:

(a) 10 CFR 600.322, if the participant is a for-profit firm.

(b) 10 CFR 600.232(f), if the participant is a State or local governmental organization. Note that 10 CFR 600.232(f) contains additional requirements for managing the property.

(c) 10 CFR 600.133(a) and 600.134(f), if the participant is a nonprofit organization other than a GOCO or FFRDC (requirements for GOCOs and FFRDCs should conform with the property standards in their procurement contracts).

### § 603.695 Requirements for supplies.

An expenditure-based TIA's provisions should permit participants to use their existing procedures to account for and manage supplies. A fixed-support TIA should not include requirements to account for or manage supplies.

PURCHASING

### § 603.700 Standards for purchasing systems of for-profit firms.

(a) If the TIA is an expenditure-based award, it should require for-profit participants that currently perform under DOE assistance instruments subject to the purchasing standards in 10 CFR 600.331 to use the same requirements for the TIA, unless there are programmatic or business reasons to do otherwise (in which case the reasons must be documented in the award file).

(b) Other for-profit participants under an expenditure-based TIA should be allowed to use their existing purchasing systems, as long as they flow down the applicable requirements in Federal statutes, Executive Orders or Government-wide regulations (see Appendices A and B to this part for a list of those requirements).

### § 603.705 Standards for purchasing systems of nonprofit organizations.

So as not to force system changes for any nonprofit participant, an expenditure-based TIA should provide that each nonprofit participant's purchasing system comply with:

(a) 10 CFR 600.236, if the participant is a State or local governmental organization.

(b) 10 CFR 600.140 through 10 CFR 600.149, if the participant is a nonprofit organization other than a GOCO or FFRDC that is excepted from the definition of ''recipient'' in 10 CFR 600.101. If a GOCO or FFRDC is a participant, the TIA must specify appropriate standards that conform as much as practicable with requirements in its procurement contract.

## Subpart G—Award Terms Related to Other Administrative Matters

### § 603.800 Scope.

This subpart addresses administrative matters that do not impose organization-wide requirements on a participant's financial management, property management, or purchasing system. Because an organization does not

have to redesign its systems to accommodate award-to-award variations in these requirements, TIAs may differ in the requirements that they specify for a given participant, based on the circumstances of the particular RD&D project. To eliminate needless administrative complexity, the contracting officer should handle some requirements, such as the payment method, in a uniform way for the agreement as a whole.

PAYMENTS

### § 603.805 Payment methods.

*A TIA may provide for:*

(a) *Reimbursement*, as described in 10 CFR 600.312(a)(1), if it is an expenditure-based award.

(b) *Advance payments*, as described in 10 CFR 600.312(a)(2), subject to the conditions in 10 CFR 600.312(b)(2)(i) through (iii).

(c) *Payments based on payable milestones*. These are payments made according to a schedule that is based on predetermined measures of technical progress or other payable milestones. This approach relies upon the fact that, as the RD&D progresses throughout the term of the agreement, observable activity will be taking place. The recipient is paid upon the accomplishment of a predetermined measure of progress. A fixed-support TIA must use this payment method (this does not preclude use of an initial advance payment, if there is no alternative to meeting immediate cash needs). Payments based on payable milestones is the preferred method of payment for an expenditure-based TIA if well-defined outcomes can be identified.

### § 603.810 Method and frequency of payment requests.

The procedure and frequency for payment requests depend upon the payment method, as follows:

(a) For either reimbursements or advance payments, the TIA must allow recipients to submit requests for payment at least monthly. The contracting officer may authorize the recipients to use the forms or formats described in 10 CFR 600.312(d).

(b) If the payments are based on payable milestones, the recipient will submit a report or other evidence of accomplishment to the program official at the completion of each predetermined activity. If the award is an expenditure-based TIA that includes minimum cost sharing percentages for milestones (see 10 CFR 603.570(c)), the recipient must certify in the report that the minimum cost sharing requirement has been met. The contracting officer may approve payment to the recipient after receiving validation from the program manager that the milestone was successfully reached.

### § 603.815 Withholding payments.

A TIA must provide that the contracting officer may withhold payments in the circumstances described in 10 CFR 600.312(g), but not otherwise.

### § 603.820 Interest on advance payments.

If an expenditure-based TIA provides for either advance payments or payable milestones, the agreement must require the recipient to:

(a) Maintain in an interest-bearing account any advance payments or milestone payment amounts received in advance of needs to disburse the funds for program purposes unless:

(1) The recipient receives less than $120,000 in Federal grants, cooperative agreements, and TIAs per year;

(2) The best reasonably available interest-bearing account would not be expected to earn interest in excess of $1,000 per year on the advance or milestone payments; or

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources for the project.

(b) Remit annually the interest earned to the contracting officer.

REVISION OF BUDGET AND PROGRAM PLANS

### § 603.825 Government approval of changes in plans.

If it is an expenditure-based award, a TIA must require the recipient to obtain the contracting officer's prior approval if there is to be a change in

plans that may result in a need for additional Federal funding (this is unnecessary for a fixed-support TIA because the recipient is responsible for additional costs of achieving the outcomes). Other than that, the program official's substantial involvement in the project should ensure that the Government has advance notice of changes in plans.

### § 603.830 Pre-award costs.

Pre-award costs, as long as they are otherwise allowable costs of the project, may be charged to an expenditure-based TIA only with the specific approval of the contracting officer. All pre-award costs are incurred at the recipient's risk (e.g., DOE is not obligated to reimburse the costs if, for any reason, the recipient does not receive an award, or if the award is less than anticipated and inadequate to cover the costs).

PROGRAM INCOME

### § 603.835 Program income requirements.

A TIA must apply the standards of 10 CFR 600.314 for program income that may be generated. The TIA must also specify if the recipient is to have any obligation to the Federal Government with respect to program income generated after the end of the project period (i.e., the period, as established in the award document, during which Federal support is provided).

INTELLECTUAL PROPERTY

### § 603.840 Negotiating data and patent rights.

(a) The contracting officer must confer with program officials and assigned intellectual property counsel to develop an overall strategy for intellectual property that takes into account inventions and data that may result from the project and future needs the Government may have for rights in them. The strategy should take into account program mission requirements and any special circumstances that would support modification of standard patent and data terms, and should include considerations such as the extent of the recipient's contribution to the development of the technology; expected Government or commercial use of the technology; the need to provide equitable treatment among consortium or team members; and the need for the DOE to engage non-traditional Government contractors with unique capabilities.

(b) Because a TIA entails substantial cost sharing by recipients, the contracting officer must use discretion in negotiating Government rights to data and patentable inventions resulting from the RD&D under the agreements. The considerations in §§ 603.845 through 603.875 are intended to serve as guidelines, within which there is considerable latitude to negotiate provisions appropriate to a wide variety of circumstances that may arise.

### § 603.845 Data rights requirements.

(a) If the TIA is a cooperative agreement, the requirements at 10 CFR 600.325(d), Rights in data-general rule, apply. The ''Rights in Data—General'' provision in Appendix A to Subpart D of 10 CFR 600 normally applies. This provision provides the Government with unlimited rights in data first produced in the performance of the agreement, except as provided in paragraph (c) Copyright. However, in certain circumstances, the ''Rights in Data—Programs Covered Under Special Protected Data Statutes'' provision in Appendix A may apply.

(b) If the TIA is an assistance transaction other than a cooperative agreement, the requirements at 10 CFR 600.325(e), Rights in data—programs covered under special protected data statutes, normally apply. The ''Rights in Data—Programs Covered Under Special Data Statutes'' provision in Appendix A to Subpart D of 10 CFR 600 may be modified to accommodate particular circumstances (e.g., access to or expanded use rights in protected data among consortium or team members), or to list data or categories of data that the recipient must make available to the public. In unique cases, the contracting officer may negotiate special data rights requirements that vary from those in 10 CFR 600.325. Modifications to the standard data provisions must be approved by intellectual property counsel.

**§ 603.850 Marking of data.**

To protect the recipient's interests in data, the TIA should require the recipient to mark any particular data that it wishes to protect from disclosure as specified in 10 CFR 600.15(b).

[76 FR 26582, May 9, 2011]

**§ 603.855 Protected data.**

In accordance with law and regulation, the contracting officer must not release or disclose data marked with a restrictive legend (as specified in 603.850) to third parties, unless they are parties authorized by the award agreement or the terms of the legend to receive the data and are subject to a written obligation to treat the data in accordance with the marking.

**§ 603.860 Rights to inventions.**

(a) The contracting officer should negotiate rights in inventions that represent an appropriate balance between the Government's interests and the recipient's interests.

(1) The contracting officer has the flexibility to negotiate patent rights requirements that vary from that which the Bayh-Dole statute (Chapter 18 of Title 35, U.S.C.) and 42 U.S.C. 2182 and 5908 require. A TIA becomes an assistance transaction other than a cooperative agreement if its patent rights requirements vary from those required by these statutes.

(2) If the TIA is a cooperative agreement, the patent rights provision of 10 CFR 600.325(b) or (c) or 10 CFR 600.136 applies, depending on the type of recipient. Unless a class waiver has been issued under 10 CFR 784.7, it will be necessary for a large, for-profit business to request a patent waiver to obtain title to subject inventions.

(b) The contracting officer may negotiate Government rights that vary from the statutorily-required patent rights requirements described in paragraph (a)(2) of this section when necessary to accomplish program objectives and foster the Government's interests. Doing so would make the TIA an assistance transaction other than a cooperative agreement. The contracting officer must decide, with the help of the program manager and assigned intellectual property counsel, what best represents a reasonable arrangement considering the circumstances, including past investments and anticipated future investments of the recipient to the development of the technology, contributions under the current TIA, and potential commercial and Government markets. Any change to the standard patent rights provisions must be approved by assigned intellectual property counsel.

(c) Taking past investments as an example, the contracting officer should consider whether the Government or the recipient has contributed more substantially to the prior RD&D that provides the foundation for the planned effort. If the predominant past contributor to the particular technology has been:

(1) The Government, then the TIA's patent rights provision should be the standard provision as set forth in 10 CFR 600.325(b) or (c), or 10 CFR 600.136, as applicable.

(2) The recipient, then less restrictive patent requirements may be appropriate, which would make the TIA an assistance transaction other than a cooperative agreement. The contracting officer normally would, with the concurrence of intellectual property counsel, allow the recipient to retain title to subject inventions without going through the process of obtaining a patent waiver as required by 10 CFR 784. For example, with the concurrence of intellectual property counsel, the contracting officer also could eliminate or modify the nonexclusive paid-up license for practice by or on behalf of the Government to allow the recipient to benefit more directly from its investments.

(d) For subawards under a TIA that is other than a cooperative agreement, the TIA should normally specify that subrecipients' invention rights are to be negotiated between recipient and subrecipient; that subrecipients will get title to inventions they make; or some other disposition of invention rights. Factors to be considered by the contracting officer in addressing subrecipient's invention rights include: the extent of cost sharing by parties at all tiers; a subrecipient's status as a small business, nonprofit, or FFRDC; and whether an appropriate field of use

licensing requirement would meet the needs of the parties.

(e) Consortium members may allocate invention rights in their collaboration agreement, subject to the review of the contracting officer (See § 603.515). The contracting officer, in performing such review, should consider invention rights to be retained by the Government and rights that may be obtained by small business, nonprofit or FFRDC consortium members.

### § 603.865 March-in rights.

A TIA's patent rights provision should include the Bayh-Dole march-in rights set out in paragraph (j) of the Patent Rights (Small Business Firms and Nonprofit Organization) provision in Appendix A to subpart D of 10 CFR 600, or an equivalent clause, concerning actions that the Government may take to obtain the right to use subject inventions, if the recipient fails to take effective steps to achieve practical application of the subject inventions within a reasonable time. The march-in provision may be modified to best meet the needs of the program. However, only infrequently should the march-in provision be entirely removed (*e.g.*, if a recipient is providing most of the funding for a RD&D project, with the Government providing a much smaller share).

### § 603.870 Marking of documents related to inventions.

To protect the recipient's interest in inventions, the TIA should require the recipient to mark documents disclosing inventions it desires to protect by obtaining a patent. The recipient should mark the documents with a legend identifying them as intellectual property subject to public release or public disclosure restrictions, as provided in 35 U.S.C. 205.

### § 603.875 Foreign access to technology and U.S. competitiveness provisions.

(a) Consistent with the objective of enhancing national security and United States competitiveness by increasing the public's reliance on the United States commercial technology, the contracting officer must include provisions in a TIA that addresses foreign access to technology developed under the TIA.

(b) A provision must provide, as a minimum, that any transfer of the technology must be consistent with the U.S. export laws, regulations and the Department of Commerce Export Regulation at Chapter VII, Subchapter C, Title 15 of the CFR (15 CFR parts 730–774), as applicable.

(c) A provision should also provide that any products embodying, or produced through the use of, any created intellectual property, will be manufactured substantially in the United States, and that any transfer of the right to use or sell the products must, unless the Government grants a waiver, require that the products will be manufactured substantially in the United States. In individual cases, the contracting officer, with the approval of the program official and intellectual property counsel, may waive or modify the requirement of substantial manufacture in the United States at the time of award, or subsequent thereto, upon a showing by the recipient that:

(1) Alternative benefits are being secured for the United States taxpayer (*e.g.*, increased domestic jobs notwithstanding foreign manufacture);

(2) Reasonable but unsuccessful efforts have been made to transfer the technology under similar terms to those likely to manufacture substantially in the United States; or

(3) Under the circumstances domestic manufacture is not commercially feasible.

## FINANCIAL AND PROGRAMMATIC REPORTING

### § 603.880 Reports requirements.

A TIA must include requirements that, as a minimum, provide for periodic reports addressing program performance and, if it is an expenditure-based award, business/financial status. The contracting officer must require submission of the reports at least annually, and may require submission as frequently as quarterly (this does not preclude a recipient from electing to submit more frequently than quarterly the financial information that is required to process payment requests if the award is an expenditure-based TIA

that uses reimbursement or advance payments under § 603.810(a)). The requirements for the content of the reports are as follows:

(a) The program portions of the reports must address progress toward achieving performance goals and milestones, including current issues, problems, or developments.

(b) The business/financial portions of the reports, applicable only to expenditure-based awards, must provide summarized details on the status of resources (federal funds and non-federal cost sharing), including an accounting of expenditures for the period covered by the report. The report should compare the resource status with any payment and expenditure schedules or plans provided in the original award; explain any major deviations from those schedules; and discuss actions that will be taken to address the deviations. The contracting officer may require a recipient to separately identify in these reports the expenditures for each participant in a consortium and for each programmatic milestone or task, if the contracting officer, after consulting with the program official, judges that those additional details are needed for good stewardship.

**§ 603.885 Updated program plans and budgets.**

In addition to reports on progress to date, a TIA may include a provision requiring the recipient to annually prepare an updated technical plan for future conduct of the research effort and a revised budget if there is a significant change from the initial budget.

**§ 603.890 Final performance report.**

A TIA must require a final performance report that addresses all major accomplishments under the TIA.

**§ 603.895 Protection of information in programmatic reports.**

If a TIA is awarded under the authority of 42 U.S.C. 7256(g) (*i.e.*, it is a type of assistance transaction ''other than'' a contract, grant or a cooperative agreement), the contracting officer may inform a participant that the award is covered by a special protected data statute, which provides for the protection from public disclosure, for a period of up to 5 years after the date on which the information is developed, any information developed pursuant to this transaction that would be trade secret, or commercial or financial information that is privileged or confidential, if the information had been obtained from a non-Federal party.

**§ 603.900 Receipt of final performance report.**

The TIA should make receipt of the final report a condition for final payment. If the payments are based on payable milestones, the submission and acceptance of the final report by the Government representative will be incorporated as an event that is a prerequisite for one of the payable milestones.

RECORDS RETENTION AND ACCESS REQUIREMENTS

**§ 603.905 Record retention requirements.**

A TIA must require participants to keep records related to the TIA (for which the agreement provides Government access under § 603.910) for a period of three years after submission of the final financial status report for an expenditure-based TIA or final program performance report for a fixed-support TIA, with the following exceptions:

(a) The participant must keep records longer than three years after submission of the final financial status report if the records relate to an audit, claim, or dispute that begins but does not reach its conclusion within the 3-year period. In that case, the participant must keep the records until the matter is resolved and final action taken.

(b) Records for any real property or equipment acquired with project funds under the TIA must be kept for three years after final disposition.

**§ 603.910 Access to a for-profit participant's records.**

(a) If a for-profit participant currently grants access to its records to the DCAA or other Federal Government auditors, the TIA must include for that participant the standard access-to-records requirements at 10 CFR 600.342(e). If the agreement is a fixed-

support TIA, the language in 10 CFR 600.342(e) may be modified to provide access to records concerning the recipient's technical performance, without requiring access to the recipient's financial or other records. Note that any need to address access to technical records in this way is in addition to, not in lieu of, the need to address rights in data (see § 603.845).

(b) For other for-profit participants that do not currently give the Federal Government direct access to their records and are not willing to grant full access to records pertinent to the award, the contracting officer may negotiate limited access to the recipient's financial records. For example, if the audit provision of an expenditure-based TIA gives an IPA access to the recipient's financial records for audit purposes, the Federal Government must have access to the IPA's reports and working papers and the contracting officer need not include a provision requiring direct Government access to the recipient's financial records. For both fixed-support and expenditure-based TIAs, the TIA must include the access-to-records requirements at 10 CFR 600.342(e) for records relating to technical performance.

### § 603.915 Access to a nonprofit participant's records.

A TIA must include for any nonprofit participant the standard access-to-records requirement at:

(a) 10 CFR 600.242(e), for a participant that is a State or local governmental organization;

(b) 10 CFR 600.153(e), for a participant that is a nonprofit organization. The same requirement applies to any GOCO or FFRDC, even though nonprofit GOCOs and FFRDCs are exempted from the definition of ''recipient'' in 10 CFR 600.101.

TERMINATION AND ENFORCEMENT

### § 603.920 Termination and enforcement requirements.

(a) *Termination*. A TIA must include the following conditions for termination:

(1) An award may be terminated in whole or in part by the contracting officer, if a recipient materially fails to comply with the terms and conditions of the award.

(2) Subject to a reasonable determination by either party that the project will not produce beneficial results commensurate with the expenditure of resources, that party may terminate in whole or in part the agreement by providing at least 30 days advance written notice to the other party, provided such notice is preceded by consultation between the parties. The two parties will negotiate the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated. If either party determines in the case of partial termination that the reduced or modified portion of the award will not accomplish the purpose for which the award was made, the award may be terminated in its entirety.

(3) Unless otherwise negotiated, for terminations of an expenditure based TIA, DOE's maximum liability is the lesser of:

(i) DOE's share of allowable costs incurred up to the date of termination, or

(ii) The amount of DOE funds obligated to the TIA.

(4) Unless otherwise negotiated, for terminations of a fixed-support based TIA, DOE shall pay the recipient a proportionate share of DOE's financial commitment to the project based on the percent of project completion as of the date of termination.

(5) Notwithstanding paragraphs (3) and (4) of this section, if the award includes milestone payments, the Government has no obligation to pay the recipient beyond the last completed and paid milestone if the recipient decides to terminate.

(b) Enforcement. The standards of 10 CFR 600.352 (for enforcement) and the procedures in 10 CFR 600.22 (for disputes and appeals) apply.

## Subpart H—Executing the Award

### § 603.1000 Contracting officer's responsibilities at time of award.

At the time of the award, the contracting officer must:

(a) Ensure that the award document contains the appropriate terms and

conditions and is signed by the appropriate parties, in accordance with §§ 603.1005 through 603.1015.

(b) Document the analysis of the agreement in the award file, as discussed in § 603.1020.

(c) Provide information about the award to the office responsible for reporting on TIAs.

THE AWARD DOCUMENT

**§ 603.1005 General responsibilities.**

The contracting officer is responsible for ensuring that the award document is complete and accurate. The document should:

(a) Address all issues;

(b) State requirements directly. It is not helpful to readers to incorporate statutes or rules by reference, without sufficient explanation of the requirements. The contracting officer generally should not incorporate clauses from the Federal Acquisition Regulation (48 CFR parts 1–53) or Department of Energy Acquisition Regulation (48 CFR parts 901–970) because those provisions are designed for procurement contracts that are used to acquire goods and services, rather than for a TIA or other assistance instruments.

(c) Be written in clear and concise language, to minimize potential ambiguity.

**§ 603.1010 Substantive issues.**

Each TIA is designed and negotiated individually to meet the specific requirements of the particular project, so the list of substantive issues that will be addressed in the award document may vary. Every award document must address:

(a) *Project scope*. The scope is an overall vision statement for the project, including a discussion of the project's purpose, objectives, and detailed commercial goals. It is a critical provision because it provides a context for resolving issues that may arise during post-award administration. In a fixed-support TIA, the well-defined outcomes that reliably indicate the amount of effort expended and serve as the basis for the level of the fixed support must be clearly specified (see §§ 603.305 and 603.560(a)).

(b) *Project management*. The TIA should describe the nature of the relationship between the Federal Government and the recipient; the relationship among the participants, if the recipient is an unincorporated consortium; and the overall technical and administrative management of the project. A TIA is used to carry out collaborative relationships between the Federal Government and the recipient. Consequently, there must be substantial involvement of the DOE program official (see § 603.220) and usually the contracting officer. The program official provides technical insight, which differs from the usual technical oversight of a project. The management provision also should discuss how modifications to the TIA are made.

(c) *Termination, enforcement, and disputes*. A TIA must provide for termination, enforcement remedies, and disputes and appeals procedures, in accordance with § 603.920.

(d) *Funding*. The TIA must:

(1) Show the total amount of the agreement and the total period of performance.

(2) If the TIA is an expenditure-based award, state the Government's and recipient's agreed-upon cost shares for the project period and for each budget period. The award document should identify values for any in-kind contributions, determined in accordance with §§ 603.530 through 603.555, to preclude later disagreements about them.

(3) Specify the amount of Federal funds obligated and the performance period for those obligated funds.

(4) State, if the agreement is to be incrementally funded, that the Government's obligation for additional funding is contingent upon the availability of funds and that no legal obligation on the part of the Government exists until additional funds are made available and the agreement is amended. The TIA also must include a prior approval requirement for changes in plans requiring additional Government funding, in accordance with § 603.825.

(e) *Payment*. The TIA must identify the payment method and tell the recipient how, when, and where to submit payment requests, as discussed in §§ 603.805 through 603.815. The payment method must take into account sound

cash management practices by avoiding unwarranted cash advances. For an expenditure-based TIA, the payment provision must require the return of interest should excess cash balances occur, in accordance with § 603.820. For any TIA using the milestone payment method described in § 603.805(c), the TIA must include language notifying the recipient that the contracting officer may adjust amounts of future milestone payments if a project's expenditures fall too far below the projections that were the basis for setting the amounts (see § 603.575(c) and § 603.1105(c)).

(f) *Records retention and access to records.* The TIA must include the records retention requirement at § 603.910. The TIA also must provide for access to for-profit and nonprofit participants' records, in accordance with § 603.915 and § 603.920.

(g) *Patents and data rights.* In designing the patents and data rights provision, the TIA must set forth the minimum required Federal Government rights in intellectual property generated under the award and address related matters, as provided in §§ 603.840 through 603.875. It is important to define all essential terms in the patent rights provision.

(h) *Foreign access to technology and U.S. competitiveness.* The TIA must include provisions, in accordance with § 603.875, concerning foreign access and domestic manufacture of products using technology generated under the award.

(i) *Title to, management of, and disposition of tangible property.* The property provisions for for-profit and nonprofit participants must be in accordance with §§ 603.685 through 603.700.

(j) *Financial management systems.* For an expenditure-based award, the TIA must specify the minimum standards for financial management systems of both for-profit and nonprofit participants, in accordance with §§ 603.615 and 603.620.

(k) *Allowable costs.* If the TIA is an expenditure-based award, it must specify the standards that both for-profit and nonprofit participants are to use to determine which costs may be charged to the project, in accordance with §§ 603.625 through 603.635, as well as § 603.830.

(l) *Audits.* If a TIA is an expenditure-based award, it must include an audit provision for both for-profit and nonprofit participants and subrecipients, in accordance with §§ 603.640 through 603.670 and § 603.675.

(m) *Purchasing system standards.* The TIA should include a provision specifying the standards in §§ 603.700 and 603.705 for purchasing systems of for-profit and nonprofit participants, respectively.

(n) *Program income.* The TIA should specify requirements for program income, in accordance with § 603.835.

(o) *Financial and programmatic reporting.* The TIA must specify the reports that the recipient is required to submit and tell the recipient when and where to submit them, in accordance with §§ 603.880 through 603.900.

(p) *Assurances for applicable national policy requirements.* The TIA must incorporate assurances of compliance with applicable requirements in Federal statutes, Executive Orders, or regulations (except for national policies that require certifications). Appendix A to this part contains a list of commonly applicable requirements that should be augmented with any specific requirements that apply to a particular TIA (e.g., general provisions in the appropriations act for the specific funds that are being obligating).

(q) *Other matters.* The agreement should address any other issues that need clarification, including the name of the contracting officer who will be responsible for post-award administration and the statutory authority or authorities for entering into the TIA. In addition, the agreement must specify that it takes precedence over any inconsistent terms and conditions in collateral documents such as attachments to the TIA or the recipient's articles of collaboration.

**§ 603.1015 Execution.**

(a) If the recipient is a consortium that is not formally incorporated and the consortium members prefer to have the agreement signed by all of them individually, the agreement may be executed in that manner.

(b) If they wish to designate one consortium member to sign the agreement on behalf of the consortium as a whole, the determination whether to execute the agreement in that way should not be made until the contracting officer reviews the consortium's articles of collaboration with legal counsel.

(1) The purposes of the review are to:

(i) Determine whether the articles properly authorize one participant to sign on behalf of the other participants and are binding on all consortium members with respect to the RD&D project; and

(ii) Assess the risk that otherwise could exist when entering into an agreement signed by a single member on behalf of a consortium that is not a legal entity. For example, the contracting officer should assess whether the articles of collaboration adequately address consortium members' future liabilities related to the RD&D project (e.g., whether they will have joint and severable liability).

(2) After the review, in consultation with legal counsel, the contracting officer should determine whether it is better to have all of the consortium members sign the agreement individually or to allow them to designate one member to sign on all members' behalf.

REPORTING INFORMATION ABOUT THE AWARD

### § 603.1020 File documents.

The award file should include an analysis which:

(a) Briefly describes the program and details the specific commercial benefits that should result from the project supported by the TIA. If the recipient is a consortium that is not formally incorporated, a copy of the signed articles of collaboration should be attached.

(b) Describes the process that led to the award of the TIA, including how DOE solicited and evaluated proposals and selected the one supported through the TIA.

(c) Explains the basis for the decision that a TIA was the most appropriate instrument, in accordance with the factors in Subpart B of this part. The explanation must include the answers to the relevant questions in § 603.225(a) through (d).

(d) Explains how the recipient's cost sharing contributions was valued in accordance with §§ 603.530 through 603.555. For a fixed-support TIA, the file must document the analysis required (see § 603.560) to set the fixed level of Federal support; the documentation must explain how the recipient's minimum cost share was determined and how the expenditures required to achieve the project outcomes were estimated.

(e) Documents the results of the negotiation, addressing all significant issues in the TIA's provisions.

## Subpart I—Post-Award Administration

### § 603.1100 Contracting officer's post-award responsibilities.

Generally, the contracting officer's post-award responsibilities are the same responsibilities as those for any cooperative agreement. Responsibilities for a TIA include:

(a) Participating as the business partner to the DOE program official to ensure the Government's substantial involvement in the RD&D project. This may involve attendance with program officials at kickoff meetings or post-award conferences with recipients. It also may involve attendance at the consortium management's periodic meetings to review technical progress, financial status, and future program plans.

(b) Tracking and processing of reports required by the award terms and conditions, including periodic business status reports, programmatic progress reports, and patent reports.

(c) Handling payment requests and related matters. For a TIA using advance payments, that includes reviews of progress to verify that there is continued justification for advancing funds, as discussed in § 603.1105(b). For a TIA using milestone payments, it includes making any needed adjustments in future milestone payment amounts, as discussed in § 603.1105(c).

(d) Making continuation awards for subsequent budget periods, if the agreement includes separate budget periods. See 10 CFR 600.26(b). Any continuation award is contingent on availability of

funds, satisfactory progress towards meeting the performance goals and milestones, submittal of required reports, and compliance with the terms and conditions of the award.

(e) Coordinating audit requests and reviewing audit reports for both single audits of participants' systems and any award-specific audits that may be needed, as discussed in §§ 603.1115 and 603.1120.

(f) Responding, after coordination with program officials and intellectual property counsel, to recipient requests for permission to assign or license intellectual property to entities that do not agree to manufacture substantially in the United States, as described in § 603.875(b). Before granting approval for any technology, the contracting officer must secure assurance that any such assignment is consistent with license rights for Government use of the technology, and that other conditions for any such transfer are met.

### § 603.1105 Advance payments or payable milestones.

The contracting officer must:

(a) For any expenditure-based TIA with advance payments or payable milestones, forward to the responsible payment office any interest that the recipient remits in accordance with § 603.820(b). The payment office will return the amounts to the Department of the Treasury's miscellaneous receipts account.

(b) For any expenditure-based TIA with advance payments, consult with the program official and consider whether program progress reported in periodic reports, in relation to reported expenditures, is sufficient to justify the continued authorization of advance payments under § 603.805(b).

(c) For any expenditure-based TIA using milestone payments, work with the program official at the completion of each payable milestone or upon receipt of the next business status report to:

(1) Compare the total amount of project expenditures, as recorded in the payable milestone report or business status report, with the projected budget for completing the milestone; and

(2) Adjust future payable milestones, as needed, if expenditures lag substantially behind what was originally projected and the contracting officer judges that the recipient is receiving Federal funds sooner than necessary for program purposes. Before making adjustments, the contracting officer should consider how large a deviation is acceptable at the time of the milestone. For example, suppose that the first milestone payment for a TIA is $50,000, and that the awarding official set the amount based on a projection that the recipient would have to expend $100,000 to reach the milestone (*i.e.*, the original plan was for the recipient's share at that milestone to be 50% of project expenditures). If the milestone payment report shows $90,000 in expenditures, the recipient's share at this point is 44% ($40,000 out of the total $90,000 expended, with the balance provided by the $50,000 milestone payment of Federal funds). For this example, the contracting officer should adjust future milestones if a 6% difference in the recipient's share at the first milestone is judged to be too large, but not otherwise. Remember that milestone payment amounts are not meant to track expenditures precisely at each milestone and that a recipient's share will increase as it continues to perform RD&D and expend funds, until it completes another milestone to trigger the next Federal payment.

### § 603.1110 Other payment responsibilities.

Regardless of the payment method, the contracting officer should ensure that:

(a) The request complies with the award terms;

(b) Available funds are adequate to pay the request;

(c) The recipient will not have excess cash on hand, based on expenditure patterns; and

(d) Payments are not withheld, except in one of the circumstances described in 10 CFR 600.312(g).

### § 603.1115 Single audits.

For audits of for-profit participant's systems, under §§ 603.640 through 603.660, the contracting officer is the

focal point for ensuring that participants submit audit reports and for resolving any findings in those reports. The contracting officer's responsibilities regarding single audits of nonprofit participant's systems are identified in the DOE ''Guide to Financial Assistance.''

**§ 603.1120 Award-specific audits.**

Guidance on when and how the contracting officer should request additional audits for an expenditure-based TIA is identical to the guidance in 10 CFR 600.316(d). If the contracting officer requires an award-specific examination or audit of a for-profit participant's records related to a TIA, the contracting officer must use the auditor specified in the award terms and conditions, which should be the same auditor who performs periodic audits of the participant.

## Subpart J—Definitions of Terms Used in this Part

**§ 603.1200 Definitions.**

The terms defined in 10 CFR 600.3 apply to all DOE financial assistance, including a TIA. In addition to those terms, the following terms are used in this part.

**§ 603.1205 Advance.**

A payment made to a recipient before the recipient disburses the funds for program purposes. Advance payments may be based upon a recipient's request or a predetermined payment schedule.

**§ 603.1210 Articles of collaboration.**

An agreement among the participants in a consortium that is not formally incorporated as a legal entity, by which they establish their relative rights and responsibilities (see § 603.515).

**§ 603.1215 Assistance.**

The transfer of a thing of value to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States (see 31 U.S.C. 6101(3)). Grants, cooperative agreements, and technology investment agreements are examples of legal instruments used to provide assistance.

**§ 603.1220 Award-specific audit.**

An audit of a single TIA, usually done at the cognizant contracting officer's request, to help resolve issues that arise during or after the performance of the RD&D project. An award-specific audit of an individual award differs from a periodic audit of a participant (as defined in § 603.1295).

**§ 603.1225 Cash contributions.**

A recipient's cash expenditures made as contributions toward cost sharing, including expenditures of money that third parties contributed to the recipient.

**§ 603.1230 Commercial firm.**

A for-profit firm or segment of a for-profit firm (*e.g.*, a division or other business unit) that does a substantial portion of its business in the commercial marketplace.

**§ 603.1235 Consortium.**

A group of RD&D-performing organizations that either is formally incorporated or that otherwise agrees to jointly carry out a RD&D project (see definition of ''articles of collaboration,'' in § 603.1210).

**§ 603.1240 Cooperative agreement.**

A legal instrument which, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of ''grant,'' in § 603.1270), except that substantial involvement is expected between the DOE and the recipient when carrying out the activity contemplated by the cooperative agreement. The term does not include ''cooperative research and development agreements'' as defined in 15 U.S.C. 3710a.

**§ 603.1245 Cost sharing.**

A portion of project costs from non-Federal sources that are borne by the recipient or non-Federal third parties on behalf of the recipient, rather than by the Federal Government.

**§ 603.1250 Data.**

Recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. It does not include information incidental to administration, such as financial, administrative, cost or pricing, or other management information related to the administration of a TIA.

**§ 603.1255 Equipment.**

Tangible property, other than real property, that has a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

**§ 603.1260 Expenditure-based award.**

A Federal Government assistance award for which the amounts of interim payments or the total amount ultimately paid (*i.e.*, the sum of interim payments and final payment) are subject to redetermination or adjustment, based on the amounts expended by the recipient in carrying out the purposes for which the award was made, as long as the redetermination or adjustment does not exceed the total Government funds obligated to the award. Most Federal Government grants and cooperative agreements are expenditure-based awards.

**§ 603.1265 Expenditures or outlays.**

Charges made to the project or program. They may be reported either on a cash or accrual basis, as shown in the following table:

| If reports are prepared on a . . . | Expenditures are the sum of . . . |
|---|---|
| (a) Cash basis | (1) Cash disbursements for direct charges for goods and services;<br>(2) The amount of indirect expense charge;<br>(3) The value of third party in-kind contributions applied; and<br>(4) The amount of cash advances and payments made to any other organizations for the performance of a part of the RD&D effort. |
| (b) Accrual basis | (1) Cash disbursements for direct charges for goods and services;<br>(2) The amount of indirect expense incurred;<br>(3) The value of in-kind contributions applied; and<br>(4) The net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, and other payees and other amounts becoming owed under programs for which no current services or performance are required. |

**§ 603.1270 Grant.**

A legal instrument which, consistent with 31 U.S.C. 6304, is used to enter into a relationship:

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

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

**§ 603.1275 In-kind contributions.**

The value of non-cash contributions made by a recipient or non-Federal third parties toward cost sharing.

**§ 603.1280 Institution of higher education.**

An educational institution that:

(a) Meets the criteria in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001); and

(b) Is subject to the provisions of OMB Circular A–110, ''Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,'' as implemented by the Department of Energy at 10 CFR 600, Subpart B.

**§ 603.1285 Intellectual property.**

Patents, trademarks, copyrights, mask works, protected data, and other forms of comparable property protected by Federal law and foreign counterparts.

**§ 603.1290 Participant.**

A consortium member or, in the case of an agreement with a single for-profit entity, the recipient. Note that a for-profit participant may be a firm or a segment of a firm (*e.g.*, a division or other business unit).

**§ 603.1295 Periodic audit.**

An audit of a participant, performed at an agreed-upon time (usually a regular time interval), to determine whether the participant as a whole is managing its Federal awards in compliance with the terms of those awards. Appendix A to this part describes what such an audit may cover. A periodic audit of a participant differs from an award-specific audit of an individual award (as defined in § 603.1220).

**§ 603.1300 Procurement contract.**

A Federal Government procurement contract. It is a legal instrument which, consistent with 31 U.S.C. 6303, reflects a relationship between the Federal Government and a State, a local government, or other non-government entity when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the Federal Government. See the more detailed definition of the term ''contract'' at 48 CFR 2.101.

**§ 603.1305 Program income.**

Gross income earned by the recipient or a participant that is generated by a supported activity or earned as a direct result of a TIA. Program income includes but is not limited to: income from fees for performing services; the use or rental of real property, equipment, or supplies acquired under a TIA; the sale of commodities or items fabricated under a TIA; and license fees and royalties on patents and copyrights. Interest earned on advances of Federal funds is not program income.

**§ 603.1310 Program official.**

A Federal Government program manager, project officer, scientific officer, or other individual who is responsible for managing the technical program being carried out through the use of a TIA.

**§ 603.1315 Property.**

Real property, equipment, supplies, and intellectual property, unless stated otherwise.

**§ 603.1320 Real property.**

Land, including land improvements, structures and appurtenances thereto, but excluding movable machinery and equipment.

**§ 603.1325 Recipient.**

An organization or other entity that receives a TIA from DOE. Note that a for-profit recipient may be a firm or a segment of a firm (*e.g.*, a division or other business unit).

**§ 603.1330 Supplies.**

Tangible property other than real property and equipment. Supplies have a useful life of less than one year or an acquisition cost of less than $5,000 per unit.

**§ 603.1335 Termination.**

The cancellation of a TIA, in whole or in part, at any time prior to either:

(a) The date on which all work under the TIA is completed; or

(b) The date on which Federal sponsorship ends, as given in the award document or any supplement or amendment thereto.

**§ 603.1340 Technology investment agreement.**

A TIA is a special type of assistance instrument used to increase involvement of commercial firms in the DOE research, development and demonstration (RD&D) programs. A TIA, like a cooperative agreement, requires substantial Federal involvement in the technical or management aspects of the project. A TIA may be either a type of cooperative agreement or a type of assistance transaction other than a cooperative agreement, depending on the intellectual property provisions. A TIA is either:

(a) A type of cooperative agreement with more flexible provisions tailored for involving commercial firms (as distinct from a cooperative agreement subject to all of the requirements in 10 CFR Part 600), but with intellectual property provisions in full compliance

with the DOE intellectual property statutes (*i.e.*, Bayh-Dole statute and 42 U.S.C. §§ 2182 and 5908, as implemented in 10 CFR 600.325); or

(b) An assistance transaction other than a cooperative agreement, if its intellectual property provisions vary from the Bayh-Dole statute and 42 U.S.C. §§ 2182 and 5908, which require the Government to retain certain intellectual property rights, and require differing treatment between large businesses and nonprofit organizations or small businesses.

## APPENDIX A TO PART 603—APPLICABLE FEDERAL STATUTES, EXECUTIVE ORDERS, AND GOVERNMENT-WIDE REGULATIONS

Whether the TIA is a cooperative agreement or a type of assistance transaction other than a cooperative agreement, the terms and conditions of the agreement must provide for recipients' compliance with applicable Federal statutes, Executive Orders and Government-wide regulations. This appendix lists some of the more common requirements to aid in identifying ones that apply to a specific TIA. The list is not intended to be all-inclusive, however; the contracting officer may need to consult legal counsel to verify whether there are others that apply (*e.g.*, due to a provision in the appropriations act for the specific funds in use or due to a statute or rule that applies to a particular program or type of activity).

### A. CERTIFICATIONS

All financial assistance applicants, including applicants requesting a TIA must comply with the prohibitions concerning lobbying in a Government-wide common rule that the DOE has codified at 10 CFR part 601. The ''List of Certifications and Assurances for SF 424(R&R)'' on the DOE Applicant and Recipient page at *http://grants.pr.doe.gov* includes the Government-wide certification that must be provided with a proposal for a financial assistance award, including a TIA.

### B. ASSURANCES THAT APPLY TO A TIA

Currently the DOE approach to communicating Federal statutes, Executive Orders and Government-wide regulations is to provide potential applicants a list of ''National Policies Assurances to be Incorporated as Award Terms'' in the program announcement (This list is available on the Applicant and Recipient Page at *http://grants.pr.doe.gov* under Award Terms). The contracting officer should follow this approach for announcements that allow for the award of a TIA. The contracting officer should normally incorporate by reference or attach the list of national policy assurances to a TIA award. Of these requirements, the following four assurances apply to all TIA:

1. Prohibitions on discrimination on the basis of race, color, or national origin in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, *et seq.*) as implemented by DOE regulations at 10 CFR part 1040. These apply to all financial assistance. They require recipients to flow down the prohibitions to any subrecipients performing a part of the substantive RD&D program (as opposed to suppliers from whom recipients purchase goods or services).

2. Prohibitions on discrimination on the basis of age, in the Age Discrimination Act of 1975 (42 U.S.C. 6101, *et seq.*) as implemented by DOE regulations at 10 CFR part 1040. They apply to all financial assistance and require flow down to subrecipients.

3. Prohibitions on discrimination on the basis of handicap, in section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) as implemented by DOE regulations at 10 CFR part 1041. They apply to all financial assistance and require flow down to subrecipients.

4. Preferences for use of U.S.-flag air carriers in the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118), which apply to uses of U.S. Government funds.

### C. OTHER ASSURANCES

Additional assurance requirements may apply in certain circumstances, as follows:

1. If construction work is to be done under a TIA or its subawards, it is subject to the prohibitions in Executive Order 11246 on discrimination on the basis of race, color, religion, sex, or national origin.

2. If the RD&D involves human subjects or animals, it is subject to the requirements codified by the Department of Health and Human Services at 45 CFR part 46 and implemented by DOE at 10 CFR part 745 and rules on animal acquisition, transport, care, handling and use in 9 CFR parts 1 through 4, Department of Agriculture rules and rules of the Department of Interior at 50 CFR parts 10 through 24 and Commerce at 50 CFR parts 217 through 277, respectively. See item a. or b., respectively, under the heading ''Live organisms'' included on the DOE ''National Policy Assurances To Be Incorporated As Award Terms'' on the Applicant and Recipient Page.

3. If the RD&D involves actions that may affect the environment, it is subject to the National Environmental Policy Act, and may also be subject to national policy requirements for flood-prone areas, coastal zones, coastal barriers, wild and scenic rivers, and underground sources of drinking water.

4. If the project may impact a historic property, it is subject to the National Historic Preservation Act of 1966 (16 U.S.C. 470, *et seq.*).

APPENDIX B TO PART 603—FLOW DOWN REQUIREMENTS FOR PURCHASES OF GOODS AND SERVICES

A. As discussed in § 603.705, the contracting officer must inform recipients of any requirements that flow down to their purchases of goods or services (e.g., supplies or equipment) under their TIA. Note that purchases of goods or services differ from subawards, which are for substantive RD&D program performance.

B. Appendix A to 10 CFR part 600, subpart D lists eight requirements that commonly apply to firms' purchases under grants or cooperative agreements. Of those eight, two that apply to all recipients' purchases under a TIA are:

1. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352).* A contractor submitting a bid to the recipient for a contract award of $100,000 or more must file a certification with the recipient that it has not and will not use Federal appropriations for certain lobbying purposes. The contractor also must disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. For further details, see 10 CFR part 601, the DOE's codification of the Government-wide common rule implementing this amendment.

2. *Debarment and suspension.* Recipients may not make contract awards that exceed the simplified acquisition threshold (currently $100,000) and certain other contract awards may not be made to parties listed on the General Services Administration (GSA) ''List of Parties Excluded from Federal Procurement and Nonprocurement Programs.'' The GSA list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and parties declared ineligible under statutory or regulatory authority other than Executive Orders 12549 (3 CFR, 1986 Comp., p. 189) and 12689 (3 CFR, 1989 Comp., p. 235). For further details, see subparts A through E of 10 CFR part 606, which is the DOE's codification of the Government-wide common rule implementing Executive Orders 12549 and 12689.

C. One other requirement applies only in cases where construction work is to be performed under the TIA with Federal funds or recipient funds counted toward required cost sharing:

1. *Equal Employment Opportunity.* If the TIA includes construction work, the contracting officer should inform the recipient that Department of Labor regulations at 41 CFR 60–1.4(b) prescribe a clause that must be incorporated into construction awards and subawards. Further details are provided in Appendix B to 10 CFR 600 subpart D, item 1.

# PART 605—THE OFFICE OF SCIENCE FINANCIAL ASSISTANCE PROGRAM

Sec.
605.1 Purpose and scope.
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605.20 Dissemination of results.
APPENDIX A TO PART 605—ENERGY RESEARCH PROGRAM OFFICE DESCRIPTIONS

AUTHORITY: Section 31 of the Atomic Energy Act, as amended, Pub. L. 83–703, 68 Stat. 919 (42 U.S.C. 2051); sec. 107 of the Energy Reorganization Act of 1974, Pub. L. 93–438, 88 Stat. 1240 (42 U.S.C. 5817); Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. 93–577, 88 Stat. 1878 (42 U.S.C. 5901 *et seq.*); secs. 644 and 646 of the Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 599 (42 U.S.C. 7254 and 7256); Federal Grant and Cooperative Agreement Act, as amended (31 U.S.C. 6301 *et seq.*).

SOURCE: 57 FR 40583, Sept. 3, 1992, unless otherwise noted.

## § 605.1 Purpose and scope.

This part sets forth the policies and procedures applicable to the award and administration of grants and cooperative agreements by the DOE Office of Science (SC) for basic and applied research, educational and/or training activities, conferences and related activities.

[57 FR 40583, Sept. 3, 1992, as amended at 79 FR 76046, Dec. 19, 2014]

## § 605.2 Applicability.

(a) This part applies to all grants and cooperative agreements awarded after the effective date of this amended rule.

(b) Except as otherwise provided by this part, the award and administration of grants and cooperative agreements shall be governed by 2 CFR part 200 as amended by 2 CFR part 910 (DOE Financial Assistance Rules).

[57 FR 40583, Sept. 3, 1992, as amended at 79 FR 76046, Dec. 19, 2014]

### § 605.3 Definitions.

In addition to the definitions provided in 2 CFR part 200 as amended by 2 CFR part 910, the following definitions are provided for purposes of this part—

*Basic and applied research* means basic and applied research and that part of development not related to the development of specific systems or products. The primary aim of research is scientific study and experimentation directed toward advancing the state of the art or increasing knowledge or understanding rather than focusing on a specific system or product.

*Educational/Training* means support for education or related activities for an individual or organization that will enhance education levels and skills in particular scientific or technical areas of interest to DOE.

*Principal investigator* means the scientist or other individual designated by the recipient to direct the project.

*Recipient obligation* means the amounts of orders placed, contracts and subawards issued, services received, and similar transactions during a given period that will require payment by the recipient during the same or a future period.

*Related conference* means scientific or technical conferences, symposia, workshops or seminars for the purpose of communicating or exchanging information or views pertinent to SC.

*Special purpose equipment* means equipment which is used only for research, medical, scientific, educational, or other related project activity.

[57 FR 40583, Sept. 3, 1992, as amended at 79 FR 76046, Dec. 19, 2014]

### § 605.4 Exceptions.

Single-case exceptions from this part may be authorized in writing by the Director or Deputy Director of SC or the Head of a Contracting Activity upon the written request of DOE staff, an applicant for an award, or a recipient. A request from an applicant or a recipient must be submitted to or through the cognizant contracting officer. Whenever a proposed exception from this part would be a exception from 2 CFR part 200 as amended by 2 CFR part 910, the exception must also be authorized in accordance with the procedures prescribed in that part.

[57 FR 40583, Sept. 3, 1992, as amended at 79 FR 76046, Dec. 19, 2014]

### § 605.5 The Office of Science Financial Assistance Program.

(a) DOE may issue, under the Office of Science Financial Assistance Program, 10 CFR part 605, awards for basic and applied research, educational/training activities, conferences, and other related activities under the SC program areas set forth in paragraph (b) of this section and described in appendix A of this part.

(b) The Program areas are:

(1) Basic Energy Sciences

(2) Field Operations Management

(3) Fusion Energy

(4) Health and Environmental Research

(5) High Energy and Nuclear Physics

(6) Scientific Computing Staff

(7) Superconducting Super Collider

(8) University and Science Education Programs

(9) Program Analysis; and

(10) Other program areas of interest as may be described in a notice of availability published in the FEDERAL REGISTER.

[57 FR 40583, Sept. 3, 1992, as amended at 79 FR 76046, Dec. 19, 2014]

### § 605.6 Eligibility.

Any university or other institution of higher education or other non-profit or for-profit organization, non-Federal agency, or entity is eligible for a grant or cooperative agreement. An unaffiliated individual also is eligible for a grant or cooperative agreement.

### § 605.7 [Reserved]

### § 605.8 Solicitation.

(a) The Catalog of Federal Domestic Assistance number for this program is

81.049, and its solicitation control number is ERFAP 10 CFR part 605.

(b) An application for a new or renewal award under this solicitation may be submitted at any time to DOE at the address specified in paragraph (c) of this section. New or renewal applications shall receive consideration for funding generally within 6 months but, in any event, no later than 12 months from the date of receipt by DOE.

(c) Applicants may obtain application forms, described in § 605.9(b), and additional information from the Acquisition and Assistance Management Division, Office of Science, SC, Department of Energy, Washington, DC 20585, (301) 903–5544, and shall submit applications to the same address.

(d) DOE shall publish annually, in the FEDERAL REGISTER, a notice of the availability of the Office of Science Financial Assistance Program. DOE shall also publish notices or abbreviated notices of availability in trade and professional journals, and news media, and use other means of communication, as appropriate.

(1) Each notice of availability shall cite this part and shall include:

(i) The Catalog of Federal Domestic Assistance number and solicitation control number of the program;

(ii) The amount of money available or estimated to be available for award;

(iii) The name of the responsible DOE program official to contact for additional information, and an address where application forms may be obtained;

(iv) The address for submission of applications; and

(v) Any evaluation criteria in addition to those set forth in § 605.10.

(2) The notice of availability may also include any other relevant information helpful to applicants such as:

(i) Program objectives,

(ii) A project agenda or potential areas for project initiatives,

(iii) Problem areas requiring additional effort, and

(iv) Any other information which identifies areas in which grants or cooperative agreements may be made.

(e) DOE is under no obligation to pay for any costs associated with the preparation or submission of applications.

(f) DOE reserves the right to fund, in whole or in part, any, all, or none of the applications submitted.

(g) To be considered for a renewal award under this part, an incumbent recipient shall submit a renewal application as provided in § 605.9 (c) and (h).

[57 FR 40583, Sept. 3, 1992, as amended at 79 FR 76046, Dec. 19, 2014]

### § 605.9 Application requirements.

(a) An original and seven copies of the application for initial support must be submitted except that State governments, local governments, or Indian tribal governments shall not be required to submit more than the original and two copies of the application.

(b) Each new or renewal application in response to this part must include:

(1) An application face page, DOE Form 4650.2 (approved by OMB under OMB Control No. 1910–1400). However, the facesheet of the application for State and local governments and Indian tribal government applicants shall be the facesheet of Standard Form (SF) 424 (approved by OMB under OMB Control Number 0348–0043).

(2) A detailed description of the proposed project, including the objectives of the project, in relationship to DOE's program and the applicant's plan for carrying it out;

(3) Detailed information about the background and experience of the principal investigator(s) (including references to publications), the facilities and experience of the applicant, and the cost-sharing arrangements, if any.

(4) A detailed budget for the entire proposed period of support with written justification sufficient to evaluate the itemized list of costs provided on the entire project.

(i) Numerical details on items of cost provided by State and local government and Indian tribal government applicants shall be on Standard Form 424A, Budget Information for Non-Construction Programs (approved under OMB Control No. 0348–0044). All other applicants shall use budget form ERF 4620.1 (approved by OMB under Control No. 1910–1400).

(ii) DOE may, subsequent to receipt of an application, request additional budgetary information from an applicant when necessary for clarification

or to make informed preaward determinations under 2 CFR part 200 as amended by 2 CFR part 910.

(5) Any preaward assurances required pursuant to 2 CFR part 200 as amended by 2 CFR part 910.

(c) Applications for a renewal award must be submitted in an original and seven copies, except that State governments, local governments, or Indian tribes are required to submit only an original and two copies. (Approved by OMB under OMB Control Numbers 0348–0005—0348–0009)

(d) The application must be signed by an official who is authorized to act for the applicant organization and to commit the applicant to comply with the terms and conditions of the award, if one is issued, or if unaffiliated, by the individual applicant. (See § 605.19(a)(1) for requirements on continuation awards.)

(e) All applications which involve research, development, or demonstration activities when such activities:

(1) Have a unique geographic focus and are directly relevant to the governmental responsibilities of a State or local government within the geographic area;

(2) Necessitate the preparation of an Environmental Impact Statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.* (1976)); or

(3) Are to be initiated at a particular site or location and require unusual measures to limit the possibility of adverse exposure or hazard to the general public, are subject to the provisions of Executive Order 12372 and 10 CFR part 1005.

Anyone planning to submit such applications should contact ER for further information about compliance requirements.

(f) DOE may return an application which does not include all information and documentation required by statute, this part, 2 CFR part 200 as amended by 2 CFR part 910 or the notice of availability, when the nature of the omission precludes review of the application.

(g) During the review of the complete application, DOE may request the submission of additional information only if the information is essential to evaluate the application.

(h) In addition to including the information described in paragraphs (b), (c), and (d) of this section, an application for a renewal award must be submitted no later than six months prior to the scheduled expiration of the project period and must be on the same forms and include the same type of information as that required for initial applications. The renewal application must outline and justify a program and budget for the proposed project period, showing in detail the estimated cost of the proposed project, together with an indication of the amount of funds needed and the amount of cost sharing, if any. The application also shall describe and explain the reasons for any change in the scope or objectives of the proposed project, and shall compare and explain any difference between the estimates in the proposed budget and actual costs experienced as of the date of the application.

(i) DOE is not required to return to the applicant an application which is not selected or funded.

(j) Renewal applications must include a separate section that describes the results of work accomplished through the date of the renewal application and how such results relate to the activities proposed to be undertaken in the renewal period.

[57 FR 40583, Sept. 3, 1992, as amended at 79 FR 76046, Dec. 19, 2014]

### § 605.10 Application evaluation and selection.

(a) Applications shall be evaluated for funding generally within 6 months but, in any event, no later than 12 months from the date of receipt by DOE. After DOE has held an application for 6 months, the applicant may, in response to DOE's request, be required to revalidate the terms of the original application.

(b) DOE staff shall perform an initial evaluation of all applications to ensure that the information required by this part is provided, that the proposed effort is technically sound and feasible, and that the effort is consistent with program funding priorities. For applications which pass the initial evaluation, DOE shall review and evaluate

each application received based on the criteria set forth below and in accordance with the Merit Review System developed as required under DOE Financial Assistance Regulations, 2 CFR part 200 as amended by 2 CFR part 910.

(c) DOE shall select evaluators on the basis of their professional qualifications and expertise. Evaluators shall be required to comply with all applicable DOE rules or directives concerning the use of outside evaluators.

(d) DOE shall evaluate new and renewal applications based on the following criteria which are listed in descending order of importance:

(1) Scientific and/or technical merit or the educational benefits of the project;

(2) Appropriateness of the proposed method or approach;

(3) Competency of applicant's personnel and adequacy of proposed resources;

(4) Reasonableness and appropriateness of the proposed budget; and

(5) Other appropriate factors established and set forth by ER in a notice of availability or in a specific solicitation.

(e) Also, DOE shall consider, as part of the evaluation, other available advice or information as well as program policy factors such as ensuring an appropriate balance among the program areas listed in § 605.5(b) of this part.

(f) In addition to the evaluation criteria set forth in paragraphs (d) and (e) of this section, DOE shall consider the recipient's performance under the existing award during the evaluation of a renewal application.

(g) Selection of applications for award will be based upon the findings of the technical evaluations, the importance and relevance of the proposed application to SC's mission, and fund availability. Cost reasonableness and realism will also be considered to the extent appropriate.

(h) After the selection of an application, DOE may, if necessary, enter into negotiation with an applicant. Such negotiations are not a commitment that DOE will make an award.

[57 FR 40583, Sept. 3, 1992, as amended at 79 FR 76046, Dec. 19, 2014]

### § 605.11 Additional requirements.

(a) A recipient performing research, development, or related activities involving the use of human subjects must comply with DOE regulations in 10 CFR part 745, ''Protection of Human Subjects,'' and any additional provisions which may be included in the Special Terms and Conditions of an award.

(b) A recipient performing research involving recombinant DNA molecules and/or organisms and viruses containing recombinant DNA molecules shall comply with the National Institutes of Health ''Guidelines for Research Involving Recombinant DNA Molecules'' (51 FR 16958, May 7, 1986), or such later revision of those guidelines as may be published in the FEDERAL REGISTER. (The guidelines are available from the Office of Recombinant DNA Activities, National Institutes of Health, Building 31, room 4B11, Bethesda, Maryland 20892.)

(c) Any recipient performing research on warm-blooded animals shall comply with the Federal Laboratory Animal Welfare Act of 1966, as amended (7 U.S.C. 2131 *et seq.*) and the regulations promulgated thereunder by the Secretary of Agriculture at 9 CFR chapter I, subchapter A, pertaining to the care, handling, and treatment of warm blooded animals held or used for research, teaching, or other activities supported by Federal awards. The recipient shall comply with the guidelines described in DHHS Publication No. [NIH] 86–23, ''Guide for the Care and Use of Laboratory Animals,'' or succeeding revised editions. (This guide is available from the Office for Protection from Research Risks, Office of the Director, National Institutes of Health, Building 31, room 4B09, Bethesda, Maryland 20205.)

### § 605.12 Funding.

(a) The project period during which DOE expects to provide support for an approved project under this part shall generally not exceed 3 years and may exceed 5 years only if DOE makes a renewal award or otherwise extends the award. The project period shall be specified on the Notice of Financial Assistance Award (DOE Form 4600.1).

(b) Each budget period, of an award under this part, shall generally be 12 months and may be as much as 24 months as determined appropriate by SC.

[57 FR 40583, Sept. 3, 1992, as amended at 79 FR 76047, Dec. 19, 2014]

### § 605.13 Cost sharing.

Cost sharing is not required nor will it be considered as a criterion in the evaluation and selection process unless otherwise provided under § 605.10(d)(5).

### § 605.14 Limitation of DOE liability.

Awards under this part are subject to the requirement that the maximum DOE obligation to the recipient is the amount shown in the Notice of Financial Assistance Award as the amount of DOE funds obligated. DOE shall not be obligated to make any additional, supplemental, continuation, renewal or other awards for the same or any other purpose.

### § 605.15 Fee.

(a) Notwithstanding 2 CFR part 200 as amended by 2 CFR part 910, a fee may be paid, in appropriate circumstances, to a recipient which is a small business concern as qualified under the criteria and size standards of 13 CFR part 121 in order to permit the concern to participate in the ER Financial Assistance Program. Whether or not it is appropriate to pay a fee shall be determined by the Contracting Officer who shall, at a minimum, apply the following guidelines:

(1) Whether the acceptance of an award will displace other work the small business is currently engaged in or committed to assume in the near future; or

(2) Whether the acceptance of an award will, in the absence of paying a fee, cause substantial financial distress to the business. In evaluating financial distress, the Contracting Officer shall balance current displacement against reasonable future benefit to the company. (If the award will result in the beneficial expansion of the existing business base of the company, then no fee would generally be appropriate.) Fees shall not be paid to other entities except as a exceptionfrom 2 CFR part 200 as amended by 2 CFR part 910, nor shall fees be paid under awards in support of conferences.

(b) To request a fee, a small business concern shall submit with its application a written self certification that it is a small business concern qualified under the criteria and size standards in 13 CFR part 121. In addition, the application must state the amount of fee requested for the entire project period and the basis for requesting the amount, and must also state why payment of a fee by DOE would be appropriate.

(c) If the Contracting Officer determines that payment of a fee is appropriate under paragraph (a) of this section, the amount of fee shall be that determined to be reasonable by the Contracting Officer. The Contracting Officer shall, at a minimum, apply the following guidelines in determining the fee amount:

(1) The fee base shall include the estimated allowable cost of direct salaries and wages and allocable fringe benefits. This fee base shall exclude all other direct and indirect costs.

(2) The fee amount expressed as a percentage of the appropriate fee base pursuant to paragraph (c)(1) of this section, shall not exceed the percentage rate of fee that would result if a Federal agency contracted for the same amount of salaries, wages, and allocable fringe benefits under a cost reimbursement contract.

(3) Fee amounts, determined pursuant to paragraphs (c)(1) and (c)(2) of this section, shall be appropriately reduced when:

(i) Advance payments are provided; and/or

(ii) Title to property acquired with DOE funds vests in the recipient (10 CFR part 600).

(d) Notwithstanding 2 CFR part 200 as amended by 2 CFR part 910, any fee awarded shall be a fixed fee and shall be payable on an annual basis in proportion to the work completed, as determined by the Contracting Officer, upon satisfactory submission and acceptance by DOE of the progress report. If the project period is shortened

due to termination, or the project period is not fully funded, the fee shall be reduced by an appropriate amount.

[57 FR 40583, Sept. 3, 1992, as amended at 79 FR 76047, Dec. 19, 2014]

EDITORIAL NOTE: At 79 FR 76047, Dec. 19, 2014, § 605.15 was amended; however, portions of the amendment could not be incorporated due to inaccurate amendatory instruction.

### § 605.16 Indirect cost limitations.

Awards issued under this part for conferences and scientific/technical meetings will not include payment for indirect costs.

### § 605.17 [Reserved]

### § 605.18 National security.

Activities under SC's Financial Assistance Program shall not involve classified information (i.e., Restricted Data, formerly Restricted Data, National Security Information). However, if in the opinion of the recipient or DOE such involvement becomes expected prior to the closeout of the award, the recipient or DOE shall notify the other in writing immediately. If the recipient believes any information developed or acquired may be classifiable, the recipient shall not provide the potentially classifiable information to anyone, including the DOE officials with whom the recipient normally communicates, except the Director of Classification, and shall protect such information as if it were classified until notified by DOE that a determination has been made that it does not require such handling. Correspondence which includes the specific information in question shall be sent by registered mail to U.S. Department of Energy, Attn: Director of Classification, DP–32, Washington, DC 20585. If the information is determined to be classified, the recipient may wish to discontinue the project in which case the recipient and DOE shall terminate the award by mutual agreement. If the award is to be terminated, all material deemed by DOE to be classified shall be forwarded to DOE, in a manner specified by DOE, for proper disposition. If the recipient and DOE wish to continue the award, even though classified information is involved, the recipient shall be required to obtain both personnel and facility security clearances through the Office of Safeguards and Security for Headquarters awards, or from the cognizant field office Division of Safeguards and Security for awards obtained through DOE field organizations. Costs associated with handling and protecting any such classified information shall be negotiated at the time that the determination to proceed is made.

[57 FR 40583, Sept. 3, 1992, as amended at 79 FR 76047, Dec. 19, 2014]

### § 605.19 Continuation funding and reporting requirements.

(a) A recipient shall periodically report to DOE on the project's progress in meeting the project objectives of the award. The following types of reports shall be used:

(1) *Progress reports.* After issuance of an initial award and if future support is recommended, recipients must submit a satisfactory progress report in order to receive continuation awards for the remainder of the project period. The original and two copies of the required report (generally not to exceed two pages per project or task) must be submitted to the SC program manager 90 days prior to the anticipated continuation funding date and contain the following information: on the first page, provide the project title, principal investigator/project director name, period of time report covers, name and address of recipient organization, DOE award number, the amount of unexpended funds, if any, that are anticipated to be left at the end of the current budget period, and if the amount exceeds 10 percent of the funds available for the budget period, provide information as to why the excess funds are anticipated to be available and how they will be used in the next budget period. Report should state whether aims have changed from original application and if they have, provided revised aims. Include results of work to date. Emphasize findings and their significance to the field, and any real or anticipated problems. A completed budget page must be submitted with the continuation progress report when a change to anticipated future costs will exceed 25 percent of the original recommended future budget.

(2) *Notice of Energy R&D Project.* A Notice of Energy R&D Project, DOE Form 1430.22, which summarizes the purpose and scope of the project, must be submitted in accordance with the Distribution and Schedule of Documents set forth at the end of this section. Copies of the form may be obtained from a DOE Contracting Office.

(3) *Special reports.* The recipient shall report the following events to DOE as soon after they occur as possible:

(i) Problems, delays, or adverse conditions which will materially affect the ability to attain project objectives, or prevent the meeting of time schedules and goals. The report must describe the remedial action the recipient has taken or plans to take and any action DOE should take to alleviate the problems.

(ii) Favorable developments or events which enable meeting time schedules and goals sooner or at less cost than anticipated or producing more beneficial results than originally projected.

(4) *Final report.* A final report summarizing the entire investigation must be submitted by the recipient within 90 days after the final project period ends or the award is terminated. Satisfactory completion of an award will be contingent upon the receipt of this report. The final report shall follow the same outline as a progress report. Manuscripts prepared for publication should be appended.

(5) *Financial status report (FSR) (OMB No. 0348–0039).* The FSR is required within 90 days after completion of each budget period; for budget periods exceeding 12 months, an FSR is also required within 90 days after this first 12 months unless waived by the Contracting Officer.

(b) DOE may extend the deadline date for any report if the recipient submits a written request before the deadline which adequately justifies an extension.

(c) A table summarizing the various types of reports, time for submission, number of copies is set forth below. The schedule of reports shall be as prescribed in this table, unless the award document specifies otherwise.

(d) *DOE review of performance.* DOE or its authorized representatives may make site visits, at any reasonable time, to review the project. DOE may provide such technical assistance as may be requested.

(e) *Subrecipient progress reporting.* Recipients may place progress reporting requirements on a subrecipient consistent with the provisions of this section.

DISTRIBUTION AND SCHEDULE OF DOCUMENTS

| Type | When due | Number of copies to be submitted |
|---|---|---|
| 1. Summary: 200 words on scope and purpose (Notice of Energy R&D Project). | Immediately after award and with each application for renewal. | 3 |
| 2. Renewal | 6 months before the project period ends. | 8 |
| 3. Progress Report | 90 days prior to the next budget period (or as part of a renewal application). | 3 |
| 4. Other progress reports, brief topical reports, etc. (Designated when significant results develop or when work has direct programmatic impact). | As deemed appropriate by the recipient. | 3 |
| 5. Reprints, Conference papers. | Same as 4 above | 3 |
| 6. Final Report | Within 90 days after termination of the project. | 3 |
| 7. Financial Status Report. (FSR). | Within 90 days after completion of the project period; for budget periods exceeding 12 months an FSR is also required within 90 days after the first 12-month period. | 3 |

NOTE: Report types 5 and 6 require with submission two copies of DOE Form 1332.16, University-Type Contractor and Grantee Recommendations for Disposition of Scientific and Technical Document.

[57 FR 40583, Sept. 3, 1992, as amended at 79 FR 76047, Dec. 19, 2014]

## § 605.20 Dissemination of results.

(a) Recipients are encouraged to disseminate project results promptly. DOE reserves the right to utilize, and have others utilize, to the extent it deems appropriate, the reports resulting from awards.

(b) DOE may waive progress reporting requirements set forth in § 605.19, if the recipient submits to DOE a copy of its own report which is published or accepted for publication in a recognized

scientific or technical journal and which satisfies the information requirements of the program.

(c) Recipients are urged to publish results through normal publication channels in accordance with the applicable provisions of 2 CFR part 200 as amended by 2 CFR part 910.

(d) The article shall include an acknowledgment that the project was supported, in whole or in part, by a DOE award, and specify the award number, but state that such support does not constitute an endorsement by DOE of the views expressed in the article.

[57 FR 40583, Sept. 3, 1992, as amended at 79 FR 76047, Dec. 19, 2014]

## APPENDIX A TO PART 605—THE ENERGY RESEARCH PROGRAM OFFICE DESCRIPTIONS

### 1. BASIC ENERGY SCIENCES

This program supports basic science research efforts in a variety of disciplines to broaden the energy supply and technological base knowledge. The major science division and its objectives are as follows:

*(a) Energy Biosciences*

The primary objective of this program is to generate a basis of understanding of fundamental biological mechanisms in the areas of botanical and microbiological sciences that will support biotechnology development related to energy. The research serves as the basic information foundation with respect to renewable resource productivity for fuels and chemicals, microbial conversions or renewable materials and biological systems for the conservation of energy. This office has special requirements on the submission of preapplications, when to submit, and the length of the preapplication/application; applicants are encouraged to contact the office regarding these requirements.

*(b) Chemical Sciences*

This program sponsors experimental and theoretical research on liquids, gases, plasmas, and solids. The focus is on their chemical properties and the interactions of their component molecules, atoms, ions, and electrons. The subprogram objective is to expand, through support of basic research, our knowledge in the various areas of chemistry; the long-term goal is to contribute to new or improved processes for developing and using domestic energy resources in an efficient and environmentally sound manner. Disciplinary areas covered include physical, organic, and inorganic chemistry; chemical physics; atomic physics; photochemistry; radiation chemistry; thermodynamics; thermophysics; separations science; analytical chemistry; and actinide chemistry.

*(c) Geosciences*

The goal of this program is to develop a quantitative and predictive understanding of the energy-related aspects of processes within the earth and at the solar-terrestrial interface. The emphasis is on the upper levels of the earth's crust and the focus is on geophysics and geochemistry of rock-fluid systems and interactions. Specific topical areas receiving emphasis include: High resolution geophysical imaging; fundamental properties of rocks, minerals, and fluids; scientific drilling; and sedimentary basin systems. The resulting improved understanding and knowledge base are needed to assist efforts in the utilization of the Nation's energy resources in an environmentally acceptable fashion.

*(d) Engineering Research*

This program's objectives are: (1) To extend the body of knowledge underlying current engineering practice in order to open new ways for enhancing energy savings and production, prolonging useful equipment life, and reducing costs while maintaining output and performance quality; and (2) to broaden the technical and conceptual base for solving future engineering problems in the energy technologies. Long-term research topics of current interest include: foundations of bioprocessing of fuels and energy related wastes, fracture mechanics, experimental and theoretical studies of multiphase flows, intelligent machines, and diagnostics and control for plasma processing of materials.

*(e) Materials Sciences*

The objective of this program is to increase the understanding of phenomena and properties important to materials behavior that will contribute to meeting the needs of present and future energy technologies. It is comprised of the subfields metallurgy, ceramics, solid state physics, materials chemistry, and related disciplines where the emphasis is on the science of materials.

*(f) Advanced Energy Projects*

The objective of this program is to support exploratory research on novel concepts related to energy. The concepts may be in any field related to energy but must not fall into an area of programmatic responsibility of an existing ER technical program. The research is usually aimed at establishing the scientific feasibility of a concept and, where appropriate, at estimating its economic viability.

2. FIELD OPERATIONS MANAGEMENT

This office administers special purpose support programs that cut across DOE program areas. In conjunction with this activity, it supports related conferences, research, and training initiatives that further these areas of interest.

*(a) Laboratory Technology Transfer Program*

The SC Laboratory Technology Transfer (LTT) Program has dedicated funding which fulfills the legislative mandate to more effectively transfer research and technology from Science laboratories to industry. By design, this program provides only partial funding for technology research projects and personnel exchanges with industry and universities. Mandatory cost-sharing by industry and other partners ensures that cooperative projects will focus on those that generate real interest in the private sector and facilitate the transfer of technology. The program supports laboratory-industry personnel exchanges; comprehensive program evaluation; and cost-shared technology research, especially CRADAs to advance precompetitive research projects to a point where they can be evaluated for commercial applications. Other activities of the SC Laboratory Technology Transfer Program include coordinating technology transfer operations throughout the SC laboratory system; coordinating technology transfer elements of the institutional planning process; contributing to Departmental technology transfer policy development; and implementing appropriate outreach activities.

3. FUSION ENERGY

The magnetic fusion energy program is an applied research and development program whose goal is to develop the scientific and technological information required to design and construct magnetic fusion energy systems. This goal is pursued by three divisions, whose major functions are listed below.

(a) APPLIED PLASMA PHYSICS (APP)

This Division seeks to develop that body of physics knowledge which permits advancement of the fusion program on a sound basis. APP research programs provide: (1) The theoretical understanding of fusion plasmas necessary for interpreting results from present experiments, and the planning and design of future confinement devices; (2) the data on plasma properties, atomic physics and new diagnostic techniques for operational support of confinement experiments; research and development of Heavy Ion Fusion Accelerator (HIFAR) and reactor studies in support of the development of Inertial Fusion Energy (IFE).

(b) CONFINEMENT SYSTEMS

This Division has as its primary objective the conduct of research efforts to investigate and resolve basic physics issues associated with medium- to large-scale confinement devices. These devices are used to experimentally explore the limits of specific confinement concepts as well as to study associated physical phenomena. Specific areas of interest include: the production of increased plasma densities and temperatures; the understanding of the physical laws governing plasma energy transport and confinement scaling; equilibrium and stability of high plasma pressure; the investigation of plasma interaction with radio-frequency waves; and the study and control of particle transport in the plasma.

(c) DEVELOPMENT AND TECHNOLOGY

This Division supports research and development of the technology necessary for fabrication and operation of present and future plasma and fusion devices. The program also pursues R&D and system studies pertaining to critical feasibility issues of fusion technology and development.

4. HEALTH AND ENVIRONMENTAL RESEARCH

The goals of this research program are as follows: (1) To provide, through basic and applied research, the scientific information required to identify, understand and anticipate the long-term health and environmental consequences of energy use and development; and (2) to utilize the Department's unique resources to solve major scientific problems in medicine, biology and the environment. The goals of the program are accomplished through the effort of its divisions, which are:

*(a) Health Effects and Life Sciences Research*

This is a broad program of basic and applied biological research. The objectives are: (1) To develop experimental information from biological systems for estimating or predicting risks of carcinogenesis, mutagenesis, and delayed toxicological effects associated with low level human exposures to energy-related radiations and chemicals; (2) to define mechanisms involved in the induction of biological damage following exposure to low levels of energy-related agents; (3) to develop new technologies for detecting and quantifying latent health effects associated with such agents; (4) to support fundamental research in structural biology user facilities at DOE laboratories; and (5) to create and apply new technologies and resources for characterizing the molecular nature of the human genome.

Increasing emphasis will be placed on: Understanding of mechanisms by which low level exposures to radiation and/or energy-related chemicals produce long-term health impacts; development of new technologies

for estimating human health risks from low level exposures; development and application of technologies and approaches for cost-effective characterization of the human genome.

*(b) Medical Applications and Biophysical Research*

The objectives of this program comprise several areas: (1) To develop new concepts and techniques for detecting and measuring hazardous physical and chemical agents related to energy production; (2) to evaluate chemical and radiation exposures and dosimetry for health protection application; (3) to determine the physical and chemical mechanisms of radiation action in biological systems; and (4) to develop new instrumentation and technology for biological and biomedical research. In addition, Medical Application research is aimed at enhancing the beneficial applications of radiation, and radionuclides, in the diagnosis, study, and treatment of human diseases. This includes the development of new techniques for radioactive isotope production, labeled pharmaceuticals, imaging devices, and radiation beam applications for the improved diagnosis and therapy of human diseases or the study of human physiological processes. A new area of interest involves the integration of Nuclear Medicine and Molecular Biology. This includes development of radioisotopes and new molecular radiopharmaceutical probes specific to disease-associated targets for improved diagnosis and therapy.

*(c) Environmental Sciences*

The objectives of the program relate to environmental processes affected by energy production and use. For example, the program develops information on the physical, chemical and biological processes that cycle and transport energy related material and nutrients through the atmosphere, and the ocean margin. Specific emphasis is placed on hydrological transport, mobility and degradation of energy-related contaminants by microorganisms in subsurface systems.

This program also addresses global environmental change from increases in atmospheric carbon dioxide and other greenhouse gases. The scope of the global change program encompasses the carbon cycle, climate modeling and diagnostics, ecosystem responses, the role of the ocean in global change and experiments to quantify the links between greenhouse gas increases and climate change. A new dimension of this program addresses the role of molecular biology in understanding the ecosystem response to global change.

5. HIGH ENERGY AND NUCLEAR PHYSICS

This program supports 90 percent of the U.S. efforts in high energy and nuclear physics. The objectives of these programs are indicated below:

*(a) Nuclear Physics (Including Nuclear Data Program)*

The primary objectives of this program are an understanding of the interactions and structures of atomic nuclei and nuclear matter at the most elementary level possible, and an understanding of the fundamental forces of nature as manifested in nuclear matter.

*(b) High Energy Physics*

The primary objectives of this program are to understand the nature and relationships among fundamental forces of nature and to understand the ultimate structure of matter in terms of the properties and interrelations of its basic constituents.

6. SCIENTIFIC COMPUTING STAFF

The goal of this program is to advance the understanding of the fundamental concepts of mathematics, statistics, and computer science underlying the complex mathematical models of the key physical processes involved in the research and development programs of DOE. Broad emphasis is given in three major categories: analytical and numerical methods, information analysis techniques, and advanced concepts.

7. SUPERCONDUCTING SUPER COLLIDER (SSC)

The goals of the Superconducting Super Collider are to build a proton-proton collider with an energy of 20 TeV per proton, to construct and operate experimental systems to study the interactions of these protons, to establish the premier international laboratory for high energy physics reasearch, and to create a major resource for science education. The Office of the Superconducting Super Collider administers research grants associated with the SSC Laboratory's physics, accelerator, and associated technology research and development programs.

8. UNIVERSITY AND SCIENCE EDUCATION

The Office of University and Science Education supports a variety of science, mathematics and engineering education precollege through postgraduate programs aimed at strengthening the Nation's science education and research infrastructure. DOE's education mission has been expanded to include increasing emphasis on the precollege and general public literacy areas. Much of the support involves the use of the unique resources (scientists, facilities and equipment) at DOE's national laboratories and research facilities, and includes research and/or other ''hands-on'' opportunities for precollege and postsecondary students, teachers, and faculty members. In addition to programs centered in DOE facilities, a number of other

educational activities are supported, including:

*(a) Pre-Freshman Enrichment Program (PREP)*

PREP supports projects at colleges and universities aimed at seeking out gindividuals, typically under-represented in science-based careers, during junior high school and early high school years (sixth through tenth grades) and providing these individuals with pre-freshman enrichment activities to identify, motivate and prepare them for science-based careers. Projects must include concentrated, integrated activities that enhance the student's understanding of science and mathematics, must have a summer component at least four weeks in length, and may also include a pre-summer or post-summer component.

*(b) Museum Science Education Program*

This program funds museum projects that support the development of the media of informal energy-related science education. The media of informal science education include, but are not limited to: Interactive exhibits, demonstrations, hands-on activities, teacher-student curriculum and film/video/software productions. Examples of energy-related subjects include, but are not limited to: high energy and nuclear physics, nuclear science and technologies, global warming, waste management, energy efficiency, new materials development, fossil energy resources, renewable technologies, risk assessment, energy/environment and other timely topics. The purpose of the program is the development and use of creative informal science education media which focus on energy-related science and technology.

*(c) University Research Instrumentation Program*

The University Research Instrumentation Program has been developed as part of an interagency effort under the coordination of the Office of Science and Technology Policy to help alleviate the overall shortage of sophisticated state-of-the-art instruments required for advanced scientific and technical research at universities. The overall program objective is to assist university and college scientists in strengthening their capabilities to conduct long-range experimental/scientific research in specific energy areas of direct interest to DOE through the acquisition of large scientific/technical pieces of equipment. Only those colleges and universities that currently have DOE funded research projects, which require the requested equipment, totalling at least $150,000 in the specific area will be selected (more complete eligibility guidelines and principal research areas of particular DOE interest in any given year are available from the program office). Smaller research instruments (less than $100,000 each) are not eligible for consideration in this program. No specific fraction of cost sharing is required but the level of non-Federal funds to be provided will be considered in final selection of awards under the program.

*(d) Experimental Program To Stimulate Competitive Research*

The purpose of the DOE Experimental Program to Stimulate Competitive Research is to enhance the capabilities of the eligible designated States to develop science and engineering manpower in energy-related areas and to conduct nationally competitive energy-related research. Planning committees within eligible States may apply for planning, implementation and/or training efforts (list of eligible States and activities to be supported in any given year as well as cost-sharing requirements are available from the program office). Separate applications for planning/implementation and graduate traineeships are required. Planning/implementation applications must contain information that details development of a Statewide improvement plan for energy-related research and human resources, while training grant applications must detail the need for energy-related specific and technical educational disciplines.

*(e) Nuclear Engineering Research*

The objective of this program is to support research efforts aimed at strengthening University-based nuclear engineering programs. Specific areas of basic and applied research of interest include, but are not limited to: (1) Material behavior in a radiation environment typical of advanced nuclear power plants; (2) real-time instrumentation that identifies and applies innovative measurements technologies in nuclear-related fields; (3) advanced nuclear reactor concepts; (4) applied nuclear sciences that address improvements in the applications of radiation and the understanding of the interaction of radiation with matter; (5) engineering science research applicable to advanced nuclear reactor concepts, industry safety and reliability concerns; (6) neutronics that address improvements in reactor computational methodologies and knowledge of the basic fission processes; and (7) nuclear thermal hydraulics that address improvements of models and analysis of thermal hydraulic behavior in an advanced nuclear reactor system.

*(f) Used Energy-Related Laboratory Equipment (ERIE) Program*

In accordance with DOE's responsibility to encourage research and development in the energy area, grants of used energy-related

laboratory equipment for use in energy-oriented educational programs in the life, physical and environmental sciences, and engineering are available to universities, colleges and other non-profit educational institutions of higher learning in the United States. An institution is not required to have a current DOE grant or contract in order to participate in this program. The program office should be contacted for specific information on how to access the list of eligible equipment under this program. The cost of care and handling incident to the grant must be borne by the institution.

9. PROGRAM ANALYSIS

The Office of Program Analysis conducts assessments to identify research opportunities in specific areas of interest to DOE programs.

[57 FR 40583, Sept. 3, 1992, as amended at 79 FR 76047, Dec. 19, 2014]

# PART 609—LOAN GUARANTEES FOR PROJECTS THAT EMPLOY INNOVATIVE TECHNOLOGIES (Eff. until Jan. 17, 2017)

Sec.
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609.9 Closing on the Loan Guarantee Agreement.
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609.12 Project Costs.
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609.17 Audit and access to records.
609.18 Deviations.

AUTHORITY: 42 U.S.C. 7254, 16511–16514.

SOURCE: 74 FR 63549, Dec. 4, 2009, unless otherwise noted.

EFFECTIVE DATE NOTE: At 81 FR 90703, Dec. 15, 2016, part 609 was revised, effective Jan. 17, 2017. For the convenience of the user, the revised text in effect at Jan. 17, 2017 is set forth after the old part.

## § 609.1 Purpose and scope.

(a) This part sets forth the policies and procedures that DOE uses for receiving, evaluating, and, after consultation with the Department of the Treasury, approving applications for loan guarantees to support Eligible Projects under Section 1703 of Title XVII of the Energy Policy Act of 2005, as amended.

(b) Except as set forth in paragraph (c) of this section, this part applies to all Pre-Applications, Applications, Conditional Commitments and Loan Guarantee Agreements to support Eligible Projects under Section 1703 of Title XVII of the Energy Policy Act of 2005, as amended.

(c) Sections 609.3, 609.4 and 609.5 of this part shall not apply to any Pre-Applications, Applications, Conditional Commitments or Loan Guarantee Agreements submitted, or entered into, as applicable, on or before December 31, 2007; provided, that DOE accepted the Pre-Application and invited an Application pursuant to such Pre-Application.

(d) Part 1024 of chapter X of title 10 of the Code of Federal Regulations shall not apply to actions taken under this part.

## § 609.2 Definitions.

*Act* means Title XVII of the Energy Policy Act of 2005 (42 U.S.C. 16511–16514), as amended.

*Administrative Cost of Issuing a Loan Guarantee* means the total of all administrative expenses that DOE incurs during:

(1) The evaluation of a Pre-Application, if a Pre-Application is requested in a solicitation, and an Application for a loan guarantee;

(2) The offering of a Term Sheet, executing the Conditional Commitment, negotiation, and closing of a Loan Guarantee Agreement; and

(3) The servicing and monitoring of a Loan Guarantee Agreement, including during the construction, startup, commissioning, shakedown, and operational phases of an Eligible Project.

*Applicant* means any person, firm, corporation, company, partnership, association, society, trust, joint venture, joint stock company, or other business entity or governmental non-Federal

entity that has submitted an Application to DOE and has the authority to enter into a Loan Guarantee Agreement with DOE under the Act.

*Application* means a comprehensive written submission in response to a solicitation or a written invitation from DOE to apply for a loan guarantee pursuant to § 609.6 of this part.

*Borrower* means any Applicant who enters into a Loan Guarantee Agreement with DOE and issues Guaranteed Obligations.

*Commercial Technology* means a technology in general use in the commercial marketplace in the United States at the time the Term Sheet is issued by DOE. A technology is in general use if it has been installed in and is being used in three or more commercial projects in the United States in the same general application as in the proposed project, and has been in operation in each such commercial project for a period of at least five years. The five-year period shall be measured, for each project, starting on the in service date of the project or facility employing that particular technology. For purposes of this section, commercial projects include projects that have been the recipients of a loan guarantee from DOE under this part.

*Conditional Commitment* means a Term Sheet offered by DOE and accepted by the Applicant, with the understanding of the parties that if the Applicant thereafter satisfies all specified and precedent funding obligations and all other contractual, statutory and regulatory requirements, or other requirements, DOE and the Applicant will execute a Loan Guarantee Agreement: Provided that the Secretary may terminate a Conditional Commitment for any reason at any time prior to the execution of the Loan Guarantee Agreement; and Provided further that the Secretary may not delegate this authority to terminate a Conditional Commitment.

*Contracting Officer* means the Secretary of Energy or a DOE official authorized by the Secretary to enter into, administer and/or terminate DOE Loan Guarantee Agreements and related contracts on behalf of DOE.

*Credit Subsidy Cost* has the same meaning as ''cost of a loan guarantee'' in section 502(5)(C) of the Federal Credit Reform Act of 1990 (2 U.S.C. 661a(5)(C)), which is the net present value, at the time the Loan Guarantee Agreement is executed, of the following estimated cash flows, discounted to the point of disbursement:

(1) Payments by the Government to cover defaults and delinquencies, interest subsidies, or other payments; less

(2) Payments to the Government including origination and other fees, penalties, and recoveries; including the effects of changes in loan or debt terms resulting from the exercise by the Borrower, Eligible Lender or other Holder of an option included in the Loan Guarantee Agreement.

*DOE* means the United States Department of Energy.

*Eligible lender* means:

(1) Any person or legal entity formed for the purpose of, or engaged in the business of, lending money, including, but not limited to, commercial banks, savings and loan institutions, insurance companies, factoring companies, investment banks, institutional investors, venture capital investment companies, trusts, or other entities designated as trustees or agents acting on behalf of bondholders or other lenders; and

(2) Any person or legal entity that meets the requirements of § 609.11 of this part, as determined by DOE; or

(3) The Federal Financing Bank.

*Eligible project* means a project located in the United States that employs a New or Significantly Improved Technology that is not a Commercial Technology, and that meets all applicable requirements of section 1703 of the Act (42 U.S.C. 16513), the applicable solicitation and this part.

*Equity* means cash contributed by the Borrowers and other principals. Equity does not include proceeds from the non-guaranteed portion of Title XVII loans, proceeds from any other non-guaranteed loans, or the value of any form of government assistance or support.

*Federal Financing Bank* means an instrumentality of the United States government created by the Federal Financing Bank Act of 1973 (12 U.S.C. 2281 *et seq*). The Bank is under the general

supervision of the Secretary of the Treasury.

*Guaranteed Obligation* means any loan or other debt obligation of the Borrower for an Eligible Project for which DOE guarantees all or any part of the payment of principal and interest under a Loan Guarantee Agreement entered into pursuant to the Act.

*Holder* means any person or legal entity that owns a Guaranteed Obligation or has lawfully succeeded in due course to all or part of the rights, title, and interest in a Guaranteed Obligation, including any nominee or trustee empowered to act for the Holder or Holders.

*Intercreditor Agreement* means any agreement or instrument among DOE and one or more other persons providing financing or other credit arrangements or that otherwise provides for rights of DOE, in each case, in form and substance satisfactory to DOE and entered into or accepted by DOE in connection with a DOE loan guarantee upon a determination by DOE that such agreement or instrument is reasonable and necessary to protect the interests of the United States, and addressing such matters as collateral sharing, priorities (subject always to Section 1702(d)(3) of Title XVII) and voting rights among creditors and other intercreditor arrangements, as such agreement or instrument may be amended or modified from time to time with the consent of DOE.

*Loan Agreement* means a written agreement between a Borrower and an Eligible Lender or other Holder containing the terms and conditions under which the Eligible Lender or other Holder will make loans to the Borrower to start and complete an Eligible Project.

*Loan Guarantee Agreement* means a written agreement that, when entered into by DOE and a Borrower, an Eligible Lender or other Holder, pursuant to the Act, establishes the obligation of DOE to guarantee the payment of all or a portion of the principal and interest on specified Guaranteed Obligations of a Borrower to Eligible Lenders or other Holders subject to the terms and conditions specified in the Loan Guarantee Agreement.

*New or Significantly Improved Technology* means a technology concerned with the production, consumption or transportation of energy and that is not a Commercial Technology, and that has either:

(1) Only recently been developed, discovered or learned; or

(2) Involves or constitutes one or more meaningful and important improvements in productivity or value, in comparison to Commercial Technologies in use in the United States at the time the Term Sheet is issued.

*OMB* means the Office of Management and Budget in the Executive Office of the President.

*Pre-Application* means a written submission in response to a DOE solicitation that broadly describes the project proposal, including the proposed role of a DOE loan guarantee in the project, and the eligibility of the project to receive a loan guarantee under the applicable solicitation, the Act and this part.

*Project costs* means those costs, including escalation and contingencies, that are to be expended or accrued by Borrower and are necessary, reasonable, customary and directly related to the design, engineering, financing, construction, startup, commissioning and shakedown of an Eligible Project, as specified in § 609.12 of this part. Project costs do not include costs for the items set forth in § 609.12(c) of this part.

*Project Sponsor* means any person, firm, corporation, company, partnership, association, society, trust, joint venture, joint stock company or other business entity that assumes substantial responsibility for the development, financing, and structuring of a project eligible for a loan guarantee and, if not the Applicant, owns or controls, by itself and/or through individuals in common or affiliated business entities, a five percent or greater interest in the proposed Eligible Project, or the Applicant.

*Secretary* means the Secretary of Energy or a duly authorized designee or successor in interest.

*Term Sheet* means an offering document issued by DOE that specifies the detailed terms and conditions under

which DOE may enter into a Conditional Commitment with the Applicant. A Term Sheet imposes no obligation on the Secretary to enter into a Conditional Commitment.

*United States* means the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa or any territory or possession of the United States of America.

### § 609.3 Solicitations.

(a) DOE may issue solicitations to invite the submission of Pre-Applications or Applications for loan guarantees for Eligible Projects. DOE must issue a solicitation before proceeding with other steps in the loan guarantee process including issuance of a loan guarantee. A Project Sponsor or Applicant may only submit one Pre-Application or Application for one project using a particular technology. A Project Sponsor or Applicant, in other words, may not submit a Pre-Application or Application for multiple projects using the same technology.

(b) Each solicitation must include, at a minimum, the following information:

(1) The dollar amount of loan guarantee authority potentially being made available by DOE in that solicitation;

(2) The place and time for response submission;

(3) The name and address of the DOE representative whom a potential Project Sponsor may contact to receive further information and a copy of the solicitation;

(4) The form, format, and page limits applicable to the response submission;

(5) The amount of the application fee (First Fee), if any, that will be required;

(6) The programmatic, technical, financial and other factors the Secretary will use to evaluate response submissions, including the loan guarantee percentage requested by the Applicant and the relative weightings that DOE will use when evaluating those factors; and

(7) Such other information as DOE may deem appropriate.

### § 609.4 Submission of Pre-Applications.

In response to a solicitation requesting the submission of Pre-Applications, either Project Sponsors or Applicants may submit Pre-Applications to DOE. The information submitted in or in connection with Pre-Applications will be treated as provided in 10 CFR 600.15 and must be marked as provided in 10 CFR 600.15(b). Pre-Applications must meet all requirements specified in the solicitation and this part. At a minimum, each Pre-Application must contain all of the following:

(a) A cover page signed by an individual with full authority to bind the Project Sponsor or Applicant that attests to the accuracy of the information in the Pre-Application, and that binds the Project Sponsor(s) or Applicant to the commitments made in the Pre-Application. In addition, the information requested in paragraphs (b) and (c) of this section should be submitted in a volume one and the information requested in paragraphs (d) through (h) of this section should be submitted in a volume two, to expedite the DOE review process.

(b) An executive summary briefly encapsulating the key project features and attributes of the proposed project (for clarity, with respect to any project in which project assets or facilities are jointly owned by the Applicant and one or more other persons, each of whom owns an undivided ownership interest in such project assets or facilities, the Applicant may submit a project proposal with respect to its undivided ownership interest in such project assets or facilities);

(c) A business plan which includes an overview of the proposed project, including:

(1) A description of the Project Sponsor, including all entities involved, and its experience in project investment, development, construction, operation and maintenance;

(2) A description of the new or significantly improved technology to be employed in the project, including:

(i) A report detailing its successes and failures during the pilot and demonstration phases;

(ii) The technology's commercial applications;

(iii) The significance of the technology to energy use or emission control;

(iv) How and why the technology is ''new'' or ''significantly improved'' compared to technology already in general use in the commercial marketplace in the United States;

(v) Why the technology to be employed in the project is not in ''general use;''

(vi) The owners or controllers of the intellectual property incorporated in and utilized by such technologies; and

(vii) The manufacturer(s) and licensee(s), if any, authorized to make the technology available in the United States, the potential for replication of commercial use of the technology in the United States, and whether and how the technology is or will be made available in the United States for further commercial use;

(3) The estimated amount, in reasonable detail, of the total Project Costs;

(4) The timeframe required for construction and commissioning of the project;

(5) A description of any primary offtake or other revenue-generating agreements that will provide the primary sources of revenues for the project, including repayment of the debt obligations for which a guarantee is sought.

(6) An overview of how the project complies with the eligibility requirements in section 1703 of the Act (42 U.S.C. 16513);

(7) An outline of the potential environmental impacts of the project and how these impacts will be mitigated;

(8) A description of the anticipated air pollution and/or anthropogenic greenhouse gas reduction benefits and how these benefits will be measured and validated; and

(9) A list of all of the requirements contained in this part and the solicitation and where in the Pre-Application these requirements are addressed;

(d) A financing plan overview describing:

(1) The amount of equity to be invested and the sources of such equity;

(2) The amount of the total debt obligations to be incurred and the funding sources of all such debt if available;

(3) The amount of the Guaranteed Obligation as a percentage of total project debt; and as a percentage of total project cost; and

(4) A financial model detailing the investments in and the cash flows generated and anticipated from the project over the project's expected life-cycle, including a complete explanation of the facts, assumptions, and methodologies in the financial model;

(e) An explanation of what estimated impact the loan guarantee will have on the interest rate, debt term, and overall financial structure of the project;

(f) Where the Federal Financing Bank is not the lender, a copy of a letter from an Eligible Lender or other Holder(s) expressing its commitment to provide, or interest in providing, the required debt financing necessary to construct and fully commission the project;

(g) A copy of the equity commitment letter(s) from each of the Project Sponsors and a description of the sources for such equity; and

(h) A commitment to pay the Application fee (First Fee), if invited to submit an Application.

[74 FR 63549, Dec. 4, 2009, as amended at 76 FR 26582, May 9, 2011]

### § 609.5 Evaluation of Pre-Applications.

(a) Where Pre-Applications are requested in a solicitation, DOE will conduct an initial review of the Pre-Application to determine whether:

(1) The proposal is for an Eligible Project;

(2) The submission contains the information required by § 609.4 of this part; and

(3) The submission meets all other requirements of the applicable solicitation.

(b) If a Pre-Application fails to meet the requirements of paragraph (a) of this section, DOE may deem it non-responsive and eliminate it from further review.

(c) If DOE deems a Pre-Application responsive, DOE will evaluate:

(1) The commercial viability of the proposed project;

(2) The technology to be employed in the project;

(3) The relevant experience of the principal(s); and

(4) The financial capability of the Project Sponsor (including personal and/or business credit information of the principal(s)).

(d) After the evaluation described in paragraph (c) of this section, DOE will determine if there is sufficient information in the Pre-Application to assess the technical and commercial viability of the proposed project and/or the financial capability of the Project Sponsor and to assess other aspects of the Pre-Application. DOE may ask for additional information from the Project Sponsor during the review process and may request one or more meetings with the Project Sponsor. Any additional information submitted will be treated as provided in 10 CFR 600.15 and must be marked as provided in 10 CFR 600.15(b).

(e) After reviewing a Pre-Application and other information acquired under paragraph (c) of this section, DOE may provide a written response to the Project Sponsor or Applicant either inviting the Applicant to submit an Application for a loan guarantee and specifying the amount of the Application filing fee (First Fee) or advising the Project Sponsor that the project proposal will not receive further consideration. Neither the Pre-Application nor any written or other feedback that DOE may provide in response to the Pre-Application eliminates the requirement for an Application.

(f) No response by DOE to, or communication by DOE with, a Project Sponsor, or an Applicant submitting a Pre-Application or subsequent Application shall impose any obligation on DOE to enter into a Loan Guarantee Agreement.

[74 FR 63549, Dec. 4, 2009, as amended at 76 FR 26582, May 9, 2011]

### § 609.6 Submission of Applications.

(a) In response to a solicitation or written invitation to submit an Application, an Applicant submitting an Application must meet all requirements and provide all information specified in the solicitation and/or invitation and this part. The information submitted in or in connection with Applications will be treated as provided in 10 CFR 600.15 and must be marked as provided in 10 CFR 600.15(b).

(b) An Application must include, at a minimum, the following information and materials:

(1) A completed Application form signed by an individual with full authority to bind the Applicant and the Project Sponsors;

(2) Payment of the Application filing fee (First Fee) for the Pre-Application, if any, and Application phase;

(3) A detailed description of all material amendments, modifications, and additions made to the information and documentation provided in the Pre-Application, if a Pre-Application was requested in the solicitation, including any changes in the proposed project's financing structure or other terms;

(4) A description of how and to what measurable extent the project avoids, reduces, or sequesters air pollutants and/or anthropogenic emissions of greenhouse gases, including how to measure and verify those benefits;

(5) A description of the nature and scope of the proposed project, including:

(i) Key milestones;

(ii) Location of the project;

(iii) Identification and commercial feasibility of the new or significantly improved technology(ies) to be employed in the project;

(iv) How the Applicant intends to employ such technology(ies) in the project; and

(v) How the Applicant intends to assure, to the extent possible, the further commercial availability of the technology(ies) in the United States;

(vi) For clarity, with respect to any project in which project assets or facilities are jointly owned by the Applicant and one or more other persons, each of whom owns an undivided ownership interest in such project assets or facilities, the Applicant may submit a project proposal with respect to its undivided ownership interest in such project assets or facilities.

(6) A detailed explanation of how the proposed project qualifies as an Eligible Project;

(7) A detailed estimate of the total Project Costs together with a description of the methodology and assumptions used;

(8) A detailed description of the engineering and design contractor(s), construction contractor(s), equipment supplier(s), and construction schedules for the project, including major activity

and cost milestones as well as the performance guarantees, performance bonds, liquidated damages provisions, and equipment warranties to be provided;

(9) A detailed description of the operations and maintenance provider(s), the plant operating plan, estimated staffing requirements, parts inventory, major maintenance schedule, estimated annual downtime, and performance guarantees and related liquidated damage provisions, if any;

(10) A description of the management plan of operations to be employed in carrying out the project, and information concerning the management experience of each officer or key person associated with the project;

(11) A detailed description of the project decommissioning, deconstruction, and disposal plan, and the anticipated costs associated therewith;

(12) An analysis of the market for any product to be produced by the project, including relevant economics justifying the analysis, and copies of any contractual agreements for the sale of these products or assurance of the revenues to be generated from sale of these products;

(13) A detailed description of the overall financial plan for the proposed project, including all sources and uses of funding, equity and debt, and the liability of parties associated with the project over the term of the Loan Guarantee Agreement;

(14) A copy of all material agreements, whether entered into or proposed, relevant to the investment, design, engineering, financing, construction, startup commissioning, shakedown, operations and maintenance of the project;

(15) A copy of the financial closing checklist for the equity and debt to the extent available;

(16) Applicant's business plan on which the project is based and Applicant's financial model presenting project *pro forma* statements for the proposed term of the Guaranteed Obligations including income statements, balance sheets, and cash flows. All such information and data must include assumptions made in their preparation and the range of revenue, operating cost, and credit assumptions considered;

(17) Financial statements for the past three years, or less if the Applicant has been in operation less than three years, that have been audited by an independent certified public accountant, including all associated notes, as well as interim financial statements and notes for the current fiscal year, of Applicant and parties providing Applicant's financial backing, together with business and financial interests of controlling or commonly controlled organizations or persons, including parent, subsidiary and other affiliated corporations or partners of the Applicant;

(18) A copy of all legal opinions, and other material reports, analyses, and reviews related to the project;

(19) An independent engineering report prepared by an engineer with experience in the industry and familiarity with similar projects. The report should address: the project's siting and permitting, engineering and design, contractual requirements, environmental compliance, testing and commissioning and operations and maintenance;

(20) Credit history of the Applicant and, if appropriate, any party who owns or controls, by itself and/or through individuals in common or affiliated business entities, a five percent or greater interest in the project or the Applicant;

(21) A preliminary credit assessment for the project without a loan guarantee from a nationally recognized rating agency for projects where the estimated total Project Costs exceed $25 million. For projects where the total estimated Project Costs are $25 million or less and where conditions justify, in the sole discretion of the Secretary, DOE may require such an assessment;

(22) A list showing the status of and estimated completion date of Applicant's required project-related applications or approvals for Federal, State, and local permits and authorizations to site, construct, and operate the project;

(23) A report containing an analysis of the potential environmental impacts of the project that will enable DOE to assess whether the project will comply

with all applicable environmental requirements, and that will enable DOE to undertake and complete any necessary reviews under the National Environmental Policy Act of 1969;

(24) A listing and description of assets associated, or to be associated, with the project and any other asset that will serve as collateral for the Guaranteed Obligations, including appropriate data as to the value of the assets and the useful life of any physical assets. With respect to real property assets listed, an appraisal that is consistent with the ''Uniform Standards of Professional Appraisal Practice,'' promulgated by the Appraisal Standards Board of the Appraisal Foundation, and performed by licensed or certified appraisers, is required;

(25) An analysis demonstrating that, at the time of the Application, there is a reasonable prospect that Borrower will be able to repay the Guaranteed Obligations (including interest) according to their terms, and a complete description of the operational and financial assumptions and methodologies on which this demonstration is based;

(26) Written affirmation from an officer of the Eligible Lender or other Holder confirming that it is in good standing with DOE's and other Federal agencies' loan guarantee programs;

(27) A list of all of the requirements contained in this part and the solicitation and where in the Application these requirements are addressed;

(28) A statement from the Applicant that it believes that there is ''reasonable prospect'' that the Guaranteed Obligations will be fully paid from project revenue; and

(29) Any other information requested in the invitation to submit an Application or requests from DOE in order to clarify an Application;

(c) DOE will not consider any Application complete unless the Applicant has paid the First Fee and the Application is signed by the appropriate entity or entities with the authority to bind the Applicant to the commitments and representations made in the Application.

[74 FR 63549, Dec. 4, 2009, as amended at 76 FR 26582, May 9, 2011]

## § 609.7 Programmatic, technical and financial evaluation of Applications.

(a) In reviewing completed Applications, and in prioritizing and selecting those to whom a Term Sheet should be offered, DOE will apply the criteria set forth in the Act, the applicable solicitation, and this part. Applications will be considered in a competitive process, *i.e.* each Application will be evaluated against other Applications responsive to the Solicitation. Greater weight will be given to applications that rely upon a smaller guarantee percentage, all else being equal. Concurrent with its review process, DOE will consult with the Secretary of the Treasury regarding the terms and conditions of the potential loan guarantee. Applications will be denied if:

(1) The project will be built or operated outside the United States;

(2) The project is not ready to be employed commercially in the United States, cannot yield a commercially viable product or service in the use proposed in the project, does not have the potential to be employed in other commercial projects in the United States, and is not or will not be available for further commercial use in the United States;

(3) The entity or person issuing the loan or other debt obligations subject to the loan guarantee is not an Eligible Lender or other Holder, as defined in § 609.11 of this part;

(4) The project is for demonstration, research, or development.

(5) The project does not avoid, reduce or sequester air pollutants or anthropogenic emissions of greenhouse gases; or

(6) The Applicant will not provide an equity contribution.

(b) In evaluating Applications, DOE will consider the following factors:

(1) To what measurable extent the project avoids, reduces, or sequesters air pollutants or anthropogenic emissions of greenhouses gases;

(2) To what extent the new or significantly improved technology to be employed in the project, as compared to Commercial Technology in general use in the United States, is ready to be employed commercially in the United States, can be replicated, yields a commercially viable project or service in

the use proposed in the project, has potential to be employed in other commercial projects in the United States, and is or will be available for further commercial use in the United States;

(3) To what extent the new or significantly improved technology used in the project constitutes an important improvement in technology, as compared to Commercial Technology, used to avoid, reduce or sequester air pollutants or anthropogenic emissions of greenhouse gases, and the Applicant has a plan to advance or assist in the advancement of that technology into the commercial marketplace;

(4) The extent to which the requested amount of the loan guarantee, the requested amount of Guaranteed Obligations and, if applicable, the expected amount of any other financing or credit arrangements are reasonable relative to the nature and scope of the project;

(5) The total amount and nature of the Eligible Project Costs and the extent to which Project Costs are funded by Guaranteed Obligations;

(6) The likelihood that the project will be ready for full commercial operations in the time frame stated in the Application;

(7) The amount of equity commitment to the project by the Applicant and other principals involved in the project;

(8) Whether there is sufficient evidence that the Applicant will diligently pursue the project, including initiating and completing the project in a timely manner;

(9) Whether and to what extent the Applicant will rely upon other Federal and non-Federal governmental assistance such as grants, tax credits, or other loan guarantees to support the financing, construction, and operation of the project and how such assistance will impact the project;

(10) The feasibility of the project and likelihood that the project will produce sufficient revenues to service the project's debt obligations over the life of the loan guarantee and assure timely repayment of Guaranteed Obligations;

(11) The levels of safeguards provided to the Federal government in the event of default through collateral, warranties, and other assurance of repayment described in the Application, including the nature of any anticipated intercreditor arrangements;

(12) The Applicant's capacity and expertise to successfully operate the project, based on factors such as financial soundness, management organization, and the nature and extent of corporate and personal experience;

(13) The ability of the applicant to ensure that the project will comply with all applicable laws and regulations, including all applicable environmental statutes and regulations;

(14) The levels of market, regulatory, legal, financial, technological, and other risks associated with the project and their appropriateness for a loan guarantee provided by DOE;

(15) Whether the Application contains sufficient information, including a detailed description of the nature and scope of the project and the nature, scope, and risk coverage of the loan guarantee sought to enable DOE to perform a thorough assessment of the project; and

(16) Such other criteria that DOE deems relevant in evaluating the merits of an Application.

(c) During the Application review process DOE may raise issues or concerns that were not raised during the Pre-Application review process where a Pre-Application was requested in the applicable solicitation. Any additional information submitted to DOE will be treated as provided in 10 CFR 600.15 and must be marked as provided in 10 CFR 600.15(b).

(d) If DOE determines that a project may be suitable for a loan guarantee, DOE will notify the Applicant and Eligible Lender or other Holder in writing and provide them with a Term Sheet. If DOE reviews an Application and decides not to proceed further with the issuance of a Term Sheet, DOE will inform the Applicant in writing of the reason(s) for denial.

[74 FR 63549, Dec. 4, 2009, as amended at 76 FR 26582, May 9, 2011]

### § 609.8 Term sheets and conditional commitments.

(a) DOE, after review and evaluation of the Application, additional information requested and received by DOE,

potentially including a preliminary credit rating or credit assessment, and information obtained as the result of meeting with the Applicant and the Eligible Lender or other Holder, may offer to an Applicant and the Eligible Lender or other Holder detailed terms and conditions that must be met, including terms and conditions that must be met by the Applicant and the Eligible Lender or other Holder.

(b) The terms and conditions required by DOE will be expressed in a written Term Sheet signed by a Contracting Officer and addressed to the Applicant and the Eligible Lender or other Holder, where appropriate. The Term Sheet will request that the Project Sponsor and the Eligible Lender or other Holder express agreement with the terms and conditions contained in the Term Sheet by signing the Term Sheet in the designated place. Each person signing the Term Sheet must be a duly authorized official or officer of the Applicant and Eligible Lender or other Holder. The Term Sheet will include an expiration date on which the terms offered will expire unless the Contracting Officer agrees in writing to extend the expiration date.

(c) The Applicant and/or the Eligible Lender or other Holder may respond to the Term Sheet offer in writing or may request discussions or meetings on the terms and conditions contained in the Term Sheet, including requests for clarifications or revisions. When DOE, the Applicant, and the Eligible Lender or other Holder agree on all of the final terms and conditions and all parties sign the Term Sheet, the Term Sheet becomes a Conditional Commitment. When and if all of the terms and conditions specified in the Conditional Commitment have been met, DOE and the Applicant may enter into a Loan Guarantee Agreement.

(d) DOE's obligations under each Conditional Commitment are conditional upon statutory authority having been provided in advance of the execution of the Loan Guarantee Agreement sufficient under FCRA and Title XVII for DOE to execute the Loan Guarantee Agreement, and payment in full of the Credit Subsidy Cost for the loan guarantee that is the subject of the Conditional Commitment from one of the following:

(1) A Congressional appropriation of funds;

(2) A payment from the Borrower deposited into the Treasury; or

(3) A combination of one or more appropriations under paragraph (d)(1) and one or more payments from the Borrower under paragraph (d)(2) of this section.

(e) The Applicant is required to pay fees to DOE to cover the Administrative Cost of Issuing a Loan Guarantee for the period of the Term Sheet through the closing of the Loan Guarantee Agreement (Second Fee).

[74 FR 63549, Dec. 4, 2009, as amended at 77 FR 29855, May 21, 2012]

### § 609.9 Closing on the Loan Guarantee Agreement.

(a) Subsequent to entering into a Conditional Commitment with an Applicant, DOE, after consultation with the Applicant, will set a closing date for execution of a Loan Guarantee Agreement.

(b) By the closing date, the Applicant and the Eligible Lender or other Holder must have satisfied all of the detailed terms and conditions contained in the Conditional Commitment and other related documents and all other contractual, statutory, and regulatory requirements. If the Applicant and the Eligible Lender or other Holder has not satisfied all such terms and conditions by the closing date, the Secretary may, in his/her sole discretion, set a new closing date or terminate the Conditional Commitment.

(c) In order to enter into a Loan Guarantee Agreement at closing:

(1) DOE must have received authority in an appropriations act for the loan guarantee; and

(2) All other applicable statutory, regulatory, or other requirements must be fulfilled.

(d) Prior to, or on, the closing date, DOE will ensure that:

(1) Pursuant to section 1702(b) of the Act, DOE has received payment in full of the Credit Subsidy Cost of the loan guarantee from one of the following:

(i) A Congressional appropriation of funds;

(ii) A payment from the Borrower deposited into the Treasury; or

(iii) A combination of one or more appropriations under paragraph (d)(1)(i) and one or more payments from the Borrower under paragraph (d)(1)(ii) of this section.

(2) Pursuant to section 1702(h) of the Act, DOE has received from the Borrower the First and Second Fees and, if applicable, the Third fee, or portions thereof, for the Administrative Cost of Issuing the Loan Guarantee, as specified in the Loan Guarantee Agreement;

(3) OMB has reviewed and approved DOE's calculation of the Credit Subsidy Cost of the loan guarantee;

(4) The Department of the Treasury has been consulted as to the terms and conditions of the Loan Guarantee Agreement;

(5) The Loan Guarantee Agreement and related documents contain all terms and conditions DOE deems reasonable and necessary to protect the interest of the United States; and

(6) All conditions precedent specified in the Conditional Commitment are either satisfied or waived by a Contracting Officer and all other applicable contractual, statutory, and regulatory requirements are satisfied.

(e) Not later than the period approved in writing by the Contracting Officer, which may not be less than 30 days prior to the closing date, the Applicant must provide in writing updated project financing information if the terms and conditions of the financing arrangements changed between execution of the Conditional Commitment and that date. The Conditional Commitment must be updated to reflect the revised terms and conditions.

(f) Where the total Project Costs for an Eligible Project are projected to exceed $25 million, the Applicant must provide a credit rating from a nationally recognized rating agency reflecting the revised Conditional Commitment for the project without a Federal guarantee. Where total Project Costs are projected to be $25 million or less than $25 million, the Secretary may, on a case-by-case basis, require a credit rating. If a rating is required, an updated rating must be provided to the Secretary not later than 30 days prior to closing.

(g) Changes in the terms and conditions of the financing arrangements will affect the Credit Subsidy Cost for the Loan Guarantee Agreement. DOE may postpone the expected closing date pursuant to any changes submitted under paragraph (e) and (f) of this section. In addition, DOE may choose to terminate the Conditional Commitment.

[74 FR 63549, Dec. 4, 2009, as amended at 77 FR 29855, May 21, 2012]

### § 609.10 Loan Guarantee Agreement.

(a) Only a Loan Guarantee Agreement executed by a duly authorized DOE Contracting Officer can contractually obligate DOE to guarantee loans or other debt obligations.

(b) DOE is not bound by oral representations made during the Pre-Application stage, if Pre-Applications were solicited, or Application stage, or during any negotiation process.

(c) Except if explicitly authorized by an Act of Congress, no funds obtained from the Federal Government, or from a loan or other instrument guaranteed by the Federal Government, may be used to pay for Credit Subsidy Costs, administrative fees, or other fees charged by or paid to DOE relating to the Title XVII program or any loan guarantee there under.

(d) Prior to the execution by DOE of a Loan Guarantee Agreement, DOE must ensure that the following requirements and conditions are satisfied:

(1) The project qualifies as an Eligible Project under the Act and is not a research, development, or demonstration project or a project that employs Commercial Technologies in service in the United States;

(2) The project will be constructed and operated in the United States, the employment of the new or significantly improved technology in the project has the potential to be replicated in other commercial projects in the United States, and this technology is or is likely to be available in the United States for further commercial application;

(3) The face value of the debt guaranteed by DOE is limited to no more than 80 percent of total Project Costs;

(4)(i) Where DOE guarantees 100 percent of the Guaranteed Obligation, the

loan shall be funded by the Federal Financing Bank;

(ii) Where DOE guarantees more than 90 percent of the Guaranteed Obligation, the guaranteed portion cannot be separated from or ''stripped'' from the non-guaranteed portion of the Guaranteed Obligation if the loan is participated, syndicated or otherwise resold in the secondary market;

(iii) Where DOE guarantees 90 percent or less of the Guaranteed Obligation, the guaranteed portion may be separated from or ''stripped'' from the non-guaranteed portion of the Guaranteed Obligation, if the loan is participated, syndicated or otherwise resold in the secondary debt market;

(5) The Borrower and other principals involved in the project have made or will make a significant equity investment in the project;

(6) The Borrower is obligated to make full repayment of the principal and interest on the Guaranteed Obligation and other project debt over a period of up to the lesser of 30 years or 90 percent of the projected useful life of the project's major physical assets, as calculated in accordance with generally accepted accounting principles and practices. The non-guaranteed portion (if any) of any Guaranteed Obligation must be repaid on a pro-rata basis, and may not be repaid on a shorter or faster amortization schedule than the guaranteed portion. Any project-related financing or credit arrangement (other than the Guaranteed Obligation) may have a shorter or faster amortization schedule than the Guaranteed Obligation if DOE determines that the resulting financing structure of the project—

(i) Allocates to DOE a reasonably proportionate share of the default risk, in light of—

(A) DOE's share of the total project financing,

(B) Risk allocation among the credit providers, and

(C) Internal and external credit enhancements; and

(ii) Is appropriate to assure reasonable prospect of repayment of the principal of and interest on the DOE Guaranteed Obligation and to protect the interests of the United States in the case of default;

(7) The loan guarantee does not finance, either directly or indirectly, tax-exempt debt obligations, consistent with the requirements of section 149(b) of the Internal Revenue Code;

(8) The amount of the loan guaranteed, when combined with other funds committed to the project, will be sufficient to carry out the project, including adequate contingency funds;

(9) There is a reasonable prospect of repayment by Borrower of the principal of and interest on the Guaranteed Obligations and other project debt;

(10) The Borrower has pledged project assets and other collateral or surety, including non project-related assets, determined by DOE to be necessary to secure the repayment of the Guaranteed Obligations;

(11) The Loan Guarantee Agreement and related documents include detailed terms and conditions necessary and appropriate to protect the interest of the United States in the case of default, including ensuring availability of all the intellectual property rights, technical data including software, and technology necessary for any person or entity selected, including DOE, to complete, operate, convey, and dispose of the defaulted project;

(12) The interest rate on any Guaranteed Obligation is determined by DOE, after consultation with the Treasury Department, to be reasonable, taking into account the range of interest rates prevailing in the private sector for similar obligations of comparable risk guaranteed by the Federal government;

(13) Any Guaranteed Obligation is not subordinate to any loan or other debt obligation;

(14) There is satisfactory evidence that Borrower and Eligible Lenders or other Holders are willing, competent, and capable of performing the terms and conditions of the Guaranteed Obligations and other debt obligation and the Loan Guarantee Agreement, and will diligently pursue the project;

(15) The Borrower has made the initial (or total) payment of fees for the Administrative Cost of Issuing a Loan Guarantee for the construction and operational phases of the project (Third Fee), as specified in the Conditional Commitment;

(16) The Eligible Lender, other Holder or servicer has taken and is obligated to continue to take those actions necessary to perfect and maintain liens on assets which are pledged as collateral for the Guaranteed Obligation;

(17) If Borrower is to make payment in full or in part for the Credit Subsidy Cost of the loan guarantee pursuant to section 1702(b)(2) of the Act, such payment must be received by DOE prior to, or at the time of, closing;

(18) DOE or its representatives have access to the project site at all reasonable times in order to monitor the performance of the project;

(19) DOE, the Eligible Lender, or other Holder and Borrower have reached an agreement as to the information that will be made available to DOE and the information that will be made publicly available;

(20) The prospective Borrower has filed applications for or obtained any required regulatory approvals for the project and is in compliance, or promptly will be in compliance, where appropriate, with all Federal, State, and local regulatory requirements;

(21) The Borrower has no delinquent Federal debt, including tax liabilities, unless the delinquency has been resolved with the appropriate Federal agency in accordance with the standards of the Debt Collection Improvement Act of 1996;

(22) The Loan Guarantee Agreement and related agreements contain such other terms and conditions as DOE deems reasonable and necessary to protect the interests of the United States, including without limitation provisions for (i) such collateral and other credit support for the Guaranteed Obligation, and (ii) such collateral sharing, priorities (subject always to Section 1702(d)(3) of Title XVII) and voting rights among creditors and other intercreditor arrangements as, in each case, DOE deems reasonable and necessary to protect the interests of the United States; and

(23)(i) The Lender is an Eligible Lender, as defined in § 609.2 of this part, and meets DOE's lender eligibility and performance requirement contained in §§ 609.11 (a) and (b) of this part; and

(ii) The servicer meets the servicing performance requirements of § 609.11(c) of this part.

(e) The Loan Guarantee Agreement must provide that, in the event of a default by the Borrower:

(1) Interest accrues on the Guaranteed Obligations at the rate stated in the Loan Guarantee Agreement or Loan Agreement, until DOE makes full payment of the defaulted Guaranteed Obligations and, except when debt is funded through the Federal Financing Bank, DOE is not required to pay any premium, default penalties, or prepayment penalties;

(2) Upon payment of the Guaranteed Obligations by DOE, DOE is subrogated to the rights of the Holders of the debt, including all related liens, security, and collateral rights;

(3) The Eligible Lender or other servicer acting on DOE's behalf is obligated to take those actions necessary to perfect and maintain liens on assets which are pledged as collateral for the Guaranteed Obligations;

(4) The holder of pledged collateral is obligated to take such actions as DOE may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery upon default by the Borrower on the Guaranteed Obligations;

(f) The Loan Guarantee Agreement must contain audit provisions which provide, in substance, as follows:

(1) The Eligible Lender or other Holder or other party servicing the Guaranteed Obligations, as applicable, and the Borrower, must keep such records concerning the project as are necessary to facilitate an effective and accurate audit and performance evaluation of the project as required in § 609.17 of this part; and

(2) DOE and the Comptroller General, or their duly authorized representatives, must have access, for the purpose of audit and examination, to any pertinent books, documents, papers, and records of the Borrower, Eligible Lender or other Holder, or other party servicing the Guaranteed Obligations, as applicable. Examination of records may be made during the regular business hours of the Borrower, Eligible

Lender or other Holder, or other party servicing the Guaranteed Obligations, or at any other time mutually convenient as required in § 609.17 of this part.

(g)(1) An Eligible Lender or other Holder may sell, assign or transfer a Guaranteed Obligation to another Eligible Lender that meets the requirements of § 609.11 of this part. Such Eligible Lender to which a Guaranteed Obligation is assigned or transferred, is required to fulfill all servicing, monitoring, and reporting requirements contained in the Loan Guarantee Agreement and these regulations if the transferring Eligible Lender was performing these functions and transfer such functions to the new Eligible Lender. Any assignment or transfer, however, of the servicing, monitoring, and reporting functions must be approved by DOE in writing in advance of such assignment.

(2) The Secretary, or the Secretary's designee or contractual agent, for the purpose of identifying Holders with the right to receive payment under the guarantees shall include in the Loan Guarantee Agreement or related documents a procedure for tracking and identifying Holders of Guarantee Obligations. These duties usually will be performed by the servicer. Any contractual agent approved by the Secretary to perform this function cannot transfer or assign this responsibility without the prior written consent of the Secretary.

[74 FR 63549, Dec. 4, 2009, as amended at 77 FR 29855, May 21, 2012]

### § 609.11 Lender eligibility and servicing requirements.

(a) An Eligible Lender shall meet the following requirements:

(1) Not be debarred or suspended from participation in a Federal government contract (under 48 CFR part 9.4) or participation in a non-procurement activity (under a set of uniform regulations implemented for numerous agencies, such as DOE, at 2 CFR part 180);

(2) Not be delinquent on any Federal debt or loan;

(3) Be legally authorized to enter into loan guarantee transactions authorized by the Act and these regulations and is in good standing with DOE and other Federal agency loan guarantee programs;

(4) Be able to demonstrate, or has access to, experience in originating and servicing loans for commercial projects similar in size and scope to the project under consideration; and

(5) Be able to demonstrate experience or capability as the lead lender or underwriter by presenting evidence of its participation in large commercial projects or energy-related projects or other relevant experience; or

(6) Be the Federal Financing Bank.

(b) When performing its duties to review and evaluate a proposed Eligible Project prior to the submission of a Pre-Application or Application, as appropriate, by the Project Sponsor through the execution of a Loan Guarantee Agreement, the Eligible Lender or DOE if loans are funded by the Federal Financing Bank, shall exercise the level of care and diligence that a reasonable and prudent lender would exercise when reviewing, evaluating and disbursing a loan made by it without a Federal guarantee.

(c) The servicing duties shall be performed by the Eligible Lender, DOE or other servicer if approved by the Secretary. When performing the servicing duties the Eligible Lender, DOE or other servicer shall exercise the level of care and diligence that a reasonable and prudent lender would exercise when servicing a loan made without a Federal guarantee, including:

(1) During the construction period, enforcing all of the conditions precedent to all loan disbursements, as provided in the Loan Guarantee Agreement, Loan Agreement and related documents;

(2) During the operational phase, monitoring and servicing the Debt Obligations and collection of the outstanding principal and accrued interest as well as ensuring that the collateral package securing the Guaranteed Obligations remains uncompromised; and

(3) As specified by DOE, providing annual or more frequent financial and other reports on the status and condition of the Guaranteed Obligations and the Eligible Project, and promptly notifying DOE if it becomes aware of any problems or irregularities concerning the Eligible Project or the ability of

the Borrower to make payment on the Guaranteed Obligations or other debt obligations.

(d) With regard to partial guarantees, even though DOE may in part rely on the Eligible Lender or other servicer to service and monitor the Guaranteed Obligation, DOE will also conduct its own independent monitoring and review of the Eligible Project.

**§ 609.12 Project Costs.**

(a) Before entering into a Loan Guarantee Agreement, DOE shall determine the estimated Project Costs for the project that is the subject of the agreement. To assist the Department in making that determination, the Applicant must estimate, calculate and record all such costs incurred in the design, engineering, financing, construction, startup, commissioning and shakedown of the project in accordance with generally accepted accounting principles and practices. Among other things, the Applicant must calculate the sum of necessary, reasonable and customary costs that it has paid and expects to pay, which are directly related to the project, including costs for escalation and contingencies, to estimate the total Project Costs.

(b) Project Costs include:

(1) Costs of acquisition, lease, or rental of real property, including engineering fees, surveys, title insurance, recording fees, and legal fees incurred in connection with land acquisition, lease or rental, site improvements, site restoration, access roads, and fencing;

(2) Costs of engineering, architectural, legal and bond fees, and insurance paid in connection with construction of the facility; and materials, labor, services, travel and transportation for facility design, construction, startup, commissioning and shakedown;

(3) Costs of equipment purchases;

(4) Costs to provide equipment, facilities, and services related to safety and environmental protection;

(5) Financial and legal services costs, including other professional services and fees necessary to obtain required licenses and permits and to prepare environmental reports and data;

(6) The cost of issuing project debt, such as fees, transaction and legal costs and other normal charges imposed by Eligible Lenders and other Holders;

(7) Costs of necessary and appropriate insurance and bonds of all types;

(8) Costs of design, engineering, startup, commissioning and shakedown;

(9) Costs of obtaining licenses to intellectual property necessary to design, construct, and operate the project;

(10) A reasonable contingency reserve for cost overruns during construction; and

(11) Capitalized interest necessary to meet market requirements, reasonably required reserve funds and other carrying costs during construction; and

(12) Other necessary and reasonable costs.

(c) Project Costs do not include:

(1) Fees and commissions charged to Borrower, including finder's fees, for obtaining Federal or other funds;

(2) Parent corporation or other affiliated entity's general and administrative expenses, and non-project related parent corporation or affiliated entity assessments, including organizational expenses;

(3) Goodwill, franchise, trade, or brand name costs;

(4) Dividends and profit sharing to stockholders, employees, and officers;

(5) Research, development, and demonstration costs of readying the innovative energy or environmental technology for employment in a commercial project;

(6) Costs that are excessive or are not directly required to carry out the project, as determined by DOE, including but not limited to the cost of hedging instruments;

(7) Expenses incurred after startup, commissioning, and shakedown before the facility has been placed in service;

(8) Borrower-paid Credit Subsidy Costs and Administrative Costs of Issuing a Loan Guarantee; and

(9) Operating costs.

**§ 609.13 Principal and interest assistance contract.**

With respect to the guaranteed portion of any Guaranteed Obligation, and subject to the availability of appropriations, DOE may enter into a contract to pay Holders, for and on behalf

of Borrower, from funds appropriated for that purpose, the principal and interest charges that become due and payable on the unpaid balance of the guaranteed portion of the Guaranteed Obligation, if DOE finds that:

(a) The Borrower:

(1) Is unable to make the payments and is not in default; and

(2) Will, and is financially able to, continue to make the scheduled payments on the remaining portion of the principal and interest due under the non-guaranteed portion of the debt obligation, if any, and other debt obligations of the project, or an agreement, approved by DOE, has otherwise been reached in order to avoid a payment default on non-guaranteed debt.

(b) It is in the public interest to permit Borrower to continue to pursue the purposes of the project;

(c) In paying the principal and interest, the Federal government expects a probable net benefit to the Government will be greater than that which would result in the event of a default;

(d) The payment authorized is no greater than the amount of principal and interest that Borrower is obligated to pay under the terms of the Loan Guarantee Agreement; and

(e) Borrower agrees to reimburse DOE for the payment (including interest) on terms and conditions that are satisfactory to DOE and executes all written contracts required by DOE for such purpose.

### § 609.14 Full faith and credit and incontestability.

The full faith and credit of the United States is pledged to the payment of all Guaranteed Obligations issued in accordance with this part with respect to principal and interest. Such guarantee shall be conclusive evidence that it has been properly obtained; that the underlying loan qualified for such guarantee; and that, but for fraud or material misrepresentation by the Holder, such guarantee will be presumed to be valid, legal, and enforceable.

### § 609.15 Default, demand, payment, and collateral liquidation.

(a) In the event that the Borrower has defaulted in the making of required payments of principal or interest on any portion of a Guaranteed Obligation, and such default has not been cured within the period of grace provided in the Loan Guarantee Agreement and/or the Loan Agreement, the Eligible Lender or other Holder, or nominee or trustee empowered to act for the Eligible Lender or other Holder (referred to in this section collectively as ''Holder''), may make written demand upon the Secretary for payment pursuant to the provisions of the Loan Guarantee Agreement.

(b) In the event that the Borrower is in default as a result of a breach of one or more of the terms and conditions of the Loan Guarantee Agreement, note, mortgage, Loan Agreement, or other contractual obligations related to the transaction, other than the Borrower's obligation to pay principal or interest on the Guaranteed Obligation, as provided in paragraph (a) of this section, the Holder will not be entitled to make demand for payment pursuant to the Loan Guarantee Agreement, unless the Secretary agrees in writing that such default has materially affected the rights of the parties, and finds that the Holder should be entitled to receive payment pursuant to the Loan Guarantee Agreement.

(c) In the event that the Borrower has defaulted as described in paragraph (a) of this section and such default is not cured during the grace period provided in the Loan Guarantee Agreement, the Secretary shall notify the U.S. Attorney General and, subject to the terms of any applicable Intercreditor Agreement, may cause the principal amount of all Guaranteed Obligations, together with accrued interest thereon, and all amounts owed to the United States by Borrower pursuant to the Loan Guarantee Agreement, to become immediately due and payable by giving the Borrower written notice to such effect (without the need for consent or other action on the part of the Holders of the Guaranteed Obligations) and may exercise any other remedies available under the applicable agreements. In the event the Borrower is in default as described in paragraph (b) of this section, where the Secretary determines in writing that such a default has materially affected the rights of

the parties, the Borrower shall be given the period of grace provided in the Loan Guarantee Agreement to cure such default. If the default is not cured during the period of grace, the Secretary may, subject to the terms of any applicable Intercreditor Agreement, cause the principal amount of all Guaranteed Obligations, together with accrued interest thereon, and all amounts owed to the United States by Borrower pursuant to the Loan Guarantee Agreement, to become immediately due and payable by giving the Borrower written notice to such effect (without any need for consent or other action on the part of the Holders of the Guaranteed Obligations) and may exercise any other remedies available under the applicable agreements.

(d) No provision of this regulation shall be construed to preclude forbearance by any Holder with the consent of the Secretary for the benefit of the Borrower.

(e) Upon the making of demand for payment as provided in paragraph (a) or (b) of this section, the Holder shall provide, in conjunction with such demand or immediately thereafter, at the request of the Secretary, the supporting documentation specified in the Loan Guarantee Agreement and any other supporting documentation as may reasonably be required to justify such demand.

(f) Payment as required by the Loan Guarantee Agreement of the Guaranteed Obligation shall be made 60 days after receipt by the Secretary of written demand for payment, provided that the demand complies with the terms of the Loan Guarantee Agreement. The Loan Guarantee Agreement shall provide that interest shall accrue to the Holder at the rate stated in the Loan Guarantee Agreement until the Guaranteed Obligation has been fully paid by the Federal government.

(g) The Loan Guarantee Agreement shall provide that, upon payment of the Guaranteed Obligations, the Secretary shall be subrogated to the rights of the Holders. The Holder shall transfer and assign to the Secretary all rights held by the Holder of the Guaranteed Obligation. Such assignment shall include all related liens, security, and collateral rights to the extent held by the Holder.

(h) Where the Loan Guarantee Agreement or any applicable Intercreditor Agreement so provides, the Eligible Lender or other Holder, or other agent or servicer, as appropriate, and the Secretary may jointly agree to a workout strategy and/or a plan of liquidation of the assets pledged to secure the Guaranteed Obligation and other applicable debt.

(i) Where payment of the Guaranteed Obligation has been made (or at any such earlier time as may be permitted by applicable agreements), the Secretary, acting through the U.S. Attorney General, in accordance with the rights received through subrogation or other applicable agreements, subject to any applicable Intercreditor Agreement, may seek to foreclose on the collateral assets and/or take such other legal action as necessary for the protection of the Government.

(j) If the Secretary (or an agent acting for the benefit of the Secretary) is awarded title to collateral assets pursuant to a foreclosure proceeding, the Secretary may take action to complete, maintain, operate, or lease such assets, or otherwise dispose of any such assets or take any other necessary action which the Secretary deems appropriate (and consistent with any applicable Intercreditor Agreement), in order that the original goals and objectives of the project will, to the extent possible, be realized.

(k) In addition to foreclosure and sale of collateral pursuant thereto, the U.S. Attorney General shall take appropriate action in accordance with rights contained in the Loan Guarantee Agreement and any applicable Intercreditor Agreement to recover costs incurred by, and other amounts owed to, the Government as a result of the defaulted loan or other defaulted obligation. Any recovery so received by the U.S. Attorney General on behalf of the Government shall be applied in the following manner: First to the expenses incurred by the U.S. Attorney General, DOE and any agent acting for the benefit of DOE in effecting such recovery; second, to reimbursement of any amounts paid by DOE, and to pay any

other amounts owed to DOE, as a result of the defaulted obligation; third, to any amounts owed to DOE under related principal and interest assistance contracts; and fourth, to any other lawful claims held by the Government on such process. Any sums remaining after full payment of the foregoing shall be available for the benefit of other parties lawfully entitled to claim them.

(l) If there was a partial guarantee by DOE of the Guaranteed Obligation or if any other creditors are secured by a lien on collateral pledged to secure the Guaranteed Obligation, the proceeds received by the collateral agent or other responsible party as a result of any liquidation or sale of, collection from or other realization on any such collateral may, if so agreed in advance or unless otherwise agreed in the applicable agreements, be applied as follows (with any money distributed to the Federal Government to be further distributed according to § 609.15(k)):

(1) First, to the payment of reasonable and customary fees and expenses incurred in the liquidation or sale, collection or other realization (including without limitation any fees and expenses that the Attorney General of the United States is lawfully entitled to claim in connection with such action);

(2) Second, distributed among the Holders of the Guaranteed Obligation (including DOE, as subrogee) and the other creditors entitled to share in such proceeds on no greater than a pro rata share basis; and

(3) Third, as otherwise provided in the applicable agreement or agreements.

(m) No action taken by the Eligible Lender or other Holder or other agent or servicer in respect of any pledged assets will affect the rights of any party, including the Secretary, having an interest in the loan or other debt obligations, to pursue, jointly or severally, to the extent provided in the Loan Guarantee Agreement or other applicable agreement, legal action against the Borrower or other liable parties, for any deficiencies owing on the balance of the Guaranteed Obligations or other debt obligations after application of the proceeds received upon liquidation.

(n) In the event that the Secretary considers it necessary or desirable to protect or further the interest of the United States in connection with the liquidation or sale of, collection from or other realization on the collateral or recovery of deficiencies due under the loan, the Secretary will take such action as may be appropriate under the circumstances.

(o) Nothing in this part precludes the Secretary from purchasing any Holder's or other person's interest in the project upon liquidation or sale of, collection from or other realization on the collateral.

### § 609.16 Perfection of liens and preservation of collateral.

(a) The Loan Guarantee Agreement and other documents related thereto shall provide that:

(1) The Eligible Lender, or DOE in conjunction with the Federal Financing Bank where the loan is funded by the Federal Financing Bank, or other Holder or other agent or servicer will take those actions necessary or appropriate to perfect and maintain liens, as applicable, on assets which are pledged as collateral for the Guaranteed Obligation; and

(2) Upon default by the Borrower, the holder of pledged collateral shall take such actions as the Secretary (subject to any applicable Intercreditor Agreement) may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery from the pledged assets. The Secretary shall reimburse the holder of collateral for reasonable and appropriate expenses incurred in taking actions required by the Secretary (unless otherwise provided in applicable agreements). Except as provided in § 609.15, no party may waive or relinquish, without the consent of the Secretary, any collateral securing the Guaranteed Obligation to which the United States would be subrogated upon payment under the Loan Guarantee Agreement.

(b) In the event of a default, the Secretary may enter into such contracts as the Secretary (subject to any applicable Intercreditor Agreement) determines are required or appropriate to

care for, preserve, protect or maintain the collateral. The cost of such contracts may be charged to the Borrower.

**§ 609.17 Audit and access to records.**

(a) The Loan Guarantee Agreement and related documents shall provide that:

(1) The Eligible Lender, or DOE in conjunction with the Federal Financing Bank where loans are funded by the Federal Financing Bank or other Holder or other party servicing the Guaranteed Obligations, as applicable, and the Borrower, shall keep such records concerning the project as is necessary, including the Pre-Application, Application, Term Sheet, Conditional Commitment, Loan Guarantee Agreement, Credit Agreement, mortgage, note, disbursement requests and supporting documentation, financial statements, audit reports of independent accounting firms, lists of all project assets and non-project assets pledged as security for the Guaranteed Obligations, all off-take and other revenue producing agreements, documentation for all project indebtedness, income tax returns, technology agreements, documentation for all permits and regulatory approvals and all other documents and records relating to the Eligible Project, as determined by the Secretary, to facilitate an effective audit and performance evaluation of the project; and

(2) The Secretary and the Comptroller General, or their duly authorized representatives, shall have access, for the purpose of audit and examination, to any pertinent books, documents, papers and records of the Borrower, Eligible Lender or DOE or other Holder or other party servicing the Guaranteed Obligation, as applicable. Such inspection may be made during regular office hours of the Borrower, Eligible Lender or DOE or other Holder, or other party servicing the Eligible Project and the Guaranteed Obligations, as applicable, or at any other time mutually convenient.

(b) The Secretary may from time to time audit any or all items of costs included as Project Costs in statements or certificates submitted to the Secretary or the servicer or otherwise, and may exclude or reduce the amount of any item which the Secretary determines to be unnecessary or excessive, or otherwise not to be an item of Project Costs. The Borrower will make available to the Secretary all books and records and other data available to the Borrower in order to permit the Secretary to carry out such audits. The Borrower will represent that it has within its rights access to all financial and operational records and data relating to Project Costs, and agrees that it will, upon request by the Secretary, exercise such rights in order to make such financial and operational records and data available to the Secretary. In exercising its rights hereunder, the Secretary may utilize employees of other Federal agencies, independent accountants, or other persons.

**§ 609.18 Deviations.**

To the extent that such requirements are not specified by the Act or other applicable statutes, DOE may authorize deviations on an individual request basis from the requirements of this part upon a finding that such deviation is essential to program objectives and the special circumstances stated in the request make such deviation clearly in the best interest of the Government. DOE will consult with OMB and the Secretary of the Treasury before DOE grants any deviation that would constitute a substantial change in the financial terms of the Loan Guarantee Agreement and related documents. Any deviation, however, that was not captured in the Credit Subsidy Cost will require either additional fees or discretionary appropriations. A recommendation for any deviation shall be submitted in writing to DOE. Such recommendation must include a supporting statement, which indicates briefly the nature of the deviation requested and the reasons in support thereof.

EFFECTIVE DATE NOTE: At 81 FR 90703, Dec.15, 2016, part 609 was revised, effective Jan. 17, 2017. For the convenience of the user, the revised text is set forth as follows:

# PART 609—LOAN GUARANTEES FOR PROJECTS THAT EMPLOY INNOVATIVE TECHNOLOGIES (Eff. Jan. 17, 2017)

Sec.
609.1 Purpose and scope.
609.2 Definitions and interpretation.
609.3 Solicitations.
609.4 Submission of applications.
609.5 Programmatic, technical and financial evaluation of applications.
609.6 Term sheets and conditional commitments.
609.7 Closing on the loan guarantee agreement.
609.8 Loan guarantee agreement.
609.9 Lender servicing requirements.
609.10 Project costs.
609.11 Fees and charges.
609.12 Full faith and credit and incontestability.
609.13 Default, demand, payment, and collateral liquidation.
609.14 Preservation of collateral.
609.15 Audit and access to records.
609.16 Deviations.

AUTHORITY: 42 U.S.C. 7254, 16511–16514.

## § 609.1 Purpose and scope.

(a) This part sets forth the policies and procedures that DOE uses for receiving, evaluating, and approving applications for loan guarantees to support Eligible Projects under section 1703 of the Energy Policy Act of 2005 (Act).

(b) This part applies to all Applications, Conditional Commitments, and Loan Guarantee Agreements.

(c) Part 1024 of chapter X of title 10 of the Code of Federal Regulations shall not apply to actions taken under this part.

## § 609.2 Definitions and interpretation.

(a) *Definitions.* When used in this part the following words have the following meanings.

*Act* means Title XVII of the Energy Policy Act of 2005 (42 U.S.C. 16511–16514), as amended.

*Administrative Cost of Issuing a Loan Guarantee* means the total of all administrative expenses that DOE incurs during:

(1) The evaluation of an Application for a loan guarantee;

(2) The negotiation and offer of a Term Sheet;

(3) The negotiation of a Loan Guarantee Agreement and related documents, including the issuance of a Guarantee; and

(4) The servicing and monitoring of a Loan Guarantee Agreement, including during the construction, startup, commissioning, shakedown, and operational phases of an Eligible Project.

*Applicant* means a Person, including a prospective Borrower or Project Sponsor, that submits an Application to DOE.

*Application* means a written submission of materials responsive to a Solicitation that satisfies § 609.4.

*Application Fee* means the fee or fees required to be paid by an Applicant in connection with submission of an Application and specified in a Solicitation. The Application Fee does not include the Credit Subsidy Cost.

*Attorney General* means the Attorney General of the United States.

*Borrower* means any Person that enters into a Loan Guarantee Agreement with DOE and issues Guaranteed Obligations.

*Cargo Preference Act* means the Cargo Preference Act of 1954, 46 U.S.C. 55305, as amended.

*Commercial Technology* means a technology in general use in the commercial marketplace in the United States at the time the Term Sheet is offered by DOE. A technology is in general use if it is being used in three or more facilities that are in commercial operation in the United States for the same general purpose as the proposed project, and has been used in each such facility for a period of at least five years. The five-year period for each facility shall start on the in-service date of the facility employing that particular technology or, in the case of a retrofit of a facility to employ a particular technology, the date the facility resumes commercial operation following completion and testing of the retrofit. For purposes of this section, facilities that are in commercial operation include projects that have been the recipients of a loan guarantee from DOE under this part.

*Conditional Commitment* means a Term Sheet offered by DOE and accepted by the offeree of the Term Sheet, all in accordance with § 609.6(c); provided, that the Secretary may terminate a Conditional Commitment for any reason at any time prior to the execution of the Loan Guarantee Agreement; and provided, further, that the Secretary may not delegate this authority to terminate a Conditional Commitment.

*Contracting Officer* means the Secretary of Energy or a DOE official authorized by the Secretary to enter into, administer or terminate DOE Loan Guarantee Agreements and related contracts on behalf of DOE.

*Credit Subsidy Cost* has the same meaning as ''cost of a loan guarantee'' in section 502(5)(C) of the Federal Credit Reform Act of 1990, which is the net present value, at the time the Loan Guarantee Agreement is executed, of the following estimated cash flows, discounted to the point of disbursement:

(1) Payments by the Government to cover defaults and delinquencies, interest subsidies, or other payments; less

(2) Payments to the Government including origination and other fees, penalties, and recoveries; including the effects of changes in loan or debt terms resulting from the exercise by the Borrower, Eligible Lender or other Holder of an option included in the Loan Guarantee Agreement.

*Davis-Bacon Act* means the statute referenced in section 1702(k) of the Act.

*DOE* means the United States Department of Energy.

*Eligible Lender* means either:

(1) Any Person formed for the purpose of, or engaged in the business of, lending money that, as determined by DOE in each case, is:

(i) Not debarred or suspended from participation in a Federal government contract or participation in a non-procurement activity (under a set of uniform regulations implemented for numerous agencies, such as DOE, at 2 CFR part 180);

(ii) Not delinquent on any Federal debt or loan;

(iii) Legally authorized and empowered to enter into loan guarantee transactions authorized by the Act and these regulations;

(iv) Able to demonstrate experience in originating and servicing loans for commercial projects similar in size and scope to the Eligible Project, or able to procure such experience through contracts acceptable to DOE; and

(v) Able to demonstrate experience as the lead lender or underwriter by presenting evidence of its participation in large commercial projects or energy-related projects or other relevant experience, or able to procure such experience through contracts acceptable to DOE; or

(2) The Federal Financing Bank.

*Eligible Project* means a project that:

(1) Is located in the United States at one location, except that the project may be located at two or more locations in the United States if the project is comprised of installations or facilities employing a single New or Significantly Improved Technology that is deployed pursuant to an integrated and comprehensive business plan. An Eligible Project in more than one location is a single Eligible Project;

(2) Deploys a New or Significantly Improved Technology; and

(3) Satisfies all applicable requirements of section 1703 of the Act, the applicable Solicitation, and this part.

*Equity* means cash contributed to the permanent capital stock (or equivalent) of the Borrower or the Eligible Project by the shareholders or other owners of the Borrower or the Eligible Project. Equity does not include proceeds from the non-guaranteed portion of a Guaranteed Obligation, proceeds from any other non-guaranteed loan or obligation, or the value of any government assistance or support.

*Facility Fee* means the fee, to be paid in the amount and in the manner provided in the Term Sheet, to cover the Administrative Cost of Issuing a Loan Guarantee for the period from the Borrower's acceptance of the Term Sheet through issuance of the Guarantee.

*Federal Financing Bank* means an instrumentality of the United States government created by the Federal Financing Bank Act of 1973, under the general supervision of the Secretary of the Treasury.

*Guarantee* means the undertaking of the United States of America, acting through the Secretary pursuant to Title XVII of the Energy Policy Act of 2005, to pay in accordance with the terms thereof, principal and interest of a Guaranteed Obligation.

*Guaranteed Obligation* means any loan or other debt obligation of the Borrower for an Eligible Project for which DOE guarantees all or any part of the payment of principal and interest under a Loan Guarantee Agreement entered into pursuant to the Act.

*Holder* means any Person that holds a promissory note made by the Borrower evidencing the Guaranteed Obligation (or his designee or agent).

*Intercreditor Agreement* means any agreement or instrument (or amendment or modification thereof) among DOE and one or more other Persons providing financing or other credit arrangements to the Borrower or an Eligible Project) or that otherwise provides for rights of DOE in respect of a Borrower or in respect of an Eligible Project, in each case in form and substance satisfactory to DOE.

*Loan Agreement* means a written agreement between a Borrower and an Eligible Lender containing the terms and conditions under which the Eligible Lender will make a loan or loans to the Borrower for an Eligible Project.

*Loan Guarantee Agreement* means a written agreement that, when entered into by DOE and a Borrower, and, if applicable, an Eligible Lender, establishes the obligation of DOE to guarantee the payment of all or a portion of the principal of, and interest on, specified Guaranteed Obligations, subject to the terms and conditions specified in the Loan Guarantee Agreement.

*New or Significantly Improved Technology* means a technology, or a defined suite of technologies, concerned with the production, consumption, or transportation of energy and that is not a Commercial Technology, and that has either:

(1) Only recently been developed, discovered, or learned; or

(2) Involves or constitutes one or more meaningful and important improvements in productivity or value, in comparison to Commercial Technologies in use in the United States at the time the Term Sheet is issued.

*OMB* means the Office of Management and Budget in the Executive Office of the President.

*Person* means any natural person or any legally constituted entity, including a state or local government, tribe, corporation, company, voluntary association, partnership, limited liability company, joint venture, and trust.

*Project Costs* mean those costs, including escalation and contingencies, that are to be expended or accrued by a Borrower and are necessary, reasonable, customary and directly related to the design, engineering, financing, construction, startup, commissioning and shakedown of an Eligible Project, as specified in § 609.10(a). Project Costs do not include costs for the items set forth in § 609.10(b).

*Project Sponsor* means any Person that assumes substantial responsibility for the development, financing, and structuring of an Eligible Project and, if not the Applicant, owns or controls, by itself and/or through individuals in common or affiliated business entities, a five percent or greater interest in the proposed Eligible Project, the Borrower or the Applicant.

*Risk-Based Charge* means a charge that, together with the principal and interest on the guaranteed loan, or at such other times as DOE may determine, is payable on specified dates during the term of a Guaranteed Obligation.

*Secretary* means the Secretary of Energy or a duly authorized designee or successor in interest.

*Solicitation* means an announcement that DOE is accepting Applications that is widely disseminated to the public on the DOE Web site or otherwise, and which satisfies the requirements of § 609.3(b).

*Term Sheet* means a written offer for the issuance of a loan guarantee, executed by the Secretary (or a DOE official authorized by the Secretary to execute such offer), delivered to the offeree, that sets forth the detailed terms and conditions under which DOE and the Applicant will execute a Loan Guarantee Agreement.

*United States* means the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa and any territory or possession of the United States of America.

(b) *Interpretations*. This part shall be interpreted using the following guidelines.

(1) The word ''discretion'' when used with reference to DOE, including the Secretary, means ''sole discretion.''

(2) Defined terms in the singular shall include the plural and vice versa, and the masculine, feminine or neuter gender shall include all genders.

(3) The word ''or'' is not exclusive.

(4) References to laws by name or popular name are references to the version of such law appearing in the United States Code and include any amendment, supplement or modification of such law, and all regulations, rulings, and other laws promulgated thereunder.

(5) References to information or documents required or allowed to be submitted to DOE mean information or documents that are marked as provided in 10 CFR 600.15(b). A document or information that is not marked as provided in 10 CFR 600.15(b) will not be considered as having been submitted to or received by DOE.

(6) A reference to a Person includes such Person's successors and permitted assigns.

(7) The words ''include,'' ''includes'' and ''including'' are not limiting and mean include, includes and including ''without limitation'' and ''without limitation by specification.''

(8) The words ''hereof,'' ''herein'' and ''hereunder'' and words of similar import refer this part as a whole and not to any particular provision of this part.

**§ 609.3 Solicitations.**

(a) DOE may invite the submission of Applications for loan guarantees for Eligible Projects pursuant to a Solicitation.

(b) Each Solicitation must include, at a minimum, the following information:

(1) The dollar amount of loan guarantee authority potentially being made available by DOE in that Solicitation;

(2) The place and deadline for submission of Applications;

(3) The name and address of the DOE representative whom a potential Applicant may contact to receive further information and a copy of the Solicitation;

(4) The form, format, and page limits applicable to the Application;

(5) The amount of the Application Fee and any other fees that will be required;

(6) The programmatic, technical, financial and other factors that DOE will use to evaluate response submissions, and their relative weightings in that evaluation; and

(7) Such other information as DOE may deem appropriate.

(c) Using procedures as may be announced by DOE a potential Applicant may request a meeting with DOE to discuss its potential Application. At its discretion, DOE may meet with a potential Applicant, either in person or electronically, to discuss its potential Application. DOE may provide a potential Applicant with a preliminary response regarding whether its proposed Application may constitute an Eligible Project. DOE's responses to questions from potential Applicants and DOE's statements to potential Applicants are pre-decisional and preliminary in nature. Any such responses and statements are subject in their entirety to any final action by DOE with respect to an Application submitted in accordance with § 609.4.

**§ 609.4 Submission of applications.**

(a) In response to a Solicitation, an Applicant must meet all requirements and provide all information specified in this part and the Solicitation in the manner and on or before the date specified therein. DOE may direct that Applications be submitted in more than one part; provided, that the parts of such Application, taken as a whole, satisfy the requirements of § 609.4(c) and this part. In such event, subsequent parts of an Application may be filed only after DOE invites an Applicant to make an additional submission. The initial part of an Application may be used by DOE to determine the likelihood that the project proposed by an Applicant will be an Eligible Project, and to evaluate such project's readiness to proceed. If there have been any material amendments, modifications or additions made to the information previously submitted by an Applicant, the Applicant shall provide a detailed description thereof, including any changes in the proposed project's financing structure or other terms, promptly upon request by DOE. Where DOE has directed that an Application be submitted in parts, DOE may provide for payment of the Application Fee in parts.

(b) An Applicant may submit only one Application for one proposed project using a particular technology. An Applicant may not submit an Application or Applications for multiple Eligible Projects using the same technology. An Applicant may submit Applications for multiple proposed projects using different technologies. For purposes of this paragraph (b), the term Applicant shall include the Project Sponsor and any subsidiaries or affiliates of the Project Sponsor.

(c) An Application must include, at a minimum, the following information and materials:

(1) A completed Application form signed by an individual with full authority to bind the Applicant, including the commitments and representations made in each part of the Application;

(2) The applicable Application Fee;

(3) A description of how and to what measurable extent the proposed project avoids, reduces, or sequesters air pollutants and/or anthropogenic emissions of greenhouse gases, including how to measure and verify those effects;

(4) A description of the nature and scope of the proposed project, including:

(i) Key project milestones;

(ii) Location or locations of the proposed project;

(iii) Identification and commercial feasibility of the New or Significantly Improved Technology to be deployed;

(iv) How the Applicant intends to deploy such New or Significantly Improved Technology in the proposed project; and

(v) How the Applicant intends to assure, to the extent possible, the further commercial availability of the New or Significantly Improved Technology in the United States.

(5) An explanation of how the proposed project qualifies as a project within the category or categories of projects referred to in the Solicitation;

(6) A detailed estimate of the total Project Costs together with a description of the methodology and assumptions used;

(7) A detailed description of the engineering and design contractor(s), construction contractor(s), and equipment supplier(s);

(8) The construction schedules for the proposed project, including major activity and cost milestones;

(9) A description of the material terms and conditions of the development and construction contracts to include the performance guarantees, performance bonds, liquidated damages provisions, and equipment warranties;

(10) A detailed description of the operations and maintenance provider(s), the plant operating plan, estimated staffing requirements, parts inventory, major maintenance schedule, estimated annual downtime, and performance guarantees and related liquidated damage provisions, if any;

(11) A description of the management plan of operations to be employed in carrying out the proposed project, and information concerning the management experience of each officer or key person associated with the proposed project;

(12) A detailed description of the proposed project decommissioning, deconstruction, and disposal plan, and the anticipated costs associated therewith;

(13) An analysis of the market for any product (including but not limited to electricity and chemicals) to be produced by, or services to be provided by, the proposed project, including relevant economics justifying the analysis, and copies of

(i) Any contracts for the sale of such products or the provision of such services, or

(ii) Any other assurance of the revenues to be generated from sale of such products or provision of such services;

(14) A detailed description of the overall financial plan for the proposed project, including all sources and uses of funding, equity and debt, and the liability of parties associated with the proposed project over the term of the Loan Guarantee Agreement;

(15) A copy of all material agreements, whether entered into or proposed, relevant to the investment, design, engineering, financing, construction, startup commissioning, shakedown, operations and maintenance of the proposed project;

(16) A copy of the financial closing checklist for the equity and debt to the extent available;

(17) The Applicant's business plan on which the proposed project is based and Applicant's financial model with respect to the proposed

project for the proposed term of the Guaranteed Obligations, including, as applicable, *pro forma* income statements, balance sheets, and cash flows. All such information and data must include assumptions made in their preparation and the range of revenue, operating cost, and credit assumptions considered;

(18) Financial statements for the three immediately preceding fiscal years of the Applicant (or such shorter period as the Applicant has been in existence) that have been audited by an independent certified public accounting firm, including all associated certifications, notes and letters to management, as well as interim financial statements and notes for the current fiscal year for the Applicant and all other Persons the credit of which is material to the success of the transactions described in the Application;

(19) A copy of all legal opinions, and other material reports, analyses, and reviews related to the proposed project that have been delivered prior to submission of any part of the Application;

(20) An independent engineering report prepared by an engineer with experience in the industry and familiarity with similar projects. The report should address the proposed project's siting and permitting arrangements, engineering and design, contractual requirements, environmental compliance, testing, commissioning and operations, and maintenance;

(21) A credit history of the Applicant and each Project Sponsor;

(22) A preliminary credit assessment for the proposed project without a loan guarantee from a nationally recognized rating agency for projects where the estimated total Project Costs exceed $25 million. For proposed projects where the total estimated Project Costs are $25 million or less and where conditions justify, in the sole discretion of the Secretary, DOE may require such an assessment;

(23) A list showing the status of and estimated completion date of Applicant's required applications for federal, state, and local permits, authorizations or approvals to site, construct, and operate the proposed project;

(24) A report containing an analysis of the potential environmental impacts of the proposed project that will enable DOE to—

(i) Assess whether the proposed project will comply with all applicable environmental requirements; and

(ii) Undertake and complete any necessary reviews under the National Environmental Policy Act of 1969;

(25) A listing and description of the assets of or to be utilized for the benefit of the proposed project, and of any other asset that will serve as collateral pledged in respect of the Guaranteed Obligations, including appropriate data as to the value of such assets and the useful life of any physical assets. With respect to real property assets listed, an appraisal that is consistent with the ''Uniform Standards of Professional Appraisal Practice,'' promulgated by the Appraisal Standards Board of the Appraisal Foundation, and performed by licensed or certified appraisers, is required;

(26) An analysis demonstrating that, at the time of the Application, there is a reasonable prospect that Borrower will be able to repay the Guaranteed Obligations (including interest) according to their terms, and a complete description of the operational and financial assumptions and methodologies on which this demonstration is based; and

(27) If proposed project assets or facilities are or will be jointly owned by the Applicant and one or more other Persons, each of which owns an undivided ownership interest in such proposed project assets or facilities, a description of the Applicant's rights and obligations in respect of its undivided ownership interest in such proposed project assets or facilities.

(d) During the Application evaluation process pursuant to § 609.5, DOE may request additional information, potentially including a preliminary credit rating or credit assessment, with respect to the proposed project.

(e) DOE will not consider any part of any Application or the Application as a whole complete unless the Application Fee (or the required portion of the Application Fee related to a particular part of the Application) has been paid. An Application Fee paid in connection with one Application is not transferable to another Application. Except in the discretion of DOE, no portion of the Application Fee is refundable;

(f) DOE has no obligation to evaluate an Application that is not complete, and may proceed with such evaluation, or a partial evaluation, only in its discretion.

(g) Unless an Applicant requests an extension and such an extension is granted by DOE in its discretion, an Application may be rejected if it is not complete within four years from the date of submission (or date of submission of the first part thereof, in the case of Applications made in more than one part).

(h) Upon making a determination to engage independent consultants or outside counsel with respect to an Application, DOE will proceed to evaluate and process such Application only following execution by an Applicant or Project Sponsor, as appropriate, of an agreement satisfactory to DOE to pay the fees and expenses charged by the independent consultants and outside legal counsel.

**§ 609.5 Programmatic, technical and financial evaluation of applications.**

(a) In reviewing completed Applications, and in prioritizing and selecting those as to which a Term Sheet should be offered, DOE will apply the criteria set forth in the Act, any applicable Solicitation, and this part. Applications will be considered in a competitive process, *i.e.* each Application will be evaluated against other Applications responsive to the Solicitation. Applications will be denied if:

(1) The proposed project is not an Eligible Project;

(2) The applicable technology is not ready to be deployed commercially in the United States, cannot yield a commercially viable product or service in the use proposed in the Application, does not have the potential to be deployed in other commercial projects in the United States, or is not or will not be available for further commercial use in the United States;

(3) The Person proposed to issue the loan or purchase other debt obligations constituting the Guaranteed Obligations is not an Eligible Lender;

(4) The proposed project is for demonstration, research, or development;

(5) Significant Equity for the proposed project will not be provided by the date of issuance of the Guaranteed Obligations, or such later time as DOE in its discretion may determine; or

(6) The proposed project does not present a reasonable prospect of repayment of the Guaranteed Obligations.

(b) If an Application has not been denied pursuant to § 609.5(a), DOE will evaluate the proposed Project based on the criteria set forth in the Act, any applicable Solicitation and the following:

(1) To what measurable extent the proposed project avoids, reduces, or sequesters air pollutants or anthropogenic emissions of greenhouses gases, or contributes to the avoidance, reduction or sequestration of air pollutants or anthropogenic emissions of greenhouse gases;

(2) To what extent the technology to be deployed in the proposed project—

(i) Is ready to be deployed commercially in the United States, can be replicated, yields a commercially viable product or service in the use proposed in the proposed project, has potential to be deployed in other commercial projects in the United States, and is or will be available for further commercial use in the United States; and

(ii) Constitutes an important improvement in technology, as compared to available Commercial Technologies, used to avoid, reduce or sequester air pollutants or anthropogenic emissions of greenhouse gases;

(3) To what extent the Applicant has a plan to advance or assist in the advancement of that technology into the commercial marketplace in the United States;

(4) The extent to which the level of proposed support in the Application is consistent with a reasonable prospect of repayment of the Guaranteed Obligations by considering, among other factors:

(i) The extent to which the requested amount of the loan guarantee, the requested amount of Guaranteed Obligations and, if applicable, the expected amount of any other financing or credit arrangements, are reasonable relative to the nature and scope of the proposed project;

(ii) The total amount and nature of the Project Costs and the extent to which Project Costs are to be funded by Guaranteed Obligations; and

(iii) The feasibility of the proposed project and likelihood that it will produce sufficient revenues to service its debt obligations over the life of the loan guarantee and assure timely repayment of Guaranteed Obligations;

(5) The likelihood that the proposed project will be ready for full commercial operations in the time frame stated in the Application;

(6) The amount of Equity committed and to be committed to the proposed project by the Borrower, the Project Sponsor, and other Persons;

(7) Whether there is sufficient evidence that the Borrower will diligently implement the proposed project, including initiating and completing the proposed project in a timely manner;

(8) Whether and to what extent the Applicant will rely upon other Federal and non-Federal Government assistance such as grants, tax credits, or other loan guarantees to support the financing, construction, and operation of the proposed project and how such assistance will impact the proposed project;

(9) The levels of safeguards provided to the Federal Government in the event of default through collateral, warranties, and other assurance of repayment described in the Application, including the nature of any anticipated intercreditor arrangements;

(10) The Applicant's, or the relevant contractor's, capacity and expertise to operate the proposed project successfully, based on factors such as financial soundness, management organization, and the nature and extent of corporate and individual experience;

(11) The ability of the proposed Borrower to ensure that the proposed project will comply with all applicable laws and regulations, including all applicable environmental statutes and regulations;

(12) The levels of market, regulatory, legal, financial, technological, and other risks associated with the proposed project and their appropriateness for a loan guarantee provided by DOE;

(13) Whether the Application contains sufficient information, including a detailed description of the nature and scope of the proposed project and the nature, scope, and risk coverage of the loan guarantee sought to enable DOE to perform a thorough assessment of the proposed project; and

(14) Such other criteria that DOE deems relevant in evaluating the merits of an Application.

(c) After DOE completes its review and evaluation of a proposed project pursuant to § 609.5(b) and this part, DOE will notify the Applicant in writing of its determination whether to proceed with due diligence and negotiation of a Term Sheet in accordance with § 609.6. DOE will proceed only if it determines that the proposed project is highly qualified and suitable for a Guarantee. Upon written confirmation from the Applicant that it desires to proceed, DOE and the Applicant will commence negotiations.

(d) A determination by DOE not to proceed with a proposed project following evaluation pursuant to § 609.5(b) shall be final and nonappealable, but shall not prejudice the Applicant or other affected Persons from applying for a Guarantee in respect of a different proposed project pursuant to another, separate Application.

### § 609.6 Term sheets and conditional commitments.

(a) DOE, after negotiation of a Term Sheet with an Applicant, may offer such Term Sheet to an Applicant or such other Person that is an affiliate of the Applicant and that is acceptable to DOE. DOE's offer of a Term Sheet shall be in writing and signed by the Contracting Officer. DOE's negotiation of a Term Sheet imposes no obligation on the Secretary to offer a Term Sheet to the Applicant.

(b) DOE shall terminate its negotiations of a Term Sheet if it has not offered a Term Sheet in respect of an Eligible Project within four years after the date of the written notification set forth in § 609.5(c), unless extended in writing in the discretion of the Contracting Officer.

(c) If and when the offeree specified in a Term Sheet satisfies all terms and conditions for acceptance of the Term Sheet, including written acceptance thereof and payment of all fees specified in § 609.11(f) and therein to be paid at or prior to acceptance of the Term Sheet, the Term Sheet shall become a Conditional Commitment. Each Conditional Commitment shall include an expiration date no more than two years from the date it is issued, unless extended in writing in the discretion of the Contracting Officer. When and if all of the terms and conditions specified in the Conditional Commitment have been met, DOE and the Applicant may enter into a Loan Guarantee Agreement.

(d) If, subsequent to execution of a Conditional Commitment, the financing arrangements of the Borrower, or in respect of an Eligible Project, change from those described in the Conditional Commitment, the Applicant shall promptly provide updated financing information in writing to DOE. All such updated information shall be deemed to be information submitted in connection with an Application and shall be subject to § 609.4(b). Based on such updated information, DOE may take one or more of the following actions:

(1) Determine that such changes are not material to the Borrower, the Eligible Project or DOE;

(2) Amend the Conditional Commitment accordingly;

(3) Postpone the expected closing date of the associated Loan Guarantee Agreement; or

(4) Terminate the Conditional Commitment.

### § 609.7 Closing on the loan guarantee agreement.

(a) Subsequent to entering into a Conditional Commitment with an Applicant, DOE, after consultation with the Applicant, will set a closing date for execution of a Loan Guarantee Agreement.

(b) Prior to or on the closing date of a Loan Guarantee Agreement, DOE will ensure that:

(1) One of the following has occurred:

(i) An appropriation for the Credit Subsidy Cost has been made;

(ii) The Secretary has received from the Borrower payment in full for the Credit Subsidy Cost and deposited the payment into the Treasury; or

(iii) A combination of one or more appropriations under paragraph (b)(1)(i) of this section and one or more payments from the Borrower under paragraph (b)(1)(ii) of this section has been made that is equal to the Credit Subsidy Cost;

(2) Pursuant to section 1702(h) of the Act, DOE has received from the Applicant the remainder of the Facility Fee referred to in § 609.11(b);

(3) OMB has reviewed and approved DOE's calculation of the Credit Subsidy Cost of the Guarantee;

(4) The Department of the Treasury has been consulted as to the terms and conditions of the Loan Guarantee Agreement;

(5) The Loan Guarantee Agreement and related documents contain all terms and conditions DOE deems reasonable and necessary to protect the interest of the United States;

(6) Each holder of the Guaranteed Obligations is an Eligible Lender, and the servicer of the Guaranteed Obligations meets the servicing performance requirements of § 609.9(b);

(7) DOE has determined the principal amount of the Guaranteed Obligations expected to be issued in respect of the Eligible Project, as estimated at the time of issuance, will not exceed 80 percent of the Project Costs of the Eligible Project;

(8) All conditions precedent specified in the Conditional Commitment are either satisfied or waived by the Contracting Officer and all other applicable contractual, statutory, and regulatory requirements have been satisfied or waived by the Contracting Officer. If the counterparty to the Conditional Commitment has not satisfied all such terms and conditions on or prior to the closing date of the Loan Guarantee Agreement, the Secretary may, in his discretion, set a new closing date, or terminate the Conditional Commitment; and

(9) Where the total Project Costs for an Eligible Project are projected to exceed $25 million, the Applicant must provide a credit rating from a nationally recognized rating agency reflecting the revised Conditional Commitment for the project without a Federal guarantee. Where total Project Costs are projected to be $25 million or less, the Secretary may, on a case-by-case basis, require a credit rating. If a credit rating is required, an updated rating must be provided to the Secretary not later than 30 days prior to closing.

**§ 609.8 Loan guarantee agreement.**

(a) Only a Loan Guarantee Agreement executed by the Contracting Officer can obligate DOE to issue a Guarantee in respect of Guaranteed Obligations.

(b) DOE is not bound by oral representations.

(c) Each Loan Guarantee Agreement shall contain the following requirements and conditions, and shall not be executed until the Contracting Officer determines that the following requirements and conditions are satisfied:

(1) The Federal Financing Bank shall be the only Eligible Lender in transactions where DOE guarantees 100 percent (but not less than 100 percent) of the principal and interest of the Guaranteed Obligations issued under a Loan Guarantee Agreement.

(i) Where DOE guarantees more than 90 percent of the Guaranteed Obligation, the guaranteed portion cannot be separated from or ''stripped'' from the non-guaranteed portion of the Guaranteed Obligation if the loan is participated, syndicated or otherwise resold in the secondary market; and

(ii) Where DOE guarantees 90 percent or less of the Guaranteed Obligation, the guaranteed portion may be separated from or ''stripped'' from the non-guaranteed portion of the Guaranteed Obligation, if the loan is participated, syndicated or otherwise resold in the secondary debt market;

(2) The Borrower shall be obligated to make full repayment of the principal and interest on the Guaranteed Obligations and other debt of a Borrower over a period of up to the lesser of 30 years or 90 percent of the projected useful life of the Eligible Project's major physical assets, as calculated in accordance with U.S. generally accepted accounting principles and practices. The non-guaranteed portion (if any) of any Guaranteed Obligations must be repaid *pro rata*, and on the same amortization schedule, with the guaranteed portion.

(3) If any financing or credit arrangement of the Borrower or relating to the Eligible Project, other than the Guaranteed Obligations, has an amortization period shorter than that of the Guaranteed Obligations, DOE shall have determined that the resulting financing structure allocates to DOE a reasonably proportionate share of the default risk, in light of:

(i) DOE's share of the total debt financing of the Borrower,

(ii) Risk allocation among the credit providers to the Borrower, and

(iii) Internal and external credit enhancements.

(4) The loan guarantee does not finance, either directly or indirectly tax-exempt debt obligations, consistent with the requirements of section 149(b) of the Internal Revenue Code;

(5) The principal amount of the Guaranteed Obligations, when combined with funds from other sources committed and available to the Borrower, shall be sufficient to pay for expected Project Costs (including adequate contingency amounts), the applicable items specified in § 609.10(b), and otherwise to carry out the Eligible Project;

(6) There shall be a reasonable prospect of repayment by the Borrower of the principal of and interest on the Guaranteed Obligations and all of its other debt obligations;

(7) The Borrower shall pledge collateral or surety determined by DOE to be necessary to secure the repayment of the Guaranteed Obligations. Such collateral or security may include Eligible Project assets and assets not related to the Eligible Project;

(8) The Loan Guarantee Agreement and related documents shall include detailed terms and conditions that DOE deems necessary and appropriate to protect the interests of the United States in the case of default, including ensuring availability of all relevant intellectual property rights, technical data including software, and technology necessary for DOE or any Person selected by DOE, to complete, operate, convey, and dispose of the defaulted Borrower or the Eligible Project;

(9) The Guaranteed Obligations shall not be subordinate to other financing. Guaranteed Obligations are not subordinate to other financing if the lien on property securing the

Guaranteed Obligations, together with liens that are *pari passu* with such lien, if any, take priority or precedence over other charges or encumbrances upon the same property and must be satisfied before such other charges are entitled to participate in proceeds of the property's sale. In DOE's discretion, Guaranteed Obligations may share a lien position with other financing;

(10) There is satisfactory evidence that the Borrower will diligently pursue the Eligible Project and is willing, competent, and capable of performing its obligations under the Loan Guarantee Agreement and the loan documentation relating to its other debt obligations;

(11) The Borrower shall have paid all fees and expenses due to DOE or the U.S. Government, including such amount of the Credit Subsidy Cost as may be due and payable from the Borrower pursuant to the Conditional Commitment, upon execution of the Loan Guarantee Agreement;

(12) The Borrower, any Eligible Lender, and each other relevant party shall take, and be obligated to continue to take, those actions necessary to perfect and maintain liens on collateral in respect of the Guaranteed Obligations;

(13) DOE or its representatives shall have access to the offices of the Borrower and the Eligible Project site at all reasonable times in order to monitor the—

(i) Performance by the Borrower of its obligations under the Loan Guarantee Agreement; and

(ii) Performance of the Eligible Project;

(14) DOE and Borrower have reached an agreement regarding the information that will be made available to DOE and the information that will be made publicly available;

(15) The Borrower shall have filed applications for or obtained any required regulatory approvals for the Eligible Project and is in compliance, or promptly will be in compliance, where appropriate, with all Federal, state, and local regulatory requirements;

(16) The Borrower shall have no delinquent Federal debt;

(17) The Project Sponsors have made or will make a significant Equity investment in the Borrower or the Eligible Project, and will maintain control of the Borrower or the Eligible Project as agreed in the LGA; and

(18) The Loan Guarantee Agreement and related agreements shall include such other terms and conditions as DOE deems necessary or appropriate to protect the interests of the United States.

(d) The Loan Guarantee Agreement shall provide that, in the event of a default by the Borrower:

(1) Interest on the Guaranteed Obligations shall accrue at the rate stated in the Loan Guarantee Agreement or the Loan Agreement, until DOE makes full payment of the defaulted Guaranteed Obligations and, except when such Guaranteed Obligations are funded through the Federal Financing Bank, DOE shall not be required to pay any premium, default penalties, or prepayment penalties; and

(2) The holder of collateral pledged in respect of the Guaranteed Obligations shall be obligated to take such actions as DOE may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery.

(e)(1) An Eligible Lender or other Holder may sell, assign or transfer a Guaranteed Obligation to another Eligible Lender that meets the requirements of § 609.9. Such latter Eligible Lender shall be required to assume all servicing, monitoring and reporting requirements as provided in the Loan Guarantee Agreement. Any transfer of the servicing, monitoring, and reporting functions shall be subject to the prior written approval of DOE.

(2) The Secretary, or the Secretary's designee or contractual agent, for the purpose of identifying Holders with the right to receive payment under the Guaranteed Obligations, shall include in the Loan Guarantee Agreement or related documents a procedure for tracking and identifying Holders of Guaranteed Obligations. Any contractual agent approved by the Secretary to perform this function may transfer or assign this responsibility only with the Secretary's prior written approval.

(f) Each Loan Guarantee Agreement shall require the Borrower to make representations and warranties, agree to covenants, and satisfy conditions precedent to closing and to each disbursement that, in each case, relate to its compliance with the Davis-Bacon Act and the Cargo Preference Act.

(g) The Applicant, the Borrower or the Project Sponsor must estimate, calculate, record, and provide to DOE any time DOE requests such information and at the times provided in the Loan Guarantee Agreement all costs incurred in the design, engineering, financing, construction, startup, commissioning and shakedown of the Eligible Project in accordance with generally accepted accounting principles and practices.

### § 609.9 Lender servicing requirements.

(a) When reviewing and evaluating a proposed Eligible Project, all Eligible Lenders (other than the Federal Financing Bank) shall at all times exercise the level of care and diligence that a reasonable and prudent lender would exercise when reviewing, evaluating and disbursing a loan made by it without a Federal guarantee.

(b) Loan servicing duties shall be performed by an Eligible Lender, DOE, or another qualified loan servicer approved by DOE. When performing its servicing duties, the loan servicer shall at all times exercise

the level of care and diligence that a reasonable and prudent lender would exercise when servicing a loan made without a Federal guarantee, including:

(1) During the construction period, monitoring the satisfaction of all of the conditions precedent to all loan disbursements, as provided in the Loan Guarantee Agreement, Loan Agreement or related documents;

(2) During the operational phase, monitoring and servicing the Guaranteed Obligations and collection of the outstanding principal and accrued interest as well as undertaking to ensure that the collateral package securing the Guaranteed Obligations remains uncompromised; and

(3) Until the Guaranteed Obligation has been repaid, providing annual or more frequent financial and other reports on the status and condition of the Guaranteed Obligations and the Eligible Project, and promptly notifying DOE if it becomes aware of any problems or irregularities concerning the Eligible Project or the ability of the Borrower to make payment on the Guaranteed Obligations or its other debt obligations.

**§ 609.10 Project costs.**

(a) Project Costs include:

(1) Costs of acquisition, lease, or rental of real property, including engineering fees, surveys, title insurance, recording fees, and legal fees incurred in connection with land acquisition, lease or rental, site improvements, site restoration, access roads, and fencing;

(2) Costs of engineering, architectural, legal and bond fees, and insurance paid in connection with construction of the facility;

(3) Costs of equipment purchases, including a reasonable reserve of spare parts to the extent required;

(4) Costs to provide facilities and services related to safety and environmental protection;

(5) Costs of financial, legal, and other professional services, including services necessary to obtain required licenses and permits and to prepare environmental reports and data;

(6) Costs of issuing Eligible Project debt, such as fees, transaction, and costs referred to in §609.10(a)(5), and other customary charges imposed by Eligible Lenders;

(7) Costs of necessary and appropriate insurance and bonds of all types including letters of credit and any collateral required therefor;

(8) Costs of design, engineering, startup, commissioning and shakedown;

(9) Costs of obtaining licenses to intellectual property necessary to design, construct, and operate the Eligible Project;

(10) To the extent required by the Loan Guarantee Agreement and not intended or available for any cost referred to in §609.10(b), costs of funding any reserve fund, including without limitation, a debt service reserve, a maintenance reserve, and a contingency reserve for cost overruns during construction; provided that proceeds of a Guaranteed Loan deposited to any reserve fund shall not be removed from such fund except to pay Project Costs, to pay principal of the Guaranteed Loan, or otherwise to be used as provided in the Loan Guarantee Agreement;

(11) Capitalized interest necessary to meet market requirements and other carrying costs during construction; and

(12) Other necessary and reasonable costs.

(b) Project Costs do not include:

(1) Fees and commissions charged to Borrower, including finder's fees, for obtaining Federal or other funds;

(2) Parent corporation or other affiliated entity's general and administrative expenses, and non-Eligible Project related parent corporation or affiliated entity assessments, including organizational expenses;

(3) Goodwill, franchise, trade, or brand name costs;

(4) Dividends and profit sharing to stockholders, employees, and officers;

(5) Research, development, and demonstration costs of readying an innovative technology for employment in a commercial project;

(6) Costs that are excessive or are not directly required to carry out the Eligible Project, as determined by DOE;

(7) Expenses incurred after startup, commissioning, and shakedown before the facility, or, in DOE's discretion, any portion of the facility, has been placed in service;

(8) Borrower-paid Credit Subsidy Costs, the Administrative Cost of Issuing a Loan Guarantee, and any other fee collected by DOE; and

(9) Operating costs.

**§ 609.11 Fees and charges.**

(a) Unless explicitly authorized by statute, no funds obtained from the Federal Government, or from a loan or other instrument guaranteed by the Federal Government, may be used to pay for the Credit Subsidy Cost, the Application Fee, the Facility Fee, the Guarantee Fee, the maintenance fee and any other fees charged by or paid to DOE relating to the Act or any Guarantee thereunder.

(b) DOE may charge Applicants a non-refundable Facility Fee, with a portion being payable on or prior to the date on which the Applicant executes the Commitment Letter and the remainder being payable on or prior to the closing date for the Loan Guarantee Agreement.

(c) In order to encourage and supplement private lending activity DOE may collect from Borrowers for deposit in the United States Treasury a non-refundable Risk-Based Charge which, together with the interest rate on the Guaranteed Obligation that LPO determines to be appropriate, will take into

account the prevailing rate of interest in the private sector for similar loans and risks. The Risk-Based Charge shall be paid at such times and in such manner as may be determined by DOE, but no less frequently than once each year, commencing with payment of a pro-rated payment on the date the Guarantee is issued. The amount of the Risk-Based Charge will be specified in the Loan Guarantee Agreement.

(d) DOE may collect a maintenance fee to cover DOE's administrative expenses, other than extraordinary expenses, incurred in servicing and monitoring a Loan Guarantee Agreement. The maintenance fee shall accrue from the date of execution of the Loan Guarantee Agreement through the date of payment in full of the related Guaranteed Obligations. If DOE determines to collect a maintenance fee, it shall be paid by the Borrower each year (or portion thereof) in advance in the amount specified in the applicable Loan Guarantee Agreement.

(e) In the event a Borrower or an Eligible Project experiences difficulty relating to technical, financial, or legal matters or other events (e.g., engineering failure or financial workouts), the Borrower shall be liable as follows:

(1) If such difficulty requires DOE to incur time or expenses beyond those customarily expended to monitor and administer performing loans, DOE may collect an extraordinary expenses fee from the Borrower that will reimburse DOE for such time and expenses, as determined by DOE; and

(2) For all fees and expenses of DOE's independent consultants and outside counsel, to the extent that such fees and expenses are elected to be paid by DOE notwithstanding the provisions of paragraphs (f) and (g) of this section.

(f) Each Applicant, Borrower or Project Sponsor, as applicable, shall be responsible for the payment of all fees and expenses charged by DOE's independent consultants and outside legal counsel in connection with an Application, Conditional Commitment or Loan Guarantee Agreement, as applicable. Upon making a determination to engage independent consultants or outside counsel with respect to an Application, DOE will proceed to evaluate and process such Application only following execution by an Applicant or Project Sponsor, as appropriate, of an agreement satisfactory to DOE to pay the fees and expenses charged by the independent consultants and outside legal counsel. Appropriate provisions regarding payment of such fees and expenses shall also be included in each Term Sheet and Loan Guaranty Agreement or, upon a determination by DOE, in other appropriate agreements.

(g) Notwithstanding payment by Applicant, Borrower or Project Sponsor, all services rendered by an independent consultant or outside legal counsel to DOE in connection with an Application, Conditional Commitment or Loan Guarantee Agreement shall be solely for the benefit of DOE (and such other creditors as DOE may agree in writing). DOE may require, in its discretion, the payment of an advance retainer to such independent consultants or outside legal counsel as security for the collection of the fees and expenses charged by the independent consultants and outside legal counsel. In the event an Applicant, Borrower or Project Sponsor fails to comply with the provisions of such payment agreement, DOE in its discretion, may stop work on or terminate an Application, a Conditional Commitment or a Loan Guarantee Agreement, or may take such other remedial measures in its discretion as it deems appropriate.

(h) DOE shall not be financially liable under any circumstances to any independent consultant or outside counsel for services rendered in connection with an Application, Conditional Commitment or Loan Guarantee Agreement except to the extent DOE has previously entered into an express written agreement to pay for such services.

### § 609.12 Full faith and credit and incontestability.

The full faith and credit of the United States is pledged to the payment of principal and interest of Guaranteed Obligations pursuant to Guarantees issued in accordance with the Act and this Part. The issuance by DOE of a Guarantee shall be conclusive evidence that it has been properly obtained; that the underlying loan qualified for such Guarantee; and that, but for fraud or material misrepresentation by the Holder, such Guarantee shall be legal, valid, binding and enforceable against DOE in accordance with its terms.

### § 609.13 Default, demand, payment, and foreclosure on collateral.

(a) If a Borrower defaults in making a required payment of principal or interest on a Guaranteed Obligation and such default has not been cured within the applicable grace period, the Holder may make written demand for payment upon the Secretary in accordance with the terms of the applicable Guarantee. If a Borrower defaults in making a required payment of principal or interest on a Guaranteed Obligation and such default has not been cured within the applicable grace period, the Secretary shall notify the Attorney General.

(b) Subject to the terms of the applicable Guarantee, the Secretary shall make payment within 60 days after receipt of written demand for payment from the Holder, provided that the demand for payment complies in all respects with the terms of the applicable Guarantee. Interest shall accrue to the Holder at the rate stated in the promissory note evidencing the Guaranteed Obligation,

without giving effect to the Borrower's default in making a required payment of principal or interest on the applicable Guarantee Obligation or any other default by the Borrower, until the Guaranteed Obligation has been fully paid by DOE. Payment by the Secretary on the applicable Guarantee does not change Borrower's obligations under the promissory note evidencing the Guaranteed Obligation, Loan Guarantee Agreement, Loan Agreement or related documents, including an obligation to pay default interest.

(c) Following payment by the Secretary pursuant to the applicable Guarantee, upon demand by DOE, the Holder shall transfer and assign to the Secretary (or his designee or agent) the promissory note evidencing the Guaranteed Obligation, all rights and interests of the Holder in the Guaranteed Obligation, and all rights and interests of the Holder in respect of the Guaranteed Obligation, except to the extent that the Secretary determines that such promissory note or any of such rights and interests shall not be transferred and assigned to the Secretary. Such transfer and assignment shall include, without limitation, all of the liens, security and collateral rights of the Holder (or his designee or agent) in respect of the Guaranteed Obligation.

(d) Following payment by the Secretary pursuant to a Guarantee or other default of a Guaranteed Obligation, the Secretary is authorized to protect and foreclose on the collateral, take action to recover costs incurred by, and all amounts owed to, the United States as a result of the defaulted Guarantee Obligation, and take such other action necessary or appropriate to protect the interests of the United States. In respect of any such authorized actions that involve a judicial proceeding or other judicial action, the Secretary shall act through the Attorney General. The foregoing provisions of this paragraph shall not relieve the Secretary from its obligations pursuant to any applicable Intercreditor Agreement. Nothing in this paragraph shall limit the Secretary from exercising any rights or remedies pursuant to the terms of the Loan Guarantee Agreement.

(e) The cash proceeds received as a result of any foreclosure on the collateral, or other action, shall be distributed in accordance with the Loan Guarantee Agreement (subject to any applicable Intercreditor Agreement).

(f) The Loan Guarantee Agreement shall provide that cash proceeds received by the Secretary (or his designee or agent) as a result of any foreclosure on the collateral or other action shall be applied in the following order of priority:

(1) Toward the pro rata payment of any costs and expenses (including unpaid fees, fees and expenses of counsel, contractors and agents, and liabilities and advances made or incurred) of the Secretary, the Attorney General, the Holder, a collateral agent or other responsible person of any of them (solely in their individual capacities as such and not on behalf of or for the benefit of their principals), incurred in connection with any authorized action following payment by the Secretary pursuant to a Guarantee or other default of a Guaranteed Obligation, or as otherwise permitted under the Loan Agreement or Loan Guarantee Agreement.

(2) To pay all accrued and unpaid fees due and payable to the Secretary, the Attorney General, the Holder, a collateral agent or other responsible person of any of them on a pro rata basis in respect of the Guaranteed Obligation;

(3) To pay all accrued and unpaid interest due and payable to the Secretary, the Attorney General, the Holder, a collateral agent or other responsible person of any of them on a pro rata basis in respect of the Guaranteed Obligation;

(4) To pay all unpaid principal of the Guaranteed Obligation;

(5) To pay all other obligations of the Borrower under the Loan Guarantee Agreement, the Loan Agreement and related documents that are remaining after giving effect to the preceding provisions and are then due and payable; and;

(6) To pay to the Borrower, or its successors and assigns, or as a court of competent jurisdiction may direct, any cash proceeds then remaining following the application of all payment described above.

(g) No action taken by the Holder or its agent or designee in respect of any collateral will affect the rights of any person, including the Secretary, having an interest in the Guaranteed Obligations or other debt obligations, to pursue, jointly or severally, legal action against the Borrower or other liable persons, for any amounts owing in respect of the Guaranteed Obligation or other applicable debt obligations.

(h) In the event that the Secretary considers it necessary or desirable to protect or further the interest of the United States in connection with exercise of rights as a lien holder or recovery of deficiencies due under the Guaranteed Obligation, the Secretary may take such action as he determines to be appropriate under the circumstances.

(i) Nothing in this part precludes, nor shall any provision of this part be construed to preclude, the Secretary from purchasing any collateral or Holder's or other Person's interest in the Eligible Project upon foreclosure of the collateral.

(j) Nothing in this part precludes, nor shall any provision of this part be construed to preclude, forbearance by any Holder with the consent of the Secretary for the benefit of the Borrower and the United States.

(k) The Holder and the Secretary may agree to a formal or informal plan of reorganization in respect of the Borrower, to include a restructuring of the Guaranteed Obligation and other applicable debt of the Borrower on such terms and conditions as the Secretary determines are in the best interest of the United States.

**§ 609.14 Preservation of collateral.**

(a) If the Secretary exercises his right under the Loan Guarantee Agreement to require the holder of pledged collateral to take such actions as the Secretary (subject to any applicable Intercreditor Agreement) may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery from the collateral, the Secretary shall, subject to compliance with the Antideficiency Act, 31 U.S.C. 1341 *et seq.*, reimburse the holder of such collateral for reasonable and appropriate expenses incurred in taking actions required by the Secretary (unless otherwise provided in applicable agreements). Except as provided in § 609.13, no party may waive or relinquish, without the consent of the Secretary, any such collateral to which the United States would be subrogated upon payment under the Loan Guarantee Agreement.

(b) In the event of a default, the Secretary may enter into such contracts as he determines are required or appropriate, taking into account the term of any applicable Intercreditor Agreement, to care for, preserve, protect or maintain collateral pledged in respect of Guaranteed Obligations. The cost of such contracts may be charged to the Borrower.

**§ 609.15 Audit and access to records.**

Each Loan Guarantee Agreement and related documents shall provide that:

(a) The Eligible Lender, or DOE in conjunction with the Federal Financing Bank where loans are funded by the Federal Financing Bank or other Holder or other party servicing the Guaranteed Obligations, as applicable, and the Borrower, shall keep such records concerning the Eligible Project as are necessary, including the Application, Term Sheet, Conditional Commitment, Loan Guarantee Agreement, Credit Agreement, mortgage, note, disbursement requests and supporting documentation, financial statements, audit reports of independent accounting firms, lists of all Eligible Project assets and non-Eligible Project assets pledged in respect of the Guaranteed Obligations, all offtake and other revenue producing agreements, documentation for all Eligible Project indebtedness, income tax returns, technology agreements, documentation for all permits and regulatory approvals and all other documents and records relating to the Borrower or the Eligible Project, as determined by the Secretary, to facilitate an effective audit and performance evaluation of the Eligible Project; and

(b) The Secretary and the Comptroller General, or their duly authorized representatives, shall have access, for the purpose of audit and examination, to any pertinent books, documents, papers and records of the Borrower, Eligible Lender or DOE or other Holder or other party servicing the Guaranteed Obligation, as applicable. Such inspection may be made during regular office hours of the Borrower, Eligible Lender or DOE or other Holder, or other party servicing the Eligible Project and the Guaranteed Obligations, as applicable, or at any other time mutually convenient.

**§ 609.16 Deviations.**

(a) To the extent that the requirements under this part are not specified by the Act or other applicable statutes, DOE may authorize deviations from the requirements of this part upon:

(1) Either receipt from the Applicant, Borrower or Project Sponsor, as applicable, of—

(i) A written request that the Secretary deviate from one or more requirements; and

(ii) A supporting statement briefly describing one or more justifications for such deviation; or

(iii) A determination by the Secretary in his discretion to undertake a deviation;

(2) A finding by the Secretary that such deviation supports program objectives and the special circumstances stated in the request make such deviation clearly in the best interest of the Government; and

(3) If the waiver would constitute a substantial change in the financial terms of the Loan Guarantee Agreement and related documents, consultation by DOE with OMB and the Secretary of the Treasury.

(b) If a deviation under this section results in an increase in the applicable Credit Subsidy Cost, such increase shall be funded either by additional fees paid by or on behalf of the Borrower or, if an appropriation is available by means of an appropriations act. The Secretary has discretion to determine how the cost of a deviation is funded.

# PART 611—ADVANCED TECHNOLOGY VEHICLES MANUFACTURER ASSISTANCE PROGRAM

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## Subpart A—General

### §611.1 Purpose.

This part is issued by the Department of Energy (DOE) pursuant to section 136 of the Energy Independence and Security Act of 2007, Public Law 110–140, as amended by section 129 of Public Law 110–329. Specifically, section 136(e) directs DOE to promulgate an interim final rule establishing regulations that specify eligibility criteria and that contain other provisions that the Secretary deems necessary to administer this section and any loans made by the Secretary pursuant to this section.

### §611.2 Definitions.

The definitions contained in this section apply to provisions contained in both subpart A and subpart B.

*Adjusted average fuel economy* means a harmonic production weighted average of the combined fuel economy of all vehicles in a fleet, which were subject to CAFE.

*Advanced technology vehicle* means a passenger automobile or light truck that meets—

(1) The Bin 5 Tier II emission standard established in regulations issued by the Administrator of the Environmental Protection Agency under section 202(i) of the Clean Air Act (42 U.S.C. 7521(i)), as of the date of application, or a lower-numbered Bin emission standard;

(2) Any new emission standard in effect for fine particulate matter prescribed by the Administrator under that Act (42 U.S.C. 7401 *et seq.*), as of the date of application; and

(3) At least 125 percent of the harmonic production weighted average combined fuel economy, for vehicles with substantially similar attributes in model year 2005.

*Agreement* means the contractual loan arrangement between DOE and a Borrower for a loan made by and through the Federal Financing Bank with the full faith and credit of the United States government on the principal and interest.

*Applicant* means a party that submits a substantially complete application pursuant to this part.

*Application* means the compilation of the materials required by this part to be submitted to DOE by an Applicant. One Application can include requests for one or more loans and one or more projects. However, an Application covering more than one project must contain complete and separable information with respect to each project.

*Automobile* is used as that term is defined in 49 CFR part 523.

*Borrower* means an Applicant that receives a loan under this Program.

*CAFE* means the Corporate Average Fuel Economy program of the Energy Policy and Conservation Act, 49 U.S.C. 32901 *et seq*.

*Combined fuel economy* means the combined city/highway miles per gallon values, as are reported in accordance with section 32904 of title 49, United States Code. If CAFE compliance data is not available, the combined average fuel economy of a vehicle must be demonstrated through the use of a peer-reviewed model.

*DOE* or *Department* means the United States Department of Energy.

*Eligible Facility* means a manufacturing facility in the United States that produces qualifying advanced technology vehicles, or qualifying components.

*Eligible Project means:*

(1) Reequipping, expanding, or establishing a manufacturing facility in the United States to produce qualifying advanced technology vehicles, or qualifying components; or

(2) Engineering integration performed in the United States for qualifying advanced technology vehicles and qualifying components.

*Engineering integration costs* are the costs of engineering tasks relating to—

(1) Incorporating qualifying components into the design of advanced technology vehicles; and

(2) Designing tooling and equipment and developing manufacturing processes and material suppliers for production facilities that produce qualifying components or advanced technology vehicles.

*Equivalent vehicle* means a light-duty vehicle of the same vehicle classification as specified in 10 CFR part 523.

*Financially viable* means a reasonable prospect that the Applicant will be able to make payments of principal and interest on the loan as and when such payments become due under the terms of the loan documents, and that the applicant has a net present value that is positive, taking all costs, existing and future, into account.

*Grantee* means an entity awarded a grant made pursuant to section 136 and this Part.

*Light-duty vehicle* means passenger automobiles and light trucks.

*Light truck* is used as that term is defined in 49 CFR part 523.

*Loan Documents* mean the Agreement and all other instruments, and all documentation among DOE, the borrower, and the Federal Financing Bank evidencing the making, disbursing, securing, collecting, or otherwise administering the loan [references to loan documents also include comparable agreements, instruments, and documentation for other financial obligations for which a loan is requested or issued].

*Model year* is defined as that term is defined in 49 U.S.C. 32901.

*Passenger automobile* is used as that term is defined in 49 CFR part 523.

*Qualifying components* means components that the DOE determines are

(1) Designed for advanced technology vehicles; and

(2) Installed for the purpose of meeting the performance requirements of advanced technology vehicles.

*Secretary* means the United States Secretary of Energy.

*Security* means all property, real or personal, tangible or intangible, required by the provisions of the Loan Documents to secure repayment of any indebtedness of the Borrower under the Loan Documents.

### § 611.3 Advanced technology vehicle.

In order to demonstrate that a vehicle is an ''advanced technology vehicle'', an automobile manufacturer must provide the following:

(a) Emissions certification. An automobile manufacturer must written certify that the vehicle meets, or will meet, the emissions requirements specified in the definition of ''advanced technology vehicle''; and

(b) Demonstration of fuel economy performance. An automobile manufacturer must demonstrate that the vehicle has a combined average fuel economy of at least 125 percent of the average combined fuel economy for vehicles with substantially similar attributes for model year 2005.

(1) A combined average fuel economy calculation required under this paragraph for a vehicle that is a dual fueled automobile for the purpose of CAFE is calculated as if the vehicle were not a dual fueled automobile.

(2) The average combined fuel economy for vehicles with substantially similar attributes is a harmonic production weighted average of the combined average fuel economy of all vehicles with substantially similar attributes in model year 2005, as published by DOE.

(3) In the case of an electric drive vehicle with the ability to recharge from an off-board source, an automobile manufacturer must provide DOE with a test procedure and sufficient data to demonstrate that the vehicle meets or

exceeds the applicable average combined fuel economy of vehicles with substantially similar attributes.

## Subpart B—Direct Loan Program

### §611.100 Eligible applicant.

(a) In order to be eligible to receive a loan under this part, an applicant

(1) Must be either—

(i) An automobile manufacturer that can demonstrate an improved fuel economy as specified in paragraph (b) of this section, or

(ii) A manufacturer of a qualifying component; and

(2) Must be financially viable without receipt of additional Federal funding associated with the proposed eligible project.

(b) Improved fuel economy. (1) If the applicant is an automobile manufacturer that manufactured in model year 2005, vehicles subject to the CAFE requirements, the applicant must demonstrate that its adjusted average fuel economy for its light-duty vehicle fleet produced in the most recent year for which final CAFE compliance data is available, at the time of application, is greater than or equal to the adjusted average fuel economy of the applicant's fleet for MY 2005, based on the MY 2005 final CAFE compliance data.

(2) If the applicant is an automobile manufacturer that did not manufacture in model year 2005, vehicles subject to the CAFE requirements, the applicant must demonstrate that the projected combined fuel economy for the relevant the advanced technology vehicle that is the subject of the application is greater than or equal to the industry adjusted average fuel economy for model year 2005 of equivalent vehicles, based on final CAFE compliance data.

(3) The CAFE values under this paragraph are to be calculated using the CAFE procedures applicable to the model year being evaluated.

(4) An applicant must provide fuel economy data, at the model level, relied upon to make the demonstration required by this section.

(5) An applicant that is a manufacturer of a qualifying component under paragraph (a)(1)(ii) of this section does not need to make a showing of improved fuel economy under this paragraph.

(c) In determining under paragraph (a)(2) of this section whether an applicant is financially viable, the Department will consider a number of factors, including, but not limited to:

(1) The applicant's debt-to-equity ratio as of the date of the loan application;

(2) The applicant's earnings before interest, taxes, depreciation, and amortization (EBITDA) for the applicant's most recent fiscal year prior to the date of the loan application;

(3) The applicant's debt to EBITDA ratio as of the date of the loan application;

(4) The applicant's interest coverage ratio (calculated as EBITDA divided by interest expenses) for the applicant's most recent fiscal year prior to the date of the loan application;

(5) The applicant's fixed charge coverage ratio (calculated as EBITDA plus fixed charges divided by fixed charges plus interest expenses) for the applicant's most recent fiscal year prior to the date of the loan application;

(6) The applicant's liquidity as of the date of the loan application;

(7) Statements from applicant's lenders that the applicant is current with all payments due under loans made by those lenders at the time of the loan application; and

(8) Financial projections demonstrating the applicant's solvency through the period of time that the loan is outstanding.

(d). For purposes of making a determination under paragraph (a)(2) of this section, additional Federal funding includes any loan, grant, guarantee, insurance, payment, rebate, subsidy, credit, tax benefit, or any other form of direct or indirect assistance from the Federal government, or any agency or instrumentality thereof, other than the proceeds of a loan approved under this Part, that is, or is expected to be made available with respect to, the project for which the loan is sought under this Part.

### §611.101 Application.

The information and materials submitted in or in connection with applications will be treated as provided in 10

CFR 600.15 and must be marked as provided in 10 CFR 600.15(b). An application must include, at a minimum, the following information and materials:

(a) A certification by the applicant that it meets each of the requirements of the program as set forth in statute, the regulations in this part, and any supplemental requirements issued by DOE;

(b) A description of the nature and scope of the proposed project for which a loan or award is sought under this part, including key milestones and location of the project;

(c) A detailed explanation of how the proposed project qualifies under applicable law to receive a loan or award under this part, including vehicle simulations using industry standard model (need to add name and location of this open source model) to show projected fuel economy;

(d) A detailed estimate of the total project costs together with a description of the methodology and assumptions used to produce that estimate;

(e) A detailed description of the overall financial plan for the proposed project, including all sources and uses of funding, equity, and debt, and the liability of parties associated with the project;

(f) Applicant's business plan on which the project is based and applicant's financial model presenting project *pro forma* statements for the proposed term of the obligations including income statements, balance sheets, and cash flows. All such information and data must include assumptions made in their preparation and the range of revenue, operating cost, and credit assumptions considered;

(g) An analysis of projected market use for any product (vehicle or component) to be produced by or through the project, including relevant data and assumptions justifying the analysis, and copies of any contractual agreements for the sale of these products or assurance of the revenues to be generated from sale of these products;

(h) Financial statements for the past three years, or less if the applicant has been in operation less than three years, that have been audited by an independent certified public accountant, including all associated notes, as well as interim financial statements and notes for the current fiscal year, of the applicant and parties providing the applicant's financial backing, together with business and financial interests of controlling or commonly controlled organizations or persons, including parent, subsidiary and other affiliated corporations or partners of the applicant;

(i) A list showing the status of and estimated completion date of applicant's required project-related applications or approvals for Federal, state, and local permits and authorizations to site, construct, and operate the project, a period of 5 years preceding the submission of an application under this Part;

(j) Information sufficient to enable DOE to comply with the National Environmental Policy Act of 1969, as required by § 611.106 of this part;

(k) A listing and description of assets associated, or to be associated, with the project and any other asset that will serve as collateral for the Loan, including appropriate data as to the value of the assets and the useful life of any physical assets. With respect to real property assets listed, an appraisal that is consistent with the ''Uniform Standards of Professional Appraisal Practice,'' promulgated by the Appraisal Standards Board of the Appraisal Foundation, and performed by licensed or certified appraisers, is required;

(l) An analysis demonstrating that, at the time of the application, the applicant is financially viable without receipt of additional Federal funding associated with the proposed project, and that there is a reasonable prospect that the Applicant will be able to make payments of principal and interest on the loan as and when such payments become due under the terms of the loan documents, and that the applicant has a net present value which is positive, taking all costs, existing and future, into account. This information must include, from publicly traded companies, relevant filings with the Securities and Exchange Commission;

(m) Written assurance that all laborers and mechanics employed by contractors or subcontractors during construction, alteration, or repair that is financed, in whole or in part, by a loan

under this Part shall be paid wages at rates not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with 40 U.S.C. sections 3141–3144, 3146, and 3147;

(n) Completed Form SF–LLL, as required by 10 CFR Part 601; and

(o) Other information, as determined necessary by DOE.

[73 FR 66731, Nov. 12, 2008, as amended at 76 FR 26583, May 9, 2011]

### § 611.102 Eligible project costs.

(a) Eligible costs are:

(1) Those costs that are reasonably related to the reequipping, expanding, or establishing a manufacturing facility in the United States to produce qualifying advanced technology vehicles or qualifying components;

(2) Costs of engineering integration performed in the United States for qualifying vehicles or qualifying components;

(3) Costs for payment with loan proceeds that are incurred, but not yet paid by the borrower, after a substantially complete application has been submitted to DOE; and

(4) Costs incurred after closing of the loan.

(b) In determining the overall total cost of an Eligible Project, DOE and the applicant may include significant costs already incurred and capitalized by the applicant in accordance with Generally Accepted Accounting Principles and these costs may be considered by DOE in determining the Borrower's contribution to total project costs.

### § 611.103 Application evaluation.

(a) *Eligibility screening*. Applications will be reviewed to determine whether the applicant is eligible, the information required under § 611.101 is complete, and the proposed loan complies with applicable statutes and regulations. DOE can at any time reject an application, in whole or in part, that does not meet these requirements. Any additional information submitted to DOE will be treated as provided in 10 CFR 600.15 and must be marked as provided in 10 CFR 600.15(b).

(b) *Evaluation criteria*. Applications that are determined to be eligible pursuant to paragraph (a) of this section shall be subject to a substantive review by DOE based upon factors that include, but are not limited to, the following:

(1) The technical merit of the proposed advanced technology vehicles or qualifying components, with greater weight given for factors including, but not limited to:

(i) Improved vehicle fuel economy above that required for an advanced technology vehicle;

(ii) Potential contributions to improved fuel economy of the U.S. light-duty vehicle fleet;

(iii) Likely reductions in petroleum use by the U.S. light-duty fleet; and

(iv) Promotion of use of advanced fuel (e.g., E85, ultra-low sulfur diesel).

(2) Technical Program Factors such as economic development and diversity in technology, company, risk, and geographic location.

(3) The adequacy of the proposed provisions to protect the Government, including sufficiency of Security, the priority of the lien position in the Security, and the percentage of the project to be financed with the loan.

(4) In making loans to those manufacturers that have existing facilities, priority will be given to those facilities that are oldest or have been in existence for at least 20 years even if such facilities are idle at the time of application.

[73 FR 66731, Nov. 12, 2008, as amended at 76 FR 26583, May 9, 2011]

### § 611.104 [Reserved]

### § 611.105 Agreement.

(a) Only an Agreement executed by a duly authorized DOE Contracting Officer can contractually obligate the government to make a loan made by and through the Federal Financing Bank with the full faith and credit of the United States government on the principal and interest.

(b) DOE is not bound by oral representations made during the Application stage, or during any negotiation process.

(c) No funds obtained from the Federal Government, or from a loan or other instrument guaranteed by the Federal Government, may be used to

pay administrative fees, or other fees charged by or paid to DOE relating to the section 136 loan program.

(d) Prior to the execution by DOE of an Agreement, DOE must ensure that the following requirements and conditions, which must be specified in the Agreement, are satisfied:

(1) The Borrower is a Eligible Applicant as defined in this part;

(2) The Agreement is for an Eligible Project as defined in this part;

(3) The principal amount of the loan is limited to no more than 80 percent of reasonably anticipated total Project Costs;

(4) Loan funds will be disbursed only to meet immediate cash disbursement needs of the Borrower and not for investment purposes, and any investment earnings obtained in excess of accrued interest expense will be returned to United States Government; and

(5) Such documents, representations, warrants and covenants as DOE may require.

### § 611.106 Environmental requirements.

(a)(1) *In general.* Environmental review of the proposed projects under this part will be conducted in accordance with applicable statutes, regulations, and Executive Orders.

(2) The applicant must submit a comprehensive environmental report. The comprehensive environmental report shall consist of the specific reports and related material set forth in paragraphs (d) through (f) of this section.

(3) The regulations of the Council on Environmental Quality implementing NEPA require DOE to provide public notice of the availability of project specific environmental documents such as environmental impact statements, environmental assessments, findings of no significant impact, records of decision etc., to the affected public. See 40 CFR 1506.6(b). The comprehensive environmental report will provide substantial basis for any required environmental impact statement or environmental assessment and findings of no significant impact, pursuant to the procedures set forth in 10 CFR 1021.215. DOE may also make a determination as to whether a categorical exclusion is available with regard to an Application.

(b) The detail of each specific report must be commensurate with the complexity of the proposal and its potential for environmental impact. Each topic in each specific report shall be addressed or its omission justified, unless the specific report description indicates that the data is not required for that type of project. If material required for one specific report is provided in another specific report or in another exhibit, it may be incorporated by reference. If any specific report topic is required for a particular project but is not provided at the time the application is filed, the comprehensive environmental report shall explain why it is missing and when the applicant anticipates it will be filed.

(c) As appropriate, each specific report shall:

(1) Address conditions or resources that might be directly or indirectly affected by the project;

(2) Identify significant environmental effects expected to occur as a result of the project;

(3) Identify the effects of construction, operation (including maintenance and malfunctions), and termination of the project, as well as cumulative effects resulting from existing or reasonably foreseeable projects;

(4) Identify measures proposed to enhance the environment or to avoid, mitigate, or compensate for adverse effects of the project; and

(5) Provide a list of publications, reports, and other literature or communications that were cited or relied upon to prepare each report.

(d) Specific Report 1—Project impact and description. This report must describe the environmental impacts of the project, facilities associated with the project, special construction and operation procedures, construction timetables, future plans for related construction, compliance with regulations and codes, and permits that must be obtained.

(e) Specific Report 2—Socioeconomics. This report must identify and quantify the impacts of constructing and operating the proposed project on factors affecting towns and counties in the vicinity of the project. The report must:

(1) Describe the socioeconomic impact area;

(2) Evaluate the impact of any substantial immigration of people on governmental facilities and services and plans to reduce the impact on the local infrastructure;

(3) Describe on-site manpower requirements and payroll during construction and operation, including the number of construction personnel who currently reside within the impact area, would commute daily to the site from outside the impact area, or would relocate temporarily within the impact area;

(4) Determine whether existing housing within the impact area is sufficient to meet the needs of the additional population;

(5) Describe the number and types of residences and businesses that would be displaced by the project, procedures to be used to acquire these properties, and types and amounts of relocation assistance payments; and

(6) Conduct a fiscal impact analysis evaluating incremental local government expenditures in relation to incremental local government revenues that would result from construction of the project. Incremental expenditures include, but are not limited to, school operating costs, road maintenance and repair, public safety, and public utility costs.

(f) Specific Report 3—Alternatives. This report must describe alternatives to the project and compare the environmental impacts of such alternatives to those of the proposal. The discussion must demonstrate how environmental benefits and costs were weighed against economic benefits and costs, and technological and procedural constraints. The potential for each alternative to meet project deadlines and the environmental consequences of each alternative shall be discussed. The report must discuss the ''no action'' alternative and the potential for accomplishing the proposed objectives through the use of other means. The report must provide an analysis of the relative environmental benefits and costs for each alternative.

**§611.107 Loan terms.**

(a) All loans provided under this part shall be due and payable in full at the earlier of:

(1) the projected life, in years, of the Eligible facility that is built or installed as a result of the Eligible Project carried out using funds from the loan, as determined by the Secretary; or

(2) Twenty-five (25) years after the date the loan is closed.

(b) Loans provided under the Part must bear a rate of interest that is equal to the rate determined by the Secretary of the Treasury, taking into consideration current market yields outstanding marketable obligations of the United States of comparable maturity. This rate will be determined separately for each drawdown of the loan.

(c) A loan provided under this part may be subject to a deferral in repayment of principal for not more than 5 years after the date on which the Eligible facility that is built or installed as a result of the Eligible Project first begins operations, as determined by the Secretary.

(d)(1) The performance of all of the Borrower's obligations under the Loan Documents shall be secured by, and shall have the priority in, such Security as provided for within the terms and conditions of the Loan Documents.

(2) Accordingly, the rule states that the Secretary must have a first lien or security interest in all property acquired with loan funds. This requirement may be waived only by the Secretary on a non-delegable basis. DOE must also have a lien on any other property of the applicant pledged to secure the loan.

(3) In the event of default, if recoveries from the property and revenues pledged to the repayment of the loan are insufficient to fully repay all principal and interest on the loan, then the Federal Government will have recourse to the assets and revenues of the Borrower to the same extent as senior unsecured general obligations of the Borrower.

(e) The Borrower will be required to pay at the time of the closing of the loan a fee equal to 10 basis points of the principal amount of the loan.

**§ 611.108 Perfection of liens and preservation of collateral.**

(a) The Agreement and other documents related thereto shall provide that:

(1) DOE and the Applicant, in conjunction with the Federal Financing Bank if necessary, will take those actions necessary to perfect and maintain liens, as applicable, on assets which are pledged as collateral for the loan; and

(2) Upon default by the Borrower, the holder of pledged collateral shall take such actions as DOE may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery from the pledged assets. DOE shall reimburse the holder of collateral for reasonable and appropriate expenses incurred in taking actions required by DOE.

(b) In the event of a default, DOE may enter into such contracts as the Secretary determines are required to preserve the collateral. The cost of such contracts may be charged to the Borrower.

**§ 611.109 Audit and access to records.**

(a) The Agreement and related documents shall provide that:

(1) DOE in conjunction with the Federal Financing Bank, as applicable, and the Borrower, shall keep such records concerning the project as are necessary, including the Application, Term Sheet, Conditional Commitment, Agreement, mortgage, note, disbursement requests and supporting documentation, financial statements, audit reports of independent accounting firms, lists of all project assets and non-project assets pledged as security for the loan, all off-take and other revenue producing agreements, documentation for all project indebtedness, income tax returns, technology agreements, documentation for all permits and regulatory approvals and all other documents and records relating to the Eligible Project, as determined by the Secretary, to facilitate an effective audit and performance evaluation of the project; and

(2) The Secretary and the Comptroller General, or their duly authorized representatives, shall have access, for the purpose of audit and examination, to any pertinent books, documents, papers and records of the Borrower or DOE, as applicable. Such inspection may be made during regular office hours of the Borrower or DOE, as applicable, or at any other time mutually convenient.

(b) The Secretary may from time to time audit any or all statements or certificates submitted to the Secretary. The Borrower will make available to the Secretary all books and records and other data available to the Borrower in order to permit the Secretary to carry out such audits. The Borrower should represent that it has within its rights access to all financial and operational records and data relating to the project financed by the loan, and agrees that it will, upon request by the Secretary, exercise such rights in order to make such financial and operational records and data available to the Secretary. In exercising its rights hereunder, the Secretary may utilize employees of other Federal agencies, independent accountants, or other persons.

(c) Loan funds are being expended efficiently and effectively if documentation submitted and audits conducted under this section demonstrate that the borrower is making appropriate progress toward achieving the purpose for which the loan was originally made.

**§ 611.110 Assignment or transfer of loans.**

(a) The Loan Documents may not be modified, in whole or in part, without the prior written approval of DOE.

(b) Upon prior written approval by DOE and the Federal Financing Bank, a certification by the assignor that the assignee is an Eligible Applicant as described in § 611.100 of this part, and subject to paragraph (c) of this section and other provisions of this part, a Borrower may assign or transfer its interest in a loan provided under this part, including the loan documents, to a party that qualifies as an Eligible Applicant.

(c) The provisions of paragraph (b) of this section shall not apply to transfers which occur by operation of law.

### §611.111 Default, demand, payment, and collateral liquidation.

(a) In the event that the Borrower has defaulted in the making of required payments of principal or interest, and such default has not been cured within the period of grace provided in the Agreement, DOE may cause the principal amount of the loan, together with accrued interest thereon, and all amounts owed to the United States by Borrower pursuant to the Agreement, to become immediately due and payable by giving the Borrower written notice to such effect.

(b) In the event that the Borrower is in default as a result of a breach of one or more of the terms and conditions of the Agreement, note, mortgage, or other contractual obligations related to the transaction, other than the Borrower's obligation to pay principal or interest on the loan, and DOE determines, in writing, that such a default has materially affected the rights of the parties, the Borrower shall be given the period of grace provided in the Agreement to cure such default. If the default is not cured during the period of grace, DOE may cause the principal amount of the loan, together with accrued interest thereon, and all amounts owed to the United States by Borrower pursuant to the Agreement, to become immediately due and payable by giving the Borrower written notice to such effect.

(c) In the event that the Borrower has defaulted as described in paragraphs (a) or (b) of this section and such default is not cured during the grace period provided in the Agreement, DOE shall notify the U.S. Attorney General. DOE, acting through the U.S. Attorney General, may seek to foreclose on the collateral assets and/or take such other legal action as necessary for the protection of the Government.

(d) If DOE is awarded title to collateral assets pursuant to a foreclosure proceeding, DOE may take action to complete, maintain, operate, or lease the Eligible Facilities, or otherwise dispose of any property acquired pursuant to the Agreement or take any other necessary action which DOE deems appropriate.

(e) In addition to foreclosure and sale of collateral pursuant thereto, the U.S. Attorney General shall take appropriate action in accordance with rights contained in the Agreement to recover costs incurred by the Government as a result of the defaulted loan or other defaulted obligation. Any recovery so received by the U.S. Attorney General on behalf of the Government shall be applied in the following manner: First to the expenses incurred by the U.S. Attorney General and DOE in effecting such recovery; second, to reimbursement of any amounts paid by DOE as a result of the defaulted obligation; third, to any amounts owed to DOE under related principal and interest assistance contracts; and fourth, to any other lawful claims held by the Government on such process. Any sums remaining after full payment of the foregoing shall be available for the benefit of other parties lawfully entitled to claim them.

(f) In the event that DOE considers it necessary or desirable to protect or further the interest of the United States in connection with the liquidation of collateral or recovery of deficiencies due under the loan, DOE will take such action as may be appropriate under the circumstances.

### §611.112 Termination of obligations.

DOE, the Federal Financing Bank, and the Borrower shall have such rights to terminate the Agreement as are set forth in the loan documents.

## Subpart C—Facility/Funding Awards

### §611.200 Purpose and scope.

This subpart sets forth the policies and procedures applicable to the award and administration of grants by DOE for advanced technology vehicle manufacturing facilities as authorized by section 136(b) of the Energy Independence and Security Act (Pub. L. 110–140).

### §611.201 Applicability.

Except as otherwise provided by this subpart, the award and administration of grants shall be governed by 10 CFR part 600 (DOE Financial Assistance Rules).

### § 611.202 Advanced Technology Vehicle Manufacturing Facility Award Program.

DOE may issue, under the Advanced Technology Vehicle Manufacturing Facility Award Program, 10 CFR part 611, subpart C, awards for eligible projects.

### § 611.203 Eligibility.

In order to be eligible for an award, an applicant must be either—

(a) An automobile manufacturer that can demonstrate an improved fuel economy as specified in paragraph (b) of section 611.3, or

(b) A manufacturer of a qualifying component.

### § 611.204 Awards.

Awards issued for eligible projects shall be for an amount of no more than 30 percent of the eligible project costs.

### § 611.205 Period of award availability.

An award under section 611.204 shall apply to—

(a) Facilities and equipment placed in service before December 30, 2020; and

(b) Engineering integration costs incurred during the period beginning on December 19, 2007 and ending on December 30, 2020.

### § 611.206 Existing facilities.

The Secretary shall, in making awards to those manufacturers that have existing facilities, give priority to those facilities that are oldest or have been in existence for at least 20 years. Such facilities can currently be sitting idle.

### § 611.207 Small automobile and component manufacturers.

(a) In this section, the term ''covered firm'' means a firm that—

(1) Employs less than 500 individuals; and

(2) Manufactures automobiles or components of automobiles.

(b) *Set Aside*—Of the amount of funds that are used to provide awards for each fiscal year under this subpart, not less than 10 percent shall be used to provide awards to covered firms or consortia led by a covered firm.

### §§ 611.208–611.209 [Reserved]

# SUBCHAPTER I—SALES REGULATION

## PART 622—CONTRACTUAL PROVISIONS

### § 622.103 Dispute provisions.

(a) Except as provided in paragraph (b) of this section, all DOE contracts for the sale of personal property to any organization outside the U.S. Government shall include a Disputes clause which provides for:

(1) Binding final decisions by the Contracting Officer, subject to appeal;

(2) Appeal rights pursuant to the Contract Disputes Act of 1978;

(3) Continuation of performance by the contractor at the direction of the contracting officer pending final resolution of the dispute.

(b) Exceptions:

(1) The provisions of this part shall not apply to contracts for sale of electric power by the Power Marketing Administrations;

(2) The Secretary may exempt a contract or class of contracts from this requirement upon determination that it would not be in the public interest in an individual contract or class of contracts with a foreign government, or agency thereof, or international organization, or subsidiary body thereof, to include the Disputes clause, as permitted by section 3 of the Contract Disputes Act of 1978.

(c) The Energy Board of Contract Appeals (EBCA) has cognizance over disputes relating to DOE Sales contracts.

(d) The Disputes clause in § 624.102–4 shall be used in accordance with this § 622.103.

(Sec. 644, Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 599 (42 U.S.C. 7254))

[46 FR 34559, July 2, 1981]

## PART 624—CONTRACT CLAUSES

### § 624.102–4 Disputes.

The following clause shall be used in accordance with the provisions of § 622.103:

DISPUTES

(a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601 *et seq.*). If a dispute arises relating to the contract, the purchaser may submit a claim to the Contracting Officer who shall issue a written decision on the dispute.

(b) *Claim* means:

(1) A written request submitted to the Contracting Officer;

(2) For payment of money, adjustment of contract terms, or other relief;

(3) Which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government; and

(4) For which a Contracting Officer's decision is demanded.

(c) In the case of disputed requests or amendments to such requests for payment exceeding $50,000, or with any amendment causing the total request in dispute to exceed $50,000, the purchaser shall certify, at the time of submission of a claim, as follows:

I certify that the claim is made in good faith, that the supporting data is accurate and complete to the best of my knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the Purchaser believes the Government is liable.

(Purchaser's Name) _____

(Title) _____

(d) The Government shall pay the Purchaser interest.

(1) On the amount found due to the purchaser and unpaid on claims submitted under this clause;

(2) At the rates fixed by the Secretary of the Treasury;

(3) From the date the amount is due until the Government makes payment.

(e) The purchaser shall pay the Government interest:

(1) On the amount found due to the Government and unpaid on claims submitted under this clause;

(2) At the rates fixed by the Department of Energy for the payment of interest on past due accounts;

(3) From the date the amount is due until the purchaser makes payment.

(f) The decision of the Contracting Officer shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency unless an appeal or action is timely commenced within the times specified by the Contract Disputes Act of 1978.

(g) The purchaser shall comply with any decision of the Contracting Officer and at the direction of the Contracting Officer shall proceed diligently with performance of this contract pending final resolution of any request for relief, claim, appeal, or action related to this contract.

(Sec. 644, Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 599 (42 U.S.C. 7254))

# PART 625—PRICE COMPETITIVE SALE OF STRATEGIC PETROLEUM RESERVE PETROLEUM

Sec.
625.1 Application and purpose.
625.2 Definitions.
625.3 Standard sales provisions.
625.4 Publication of the Standard Sales Provisions.
625.5 Failure to perform in accordance with SPR Contracts of Sale.

APPENDIX A TO PART 625—STANDARD SALES PROVISIONS

AUTHORITY: 15 U.S.C. 761; 42 U.S.C. 7101; 42 U.S.C. 6201.

SOURCE: 48 FR 56541, Dec. 21, 1983, unless otherwise noted.

## § 625.1 Application and purpose.

This part shall apply to all price competitive sales of SPR petroleum by DOE. This section provides the rules for developing standard contract terms and conditions and financial and performance responsibility measures; notifying potential purchasers of those terms, conditions and measures; choosing applicable terms, conditions and measures for each sale of SPR petroleum; and notifying potential purchasers of which terms, conditions and measures will be applicable to particular sales of SPR petroleum.

## § 625.2 Definitions.

(a) *DOE*. DOE is the Department of Energy established by Public Law 95–91 (42 U.S.C. 7101 *et seq.*) and any component thereof including the SPR Office.

(b) *Notice of Sale*. The Notice of Sale is the document announcing the sale of SPR petroleum, the amount, type and location of the petroleum being sold, the delivery period and the procedures for submitting offers. The Notice of Sale will specify which contractual provisions and financial and performance responsibility measures are applicable to that particular sale of petroleum, and will provide other pertinent information.

(c) *Petroleum*. Petroleum means crude oil, residual fuel oil or any refined petroleum product (including any natural gas liquid and any natural gas liquid product) owned or contracted for by DOE and in storage in any permanent SPR facility, or temporarily stored in other storage facilities, or in transit to such facilities (including petroleum under contract but not yet delivered to a loading terminal).

(d) *Price Competitive Sale*. A price competitive sale of SPR petroleum is one in which contract awards are made to those responsive, responsible persons offering the highest prices; sales conducted pursuant to rules adopted under section 161(e) of the Energy Policy and Conservation Act (EPCA), Public Law 94–163 (42 U.S.C. 6201 *et seq.*), are not price competitive sales.

(e) *Purchaser*. A purchaser is any person or entity (including a Government agency) which enters into a contract with DOE to purchase SPR petroleum.

(f) *SPR*. SPR is the Strategic Petroleum Reserve, that program of the Department of Energy established by title I, part B of EPCA.

(g) *Standard Sales Provisions*. The Standard Sales Provisions are a set of terms and conditions of sale, which may contain or describe financial and performance responsibility measures, for petroleum sold from the SPR under this part.

## § 625.3 Standard sales provisions.

(a) *Contents*. The Standards Sales Provisions shall contain contract clauses which may be applicable to price competitive sales of SPR petroleum, including terms and conditions of sale, and purchaser financial and performance responsibility measures, or descriptions thereof. At his discretion, the Secretary or his designee may

specify in a Notice of Sale which of such terms and conditions, or financial and performance responsibility measures, shall apply to a particular sale of SPR petroleum; and, he may specify any revisions in such terms, conditions and measures, and any additional terms, conditions and measures which shall be applicable to that sale, that are consistent with the SPR Drawdown Plan adopted on December 1, 1982.

(b) *Acceptance by offerors.* All offerors must, as part of their offers for SPR petroleum in response to a Notice of Sale, agree without exception to all contractual provisions and financial and performance responsibility measures which the Notice of Sale makes applicable to the particular sale.

(c) *Award of contracts.* No contract for the sale of SPR petroleum may be awarded to any offeror who has not unconditionally agreed to all contractual provisions and financial and performance responsibility measures which the Notice of Sale makes applicable to the particular sale.

(d) *Contract documents.* The terms and conditions which the Notice of Sale makes applicable to a particular sale may be incorporated into a contract for the sale of SPR petroleum by reference to the Notice of Sale.

### § 625.4 Publication of the Standard Sales Provisions.

(a) *Publication.* The Standard Sales Provisions shall be published in the FEDERAL REGISTER and in the Code of Federal Regulations as an appendix to this rule.

(b) *Revisions of the Standard Sales Provisions.* The Standard Sales Provisions shall be reviewed periodically and republished in the FEDERAL REGISTER, with any revisions.

(c) *Notification of applicable clauses.* The Notice of Sale will specify, by referencing the FEDERAL REGISTER and the Code of Federal Regulations in which the latest version of the Standard Sales Provisions was published, which contractual terms and conditions and contractor financial and performance responsibility measures contained or described therein are applicable to that particular sale.

### § 625.5 Failure to perform in accordance with SPR Contracts of Sale.

(a) *Ineligibility.* In addition to any remedies available to the Government under the Contract of Sale, in the event that a purchaser fails to perform in accordance with applicable SPR petroleum sale contractual provisions, and such failure is not excused by those provisions, the Headquarters Senior Procurement Official, at his discretion, may make such purchaser ineligible for future awards of SPR petroleum sales contracts.

(b) *Determination of ineligibility.* No purchaser shall be made ineligible for the award of any SPR sales contract prior to notice and opportunity to respond in accordance with the requirements of this subsection.

(1) Upon the determination that a purchaser is to be considered for ineligibility, the purchaser shall be sent by certified mail return receipt requested, the following:

(i) Notification that the Headquarters Senior Procurement Official is considering making the purchaser ineligible for future awards;

(ii) Identification of the SPR sales contract which the purchaser failed to comply with, along with a brief description of the events and circumstances relating to such failure;

(iii) Advice that the purchaser may submit in writing for consideration by the Headquarters Senior Procurement Official in determining whether or not to impose ineligibility on the purchaser, any information or argument in opposition to the ineligibility; and

(iv) Advice that such information or argument in opposition to the ineligibility must be submitted within a certain time in order to be considered by the Headquarters Senior Procurement Official, such time to be not less than 21 days.

(2) After elapse of the time period established under paragraph (b)(1) of this section for receipt of the purchaser's response, the Headquarters Senior Procurement Official, at his discretion, and after consideration of the purchaser's written response, if any, may make the purchaser ineligible for future awards of SPR petroleum sales contracts. Such ineligibility shall continue for the time period determined

by the Headquarters Senior Procurement Official, as appropriate under the circumstances.

(3) The purchaser shall be notified of the Headquarters Senior Procurement Official's decision.

(c) *Reconsideration.* Any purchaser who has been excluded from participating in any SPR sale under paragraph (a) may request that the Headquarters Senior Procurement Offical reconsider the purchaser's ineligibility. The Headquarters Senior Procurement Official, at his discretion, may reinstate any such purchaser to eligibility for future competitive sales.

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SECTION A—GENERAL PRE-SALE INFORMATION

*A.1 List of Abbreviations*

(a) ASO: Apparently Successful Offeror
(b) DLI: Delivery Line Item
(c) DOE: U.S. Department of Energy
(d) MLI: Master Line Item
(e) NA: Notice of Acceptance
(f) NS: Notice of Sale
(g) SNL: Sales Notification List
(h) SSPs: Standard Sales Provisions
(i) SPR: Strategic Petroleum Reserve
(j) SPRCODR: SPR Crude Oil Delivery Report (*Exhibit E*)
(k) SPR/PMO: Strategic Petroleum Reserve Project Management Office

*A.2 Definitions*

*Affiliate*. The term ''affiliate'' means associated business concerns or individuals if, directly or indirectly, (1) either one controls or can control the other, or (2) a third party controls or can control both.

*Business Day*. The term ''business day'' means any day except Saturday, Sunday or a U.S. Government holiday.

*Contract*. The term ''contract'' means the contract under which DOE sells SPR petroleum. It is composed of the NS, the NA, the successful offer, and the SSPs incorporated by reference.

*Contracting Officer*. The term ''Contracting Officer'' means the person executing sales contracts on behalf of the Government, and any other Government employee properly designated as Contracting Officer. The term includes the authorized representative of a Contracting Officer acting within the limits of his or her authority.

*Electronic signature or signature* means a method of signing an electronic message that—

(1) Identifies and authenticates a particular person as the source of the electronic message; and

(2) Indicates such person's approval of the information contained in the electronic message.

*Government*. The term ''Government'', unless otherwise indicated in the text, means the United States Government.

*Head of the Contracting Activity*. The term ''Head of the Contracting Activity'' means Project Manager, Strategic Petroleum Reserve Project Management Office.

*Notice of Acceptance (NA)*. The term ''Notice of Acceptance'' means the document that is sent by DOE to accept the purchaser's offer to create a contract.

*Notification of Apparently Successful Offeror (ASO)*. The term ''notification of apparently successful offeror'' means the notice, written or oral, by the Contracting Officer to an offeror that it will be awarded a contract if it is determined to be responsible.

*Notice of Sale (NS)*. The term ''Notice of Sale'' means the document announcing the sale of SPR petroleum, the amount, characteristics and location of the petroleum being sold, the delivery period and the procedures for submitting offers. The NS will specify what contractual provisions and financial and performance responsibility measures are applicable to that particular sale of petroleum and provide other pertinent information.

*Offeror*. The term ''offeror'' means any person or entity (including a government agency) who submits an offer in response to a NS.

*Petroleum*. The term ''petroleum'' means crude oil, residual fuel oil, or any refined product (including any natural gas liquid, and any natural gas liquid product) owned or contracted for by DOE and in storage in any permanent SPR facility, or temporarily stored in other storage facilities.

*Project Management Office (SPR/PMO)*. The term ''Project Management Office'' means the DOE personnel and DOE contractors located in Louisiana and Texas responsible for the operation of the SPR.

*Purchaser*. The term ''purchaser'' means any person or entity (including a government agency) who enters into a contract with DOE to purchase SPR petroleum.

*Standard Sales Provisions (SSPs)*. The term ''Standard Sales Provisions'' means this set of terms and conditions of sale applicable to price competitive sales of SPR petroleum. These SSPs constitute the ''standard sales agreement'' referenced in the Strategic Petroleum Reserve ''Drawdown'' (Distribution) Plan, Amendment No. 4 (December 1, 1982, DOE/EP 0073) to the SPR Plan.

*Strategic Petroleum Reserve (SPR)*. The term ''Strategic Petroleum Reserve'' means that DOE program established by Title I, Part B, of the Energy Policy and Conservation Act, 42 U.S.C. 6201, as amended.

*Vessel*. The term ''vessel'' means a tankship, an integrated tug-barge (ITB) system, a self-propelled barge, or other barge.

*A.3 Standard Sales Provisions (SSPs)*

(a) These SSPs contain pre-sale information, sales solicitation provisions, and sales contract clauses setting forth terms and conditions of sale, including purchaser financial and performance responsibility measures, or descriptions thereof, which may be applicable to price competitive sales of petroleum from the SPR in accordance with the SPR Sales Rule, 10 CFR Part 625. The NS will specify which of these provisions shall apply to a particular sale of such petroleum, and it may specify any revisions therein and any additional provisions which shall be applicable to that sale.

(b) All offerors must, as part of their offers for SPR petroleum in response to a NS, agree

without exception to all sales provisions of that NS.

*A.4 Periodic Revisions of the Standard Sales Provisions*

DOE will review the SSPs periodically and republish them in the FEDERAL REGISTER, with any revisions. When an NS is issued, it will cite the FEDERAL REGISTER and the Code of Federal Regulations (if any) in which the latest version of the SSPs was published. Offerors are cautioned that the Code of Federal Regulations may not contain the latest version of the SSPs published in the FEDERAL REGISTER. Interested persons may view the current SSPs at *http://www.spr.doe.gov/reports/SSPs/ssp.htm.*

*A.5 Sales Notification List (SNL)*

(a) The SPR/PMO will maintain a Sales Notification List (SNL) of those potential offerors who wish to receive notification of an NS whenever one is issued. In order to assure that prospective offerors will receive such notification in a timely fashion, all potential offerors are encouraged to register on the SNL as soon as possible.

(b) Any firm or individual may complete the SNL on-line registration process at *http://www.spr.doe.gov.*

*A.6 Publication of the Notice of Sale*

(a) Notification of a NS will be sent via e-mail to those who have registered on the SNL referenced in Provision A.5.

(b) The NS will be posted on the SPR web page *http://www.spr.doe.gov* for public viewing. In addition, the issuance of the NS will be publicized on the Fossil Energy web page *http://www.fe.doe.gov/programs/reserves/.*

(c) A DOE press release, which will include the salient features of the NS, will be made available to all news agencies.

*A.7 Penalty for False Statements in Offers To Buy SPR Petroleum*

(a) Making false statements in an offer to buy SPR petroleum may expose an offeror to a penalty under the False Statements Act, 18 U.S.C. 1001, which provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Under 18 U.S.C. 3571, the maximum fine to which an individual or organization may be sentenced for violations of 18 U.S.C. (including Section 1001) is set at $250,000 and $500,000 respectively, unless there is a greater amount specified in the statute setting out the offense, or the violation is subject to special factors set out in Section 3571. The United States Sentencing Guidelines also apply to violations of Section 1001, and offenders may be subject to a range of fines under the guidelines up to and including the maximum amounts permitted by law.

SECTION B—SALES SOLICITATION PROVISIONS

*B.1 Requirements for a Valid Offer—Caution to Offerors*

(a) Offerors are advised that the submission of an offer electronically is required. Submission of an offer via the SPR's specified on-line system will constitute a legal, binding offer. The use of the combination of User Name and password to login and submit offers constitutes an electronic signature.

(b) A valid offer to purchase SPR petroleum must meet the following conditions:

(1) The offer must be submitted via the SPR's on-line system as designated in the NS;

(2) The offer must be received no later than the date and time set for receipt of offers;

(3) The offer guarantee (see Provision B.12) must be received no later than the time set for the receipt of offers;

(4) Any amendments to the NS that explicitly require acknowledgment of receipt must be properly acknowledged as specified in the NS; and

(5) Submission of an on-line offer in accordance with this provision constitutes agreement without exception to all provisions of the SSPs that the NS makes applicable to a particular sale, as well as to all provisions in the NS.

(c) At the discretion of the Contracting Officer, offers may be received by alternative means if circumstances preclude use of the specified on-line system.

*B.2 Price Indexing*

The Government, at its discretion, may make use of a price indexing mechanism to effect contract price adjustments based on petroleum market conditions, e.g., crude oil market price changes between the times of offer price submissions and physical deliveries. The NS will set forth the provisions applicable to any such mechanism.

*B.3 Certification of Independent Price Determination*

(a) The offeror certifies that:

(1) The prices in this offer have been arrived at independently, without, for the purposes of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to:

(i) Those prices;

(ii) The intention to submit an offer; or

(iii) The methods or factors used to calculate the prices offered.

(2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or to any competitor before the time set for receipt of offers, unless otherwise required by law; and

(3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(b) Each submission of an offer is considered to be a certification by the offeror that the offeror:

(1) Is the person within the offeror's organization responsible for determining the prices being offered, and that the offeror has not participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this provision; or

(2)(i) Has been authorized in writing to act as agent for the persons responsible for such decision in certifying that such persons have not participated, and will not participate, in any action contrary to (a)(1) through (a)(3) of this provision;

(ii) As their agent does hereby so certify; and

(iii) As their agent has not participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this provision.

*B.4 Requirements for Vessels—Caution to Offerors*

(a) The ''Jones Act'', 46 U.S.C. 883, prohibits the transportation of any merchandise, including SPR petroleum, by water or land and water, on penalty of forfeiture thereof, between points within the United States (including Puerto Rico, but excluding the Virgin Islands) in vessels other than vessels built in and documented under laws of the United States, and owned by United States citizens, unless the prohibition has been waived by the Secretary of Homeland Security. Further, certain U.S.-flag vessels built with Construction Differential Subsidies (CDS) are precluded by Section 506 of the Merchant Marine Act of 1936 (46 U.S.C. 1156) from participating in U.S. coastwise trade, unless such prohibition has been waived by the Secretary of Transportation, the waiver being limited to a maximum of 6 months in any given year. CDS vessels may also receive Operating Differential Subsidies, requiring separate permission from the Secretary of Transportation for domestic operation, under Section 805(a) of the same statute. The NS will advise offerors of any general waivers allowing use of non-coastwise qualified vessels or vessels built with Construction Differential Subsidies for a particular sale of SPR petroleum. If there is no general waiver, purchasers may request waivers in accordance with Provision C.7, but remain obligated to complete performance under this contract regardless of the outcome of that waiver process.

(b) The Department of Homeland Security's regulations concerning Vessels Carrying Oil, Noxious Liquid Substances, Garbage, Municipal or Commercial Waste, and Ballast Water (33 CFR part 151) and Reception Facilities For Oil, Noxious Liquid Substances, and Garbage (33 CFR part 158) implement the requirements of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto (MARPOL 73/78). These regulations prohibit any ocean-going tankship, required to retain oil or oily mixtures on-board while at sea, from entering any port or terminal unless the port or terminal has a valid Certificate of Adequacy as to its oil reception capabilities. Marine terminals in support of the SPR (*see Exhibit B,* SPR Delivery Point Data) have Certificates of Adequacy; however, they may not have reception facilities for oily ballast, vessel sludge or oily bilge water wastes. Accordingly, tankships will be required to make arrangements for and be responsible for all costs associated with appropriate disposal of such ballast, vessel sludge or oily bilge water waste or permission to load may be denied.

*B.5 ''Superfund'' Tax on SPR Petroleum—Caution to Offerors*

(a) Sections 4611 and 4612 of the Internal Revenue Code, provide for the imposition of taxes on domestic and imported petroleum to support the Hazardous Substance Response Fund (the ''Superfund'') and the Oil Spill Liability Trust Fund (''Trust Fund''). These taxes are not currently being collected.

(b) DOE has already paid the Superfund and Trust Fund taxes on some of the oil imported and stored in the SPR. However, no Superfund or Trust Fund tax has been paid on any domestic oil stored in the SPR or on imported oil stored prior to the imposition of these taxes. Because domestic and imported crude oil for which no Superfund and Trust Fund taxes have been paid and crude oils for which these taxes have been paid have been commingled in the SPR, the Government retains records of the tax status of all SPR petroleum in storage. The NS will advise purchasers in the event these taxes are reimposed.

*B.6 Export Limitations and Licensing—Caution to Offerors*

Offerors for SPR petroleum are put on notice that export of SPR crude oil is subject to U.S. export control laws implemented by the Department of Commerce Short Supply Controls, codified at 15 CFR part 754, §754.2,

Crude oil. Subsections of §754.2 provide for the approval of applications to export crude oil from the SPR in connection with refining or exchange of SPR oil. Specifically, these subsections are §§754.2(b)(iii), and 754.2(f), Refining or exchange of Strategic Petroleum Reserve Oil. These provisions implement the authority given to the President by 42 U.S.C. 6241(i) to permit the export of oil in the SPR for the purpose of obtaining refined petroleum for the U.S. market. In addition, the President could waive the requirement for an export license altogether. The NS will advise of any waivers under this Presidential authority.

*B.7 State of Hawaii Access to SPR crude oil*

Potential offerors are advised that pursuant to subsection 161 (j) of the Energy Policy and Conservation Act (42 U.S.C. 6241 (j)), the State of Hawaii, or a State-designated eligible entity authorized to act on the State's behalf, may submit a ''binding offer'' for the purchase of SPR petroleum. By submission of a binding offer, the State of Hawaii is entitled to purchase up to three percent of the quantity of SPR petroleum offered for sale or one-twelfth of the state's annual import quantity barrels. The price will be equal to the volumetrically weighted average price of the successful competitive offers for the applicable Master Line Item. Furthermore, at the request of the Hawaii or its designated eligible entity, the petroleum purchased will have first preference in its scheduling for delivery. The State of Hawaii may also enter into exchange or processing agreements to permit delivery of the purchased petroleum to other locations, if a petroleum product of similar value or quantity is delivered to the State.

*B.8 Issuance of the Notice of Sale*

In the event petroleum is sold from the SPR, DOE will issue a NS containing all the pertinent information necessary for the offeror to prepare a priced offer. A NS may be issued with a week or less allowed for the receipt of offers. Offerors are expected to examine the complete NS document, and to become familiar with the SSPs cited therein. Failure to do so will be at the offeror's risk.

*B.9 Submission of Offers and Modification of Previously Submitted Offers*

(a) Unless otherwise provided in the NS, offers must be submitted via SPR's on-line system and received no later than the date and time set for offer receipt as specified in the NS.

(b) Unless otherwise provided in the NS, offers may be modified or withdrawn on-line, provided that the modification or withdrawal is accomplished prior to the date and time specified for receipt of offers.

(c) An offeror may withdraw an offer by deleting the submission in accordance with the instructions provided for the SPR's on-line system.

(d) An offeror may modify a previously submitted offer by withdrawing the original offer (see (c) above) and resubmitting the replacement offer in its entirety no later than the date and time set for offer receipt.

(e) DOE will not release to the general public the identities of the offerors, or their offer quantities and prices, until the Apparently Successful Offerors have been determined. DOE will inform simultaneously all offerors and other interested parties of the successful and unsuccessful offerors and their offer data by means of a public ''offer posting.'' The offer posting will normally occur within a week of receipt of offers and will provide all interested parties access to offer data as well as any DOE changes in the petroleum quantities or quality to be sold. DOE will announce the date, time, and location of the offer posting as soon as practicable.

*B.10 Acknowledgment of Amendments to a Notice of Sale*

When an amendment to a NS requires acknowledgment of issuance, it must be acknowledged by an offeror in accordance with instructions provided in the NS. Such acknowledgment must be received as part of a timely offer submission.

*B.11 Late Offers, Modifications of Offers, and Withdrawal of Offers*

(a) The date/time stamp affixed by the SPR's on-line system will be the sole determinant of timely offer receipt. Any offer received after the date and time specified in the NS for receipt will be considered only if

(1) it is received before award is made; and

(2) the Contracting Officer determines that the late receipt was due solely to a failure of the Government's electronic receiving equipment, or

(3) it is the only offer received.

(b) Any modification or withdrawal of an offer is subject to the same conditions as in (a) of this provision.

(c) Notwithstanding (a) and (b) of this provision, a late modification of an otherwise successful offer that makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

*B.12 Offer Guarantee*

(a) Each offeror must submit an acceptable offer guarantee for each offer submitted. Each offer guarantee must be received at the place specified in the NS no later than the date and time set for receipt of offers.

(b) An offeror's failure to submit a timely, acceptable guarantee will result in rejection

of its offer. A properly executed copy of the offer guarantee(s) may be faxed to the telephone numbers provided in the NS, with the original sent to the Contracting Officer as provided in paragraph (d) of this provision.

(c) The amount of each offer guarantee is $10 million or 5 percent of the maximum potential contract amount, whichever is less. The maximum potential contract amount is the sum of the products determined by multiplying the offer's maximum purchase quantity for each master line item, times the highest offer prices that the offeror would have to pay for that master line item if the offer were to be successful. The SPR on-line system will perform this calculation automatically as offer information is entered.

(d) For each offer, an offeror must submit an irrevocable standby letter of credit from a U.S. depository institution containing the substantive provisions set out in *Exhibit C*, Offer Standby Letter of Credit, all letter of credit costs to be borne by the offeror. If the letter of credit contains any provisions at variance with *Exhibit C* or fails to include any provisions contained in *Exhibit C*, nonconforming provisions must be deleted and missing substantive provisions must be added or the letter of credit will not be accepted. The depository institution must be located in and authorized to do business in any state of the United States or the District of Columbia, and authorized to issue letters of credit by the banking laws of the United States or any state of the United States or the District of Columbia. The depository institution must be an account holder with the Federal Reserve Banking system and a participant (on line) in the Fed's Fedwire Deposit System Network funds transfer system. The original of the letter of credit must be sent to the Contracting Officer at the address specified in the NS. The issuing bank must provide documentation indicating that the person signing the letter of credit is authorized to do so, in the form of corporate minutes, the Authorized Signature List, or the General Resolution of Signature Authority.

(e) The envelope containing the original letter of credit shall clearly be marked ''RE: NS # _____. OFFER STANDBY LETTER OF CREDIT (Name of Company). Offerors are cautioned that if they provide more than one Offer Standby Letter of Credit for multiple offers and, due to the absence of clear information from the offeror, the Government is unable to identify which letter of credit applies to which offer, the Contracting Officer in his sole discretion may assign the letters of credit to specific offers.

(f) The offeror shall be liable for any amount lost by DOE due to the difference between the offer and the resale price, and for any additional resale costs incurred by DOE in the event that the offeror:

(1) withdraws its offer within 10 days following the time set for receipt of offers;

(2) withdraws its offer after having agreed to extend its acceptance period; or

(3) having received a notification of ASO, fails to furnish an acceptable payment and performance letter of credit (see Provision C.21) within the time limit specified by the Contracting Officer.

The offer guarantee shall be used toward offsetting such price difference or additional resale costs. Use of the offer guarantee for such recovery shall not preclude recovery by DOE of damages in excess of the amount of the offer guarantee caused by such failure of the offeror.

(g) Letters of credit furnished as offer guarantees must be valid for at least 60 calendar days after the date set for the receipt of offers.

(h) Offer guarantee letters of credit may be returned upon request to an unsuccessful offeror 5 business days after expiration of the offeror's acceptance period, and, except as provided in (i) of this provision, to a successful offeror upon receipt of a satisfactory payment and performance letter of credit.

(i) If an offeror defaults on its offer, DOE will hold the offer guarantee so that damages can be assessed against it.

### *B.13 Explanation Requests From Offerors*

Offerors may request explanations regarding meaning or interpretation of the NS from the individual at the telephone number and/or e-mail address indicated in the NS. On complex and/or significant questions, DOE reserves the right to have the offeror put the question in writing; explanation or instructions regarding these questions will be given as an amendment to the NS.

### *B.14 Currency for Offers*

Prices shall be stated and invoices shall be paid in U.S. dollars.

### *B.15 Language of Offers and Contracts*

All offers in response to the NS and all modifications of offers shall be in English. All correspondence between offerors or purchasers and DOE shall be in English.

### *B.16 Proprietary Data*

Offer quantities and prices are not considered proprietary information. If any other information submitted in connection with a sale is considered proprietary, that information shall be identified by e-mail to the address indicated in the NS, and an explanation provided as to the reason such data should be considered proprietary. Any final decision as to whether the material so identified is proprietary will be made by DOE. DOE's Freedom of Information Act regulations governing the release of proprietary data shall apply.

*B.17 SPR Crude Oil Streams and Delivery Points*

(a) The geographical locations of the terminals, pipelines, and docks interconnected with permanent SPR storage locations, the SPR crude oil streams available at each location and the delivery points for those streams are as follows, (*See* also *Exhibit A*, SPR Crude Oil Comprehensive Analysis, and *Exhibit B*, SPR Delivery Point Data):

| Geographical location | Delivery points | Crude oil stream |
|---|---|---|
| Freeport, Texas | Seaway Terminal or Seaway Pipeline Jones Creek. | SPR Bryan Mound Sweet, SPR Bryan Mound Sour |
| Texas City, Texas | Seaway Terminal or Local Pipelines | SPR Bryan Mound Sweet, SPR Bryan Mound Sour |
| Nederland, Texas | Sunoco Logistics Partners, Nederland Terminal. | SPR West Hackberry Sweet, SPR West Hackberry Sour, SPR Big Hill Sweet, SPR Big Hill Sour |
| Lake Charles, Louisiana | Shell 22-Inch/DOE Lake Charles Pipeline Connection. | SPR West Hackberry Sweet, SPR West Hackberry Sour |
| St. James, Louisiana | Shell Sugarland Terminal connected to LOCAP and Capline. | SPR Bayou Choctaw Sweet, SPR Bayou Choctaw Sour |
| Beaumont, Texas | Unocal Terminal | SPR Big Hill Sweet, SPR Big Hill Sour |
| Winnie, Texas | Shell 20-Inch Meter Station | SPR Big Hill Sweet, SPR Big Hill Sour |

(b) The NS may change delivery points and it may also include additional crude oils, terminals, temporary storage facilities or systems utilized in connection with petroleum in transit to the SPR.

(c) The NS may contain additional information supplementing *Exhibit B*, SPR Delivery Point Data.

*B.18 Notice of Sale Line Item Schedule—Petroleum Quantity, Quality, and Delivery Method*

(a) Unless the NS provides otherwise, the possible master line items (MLI) that may be offered are as identified in Provision B.17. Currently, there are eight MLIs, one for each of the eight crude oil streams that the SPR has in storage. The NS may not offer all the possible MLIs.

(b) Each MLI contains multiple delivery line items (DLIs), each of which specifies an available delivery method and the nominal delivery period. Offerors are cautioned that the NS may alter the period of time covered by each DLI. The NS will specify which DLIs are offered for each MLI.

(1) DLI-A covers petroleum to be transported by pipeline, either common carrier or local. The nominal delivery period is one month.

(2) DLI-B covers petroleum to be transported by tankships. The nominal delivery period is one month.

(3) DLI-E covers petroleum to be transported by barges (Note: These DLIs are usually only applicable to deliveries of West Hackberry and Big Hill Sweet and Sour crude oil streams from Sun Docks). The nominal delivery period is one month.

(4) Where the storage site is connected to more than one terminal or pipeline, additional DLIs will be offered. The additional DLIs will include DLI-H, covering petroleum to be transported by pipeline over the period of a month; DLI-I, covering tankships, etc. The Notice of Sale will specify any additional DLIs which may be applicable.

(c) The NS will state the total estimated number of barrels to be sold on each MLI. An offeror may offer to buy all or part of the petroleum offered on an MLI. In making awards, the Contracting Officer shall attempt to achieve award of the exact quantities offered by the NS, but may sell a quantity of petroleum in excess of the quantity offered for sale on a particular MLI in order to match the DLI offers received. In addition, the Contracting Officer may reduce the MLI quantity available for award by any amount and reject otherwise acceptable offers, if he determines, in his sole discretion after consideration of the offers received on all of the MLIs, that award of those quantities is not in the best interest of the Government because the prices offered for them are not reasonable, or that, in light of market conditions after offers are received, a lesser quantity than that offered should be sold.

(d) The NS will specify a minimum contract quantity for each DLI. To be responsive, an offer on a DLI must be for at least that quantity.

(e) The NS will specify the maximum quantity that could be sold on each of the DLIs. The maximum quantity is not an indication of the amount of petroleum that, in fact, will be sold on that DLI. Rather, it represents DOE's best estimate of the maximum amount of the particular SPR crude oil stream that can be moved by that transportation system over the delivery period. The total DOE estimated DLI maximums may exceed the total number of barrels to be sold on that MLI, as the NS DLI estimates represent estimated transportation capacity, not the amount of petroleum offered for sale.

(f) The NS will not specify what portion of the petroleum that DOE offers on a MLI will, in fact, be sold on any given DLI. Rather, the highest priced offers received on the MLI will determine the DLIs against which the offered petroleum is sold.

(g) DOE will not sell petroleum on a DLI in excess of the DLI maximum; however, DOE reserves the right to revise its estimates at any time and to award or modify contracts in accordance with its revised estimates. Offerors are cautioned that: DOE cannot guarantee that such transportation capacity is available; offerors should undertake their own analyses of available transportation capacity; and each purchaser is wholly responsible for arranging all transportation other than terminal arrangements at the terminals listed in Provision B.17, which shall be made in accordance with Provision C.5. A purchaser against one DLI cannot change a transportation mode without prior written permission from DOE, although such permission will be given whenever possible, in accordance with Provision C.6.

(h) *Exhibit A*, SPR Crude Oil Comprehensive Analysis, contains nominal characteristics for each SPR crude oil stream. Prospective offerors are cautioned that these data may change with SPR inventory changes. The NS will provide, to the maximum extent practicable, the latest data on each stream offered.

### *B.19 Line Item Information To Be Provided in the Offer*

(a) Each offeror, if determined to be an ASO on a DLI, agrees to enter into a contract under the terms of its offer for the purchase of petroleum in the offer and to take delivery of that petroleum (plus or minus 10 percent as provided for in Provision C.20) in accordance with the terms of that contract.

(b) An offeror may submit an offer for any or all the MLIs offered by the NS. However, offerors are cautioned that alternate offers on different MLIs are not permitted. For example, an offeror may offer to purchase 1,000,000 barrels of SPR West Hackberry Sweet and 1,000,000 barrels of SPR West Hackberry Sour, but may not offer to purchase, in the alternative, either 1,000,000 barrels of sweet or 1,000,000 barrels of sour.

(c) An offeror may submit multiple offers. However, separate on-line offers and offer guarantees must be submitted and each offer will be evaluated on an individual basis.

(d) The following information will be provided to DOE by the offeror on the SPR on-line offer form:

(1) Maximum MLI Quantity. The offer shall state the maximum quantity of each crude oil stream that the offeror is willing to buy.

(2) Desired Qty. The offer shall state the number of barrels that the offeror will accept on each DLI, *i.e.*, by the delivery mode and during the delivery period specified. The quantity stated on a single DLI shall not exceed the Maximum MLI Quantity for the MLI. The offeror shall designate a quantity on at least one DLI for the MLI, but may designate quantities on more than one DLI. If the offeror is willing to accept alternate DLIs, the total of its desired DLI quantities would exceed its Maximum MLI quantity; otherwise, the total of its desired DLI quantities should equal its Maximum MLI quantity.

(3) Price. The offer shall state the price per barrel for each DLI for which the offeror has designated a Desired Qty. Where offers have indicated quantities on more than one DLI with a different price on each, DOE will award the highest priced DLI first. If the offeror has the same price for two or more DLIs, it may indicate its first choice, second choice, etc., for award of those items; if the offeror does not indicate a preference, or indicates the same preference for more than one DLI, DOE may select the DLIs to be awarded at its discretion. Prices may be stated in hundredths of a cent ($0.0001). DOE shall drop from the offer and not consider any numbers of less than one one-hundredth of a cent.

(4) Accept Minimum Quantity. The offeror must choose whether to accept only the Desired Qty (by deselecting the Accept Min Qty checkbox to indicate an unwillingness to accept less than the Desired Qty for that DLI) or, in the alternative, to accept any quantity awarded between the offer's Desired Qty and the minimum contract quantity for the DLI (by leaving the Accept Min Qty checkbox selected). However, DOE will award less than the Desired Qty only if the quantity available to be awarded is less than the Desired Qty.

### *B.20 Mistake in Offer*

(a) After receiving offers, the Contracting Officer shall examine all offers for mistakes. If the Contracting Officer discovers any quantity discrepancies, he may obtain from the offeror oral or written verification of the offer actually intended, but in any event, he shall proceed with offer evaluation applying the following procedures:

(1) In case of conflict between the maximum MLI quantity and the stated DLI quantities (for example, if a single stated DLI quantity exceeds the corresponding maximum MLI quantity), the lesser quantity will govern in the evaluation of the offer.

(2) In the event that the offer fails to specify a maximum MLI quantity, the offer will be evaluated as though the largest stated DLI quantity is the offer's maximum MLI quantity.

(b) In cases where the Contracting Officer has reason to believe a mistake not covered by the procedures set forth in paragraph (a) may have been made, he shall request from the offeror a verification of the offer, calling

attention to the suspected mistake. The Contracting Officer may telephone the offeror and confirm the request by electronic means. The Contracting Officer may set a limit of as little as 6 hours for telephone response, with any required written documentation to be received within 2 business days. If no response is received, the Contracting Officer may determine that no error exists and proceed with offer evaluation.

(c) The Head of the Contracting Activity will make administrative determinations described in paragraphs (c)(1) and (c)(2) of this provision if an offeror alleges a mistake after receipt of offers and before award.

(1) The Head of the Contracting Activity may refuse to permit the offeror to withdraw an offer, but permit correction of the offer if clear and convincing evidence establishes both the existence of a mistake and the offer actually intended. However, if such correction would result in displacing one or more higher acceptable offers, the Head of the Contracting Activity shall not so determine unless the existence of the mistake and the offer actually intended are ascertainable substantially from the NS and offer itself.

(2) The Head of the Contracting Activity may determine that an offeror shall be permitted to withdraw an offer in whole, or in part if only part of the offer is affected, without penalty under the offer guarantee, where the offeror requests permission to do so and clear and convincing evidence establishes the existence of a mistake, but not the offer actually intended.

(d) In all cases where the offeror is allowed to make verbal corrections to the original offer, confirmation of these corrections must be received in writing within the time set by the Contracting Officer or the original offer will stand as submitted.

### *B.21 Evaluation of Offers*

(a) The Contracting Officer will be the determining official as to whether an offer is responsive to the SSPs and the NS. DOE reserves the right to reject any or all offers and to waive minor informalities or irregularities in offers received.

(b) A minor informality or irregularity in an offer is an inconsequential defect the waiver or correction of which would not be prejudicial to other offerors. Such a defect or variation from the strict requirements of the NS is inconsequential when its significance as to price, quantity, quality or delivery is negligible.

### *B.22 Procedures for Evaluation of Offers*

(a) Award on each DLI will be made to the responsible offerors that submit the highest priced offers responsive to the SSPs and the NS and that have provided the required payment and performance guarantee as required by Provision C.21.

(b) DOE will array all offers on an MLI from highest price to lowest price for award evaluation regardless of DLI. However, DOE will award against the DLIs and will not award a greater quantity on a DLI than DOE's estimate (which is subject to change at any time) of the maximum quantity that can be moved by the delivery method. Selection of the apparently successful offers involves the following steps:

(1) Any offers below the minimum acceptable price, if any minimum price has been established for the sale, will be rejected as nonresponsive.

(2) All offers on each MLI will be arrayed from highest price to lowest price.

(3) (i) Offers may be rejected if they are below 95 percent of the sales price, as estimated by the Government, of comparable crude oil being sold in the same area at the same time. In making the sales price estimate, the Government will consider both the ''Base Reference Price'' as defined in the Notice of Sale and other available information bearing on the issue.

(ii) For price offers at or above 95 percent of the sales price estimate, the Contracting Officer will determine price reasonableness, considering offers received and prevailing market conditions.

(iii) Price offers below 95 percent may be accepted only if the Contracting Officer determines such action is necessary to achieve SPR crude oil supply objectives and such offered prices are reasonable.

(4) The highest priced offers will be reviewed for responsiveness to the NS.

(5) In the event the highest priced offer does not take all the petroleum available on the MLI, sequentially, the next highest priced offer will be selected until all of the petroleum offered on the MLI is awarded or there are no more acceptable offers. In the event that acceptance of an offer against an MLI or a DLI would result in the sale of more petroleum on an MLI than DOE has offered or the sale of more petroleum on a DLI than DOE estimates can be delivered by the specified delivery method, DOE will not award the full amount of the offer, but rather the remaining MLI quantity or DLI capacity, provided such portion exceeds DOE's minimum contract quantity. In the event that the quantity remaining is less than the offeror is willing to accept, but more than DOE's minimum contract quantity, the Contracting Officer shall proceed to the next highest priced offer.

(6) In the event of tied offers and an insufficient remaining quantity available on the MLI or insufficient remaining capacity on the DLI to fully award all tied offers, the Contracting Officer shall apply an objective random methodology for allocating the remaining MLI quantity or DLI capacity among the tied offers, taking into consideration the quantity the offeror is willing to

accept as indicated in its offer. When making this allocation, the Contracting Officer in his sole discretion may do one or more of the following:

(i) Make an additional quantity or capacity available;

(ii) Contact an offeror to determine whether alternative delivery arrangements can be made; or

(iii) Not award all or part of the remaining quantity of petroleum.

(7) The Contracting Officer may reduce the MLI quantity available for award by any amount and reject otherwise acceptable offers if in his sole discretion he determines, after consideration of the offers received on all of the MLIs, that award of those quantities is not in the best interest of the Government because the prices offered for them are not reasonable; or if the Government determines, in light of market conditions after offers are received, to sell less than the overall quantity of SPR petroleum offered for sale.

(8) Determinations of ASO responsibility will be made by the Contracting Officer before each award. All ASOs will be notified and advised to provide to the Contracting Officer within five business days a letter of credit (*See Exhibit D*, Payment and Performance Letter of Credit) as specified in Provision C.21, all letter of credit costs to be borne by the purchaser.

(9) Compliance with required payment and performance guarantees will effectively assure a finding of responsibility of offerors, except where:

(i) An offeror is on either DOE's or the Federal Government's list of debarred, ineligible and suspended bidders; or

(ii) Evidence, with respect to an offeror, comes to the attention of the Contracting Officer of conduct or activity that represents a violation of law or regulation (including an Executive Order); or

(iii) Evidence is brought to the attention of the Contracting Officer of past activity or conduct of an offeror that shows a lack of integrity (including actions inimical to the welfare of the United States) or willingness to perform, so as to substantially diminish the Contracting Officer's confidence in the offeror's performance under the proposed contract.

### *B.23 Financial Statements and Other Information*

(a) As indicated in Provision B.22(b)(9), compliance with the required payment and performance guarantee will in most instances effectively assure a finding of responsibility. Therefore, DOE does not intend to ask for financial information from all offerors. However, after receipt of offers, but prior to making award, DOE reserves the right to ask for the audited financial statements for an offeror's most recent fiscal year and unaudited financial statements for any subsequent quarters. These financial statements must include a balance sheet and profit and loss statement for each period covered thereby. A certification by a principal accounting officer that there have been no material changes in financial condition since the date of the audited statements, and that these present the true financial condition as of the date of the offer, shall accompany the statements. If there has been a change, the amount and nature of the change must be specified and explained in the unaudited statements and a principal accounting officer shall certify that they are accurate. The Contracting Officer shall set a deadline for receipt of this information.

(b) DOE also reserves the right to require the submission of information from the offeror regarding its plans for use of the petroleum, the status of requests for export licenses, plans for complying with the Jones Act, and any other information relevant to the performance of the contract. The Contracting Officer shall set a deadline for receipt of this information.

### *B.24 Resolicitation Procedures on Unsold Petroleum*

(a) In the event that petroleum offered on an MLI remains unsold after evaluation of all offers, the Contracting Officer, at his option, may issue an amendment to the NS, resoliciting offers from all interested parties. DOE reserves the right to alter the MLIs and/or offer different MLIs in the resolicitation.

(b) In the event that for any reason petroleum that has been awarded or allotted for award becomes available to DOE for resale, the following procedures will apply:

(1) If priced offers remain valid in accordance with Provision B.25, the petroleum may go to the next highest ranked offer.

(2) If offers have expired in accordance with Provision B.25, the Contracting Officer at his option may offer the petroleum to the highest offeror for that MLI. The pertinent offeror may, at its option, accept or reject that petroleum at the price it originally offered. If that offeror rejects the petroleum, it may be offered to the next highest offeror. This process may continue until all the remaining petroleum has been allotted for award.

(3) If the petroleum is not then resold, the Contracting Officer may at his option proceed to amend the NS to resolicit offers for that petroleum or add the petroleum to the next sales cycle.

### *B.25 Offeror's Certification of Acceptance Period*

(a) By submission of an offer, the offeror certifies that its priced offer will remain valid for 10 calendar days after the date set

for the receipt of offers, and further that the successful line items of its offer will remain valid for an additional 30 calendar days should it receive a notification of ASO either by telephone or in writing during the initial 10-day period.

(b) By mutual agreement of DOE and the offeror, an individual offeror's acceptance period may be extended for a longer period.

*B.26 Notification of Apparently Successful Offeror*

The following information concerning its offer will be provided to the apparently successful offeror by DOE in the notification of ASO:

(a) Identification of SPR crude oil streams to be awarded;

(b) Total quantity to be awarded on each MLI and on each DLI;

(c) Price in U.S. dollars per barrel for each DLI;

(d) Extended total price offer for each DLI;

(e) Provisional contract number;

(f) Any other data necessary.

*B.27 Contract Documents*

If an offeror is successful, DOE will make award using an NA signed by the Contracting Officer. The NA will identify the items, quantities, prices and delivery method which DOE is accepting. The NS will be attached to the NA. Provisions of the SSPs will be made applicable through incorporation by reference in the NS. DOE may accept the offeror's offer by an electronic notice and the contract award shall be effective upon issuance of such notice. The electronic notice will be followed by a mailing of full documentation as described in Provision B.26.

*B.28 [Reserved]*

*B.29 Procedures for Selling to Other U.S. Government Agencies*

(a) If a U.S. Government agency submits an offer for petroleum in a price competitive sale, that offer will be arrayed for award consideration in accordance with Provision B.22. If a U.S. Government agency is an ASO, award and payment will be made exclusively in accordance with statutory and regulatory requirements governing transactions between agencies, and the U.S. Government agency will be responsible for complying with these requirements within the time limits set by the Contracting Officer.

(b) U.S. Government agencies are exempt from all guarantee requirements, but must make all necessary arrangements to accept delivery of and transport SPR petroleum as set out in Provision C.1. Failure by a U.S. Government agency to comply with any of the requirements of these SSPs shall not provide a basis for challenging a contract award to that agency.

SECTION C—SALES CONTRACT PROVISIONS

*C.1 Delivery of SPR Petroleum*

(a) The purchaser, at its expense, shall make all necessary arrangements to accept delivery of and transport the SPR petroleum, except for terminal arrangements which shall be coordinated with the SPR/PMO. The DOE will deliver and the purchaser will accept the petroleum at delivery points listed in the NS. The purchaser also shall be responsible for meeting any delivery requirements imposed at those points including complying with the rules, regulations, and procedures contained in applicable port/terminal manuals, pipeline tariffs or other applicable documents.

(b) For petroleum in the SPR's permanent storage sites, DOE shall provide, at no cost to the purchaser, transportation by pipeline from the SPR to the supporting SPR distribution terminal facility specified for the MLI and, for vessel loadings, a safe berth and loading facilities sufficient to deliver petroleum to the vessel's permanent hose connection. The purchaser agrees to assume responsibility for, to pay for, and to indemnify and hold DOE harmless for any other costs associated with terminal, port, vessel and pipeline services necessary to receive and transport the petroleum, including but not limited to demurrage charges assessed by the terminal, ballast and oily waste reception services, mooring and line-handling services, tank storage charges and port charges incurred in the delivery of SPR petroleum to the purchaser. The purchaser also agrees to assume responsibility for, to pay for and to indemnify and hold DOE harmless for any liability, including consequential or other damages, incurred or occasioned by the purchaser, its agent, subcontractor at any tier, assignee or any subsequent purchaser, in connection with movement of petroleum sold under a contract incorporating this provision.

*C.2 Compliance With the ''Jones Act'' and the U.S. Export Control Laws*

Failure to comply with the ''Jones Act,'' 46 U.S.C. 883, regarding use of U.S.-flag vessels in the transportation of oil between points within the United States, and with any applicable U.S. export control laws affecting the export of SPR petroleum will be considered to be a failure to comply with the terms of any contract containing these SSPs and may result in termination for default in accordance with Provision C.25. Purchasers who have failed to comply with the ''Jones Act'' or the export control laws in SPR sales may be found to be non-responsible in the evaluation of offers in subsequent sales under Provision B.22 of the SSPs. Those purchasers may also be subject to proceedings

to make them ineligible for future awards in accordance with 10 CFR Part 625.

*C.3 [Reserved]*

*C.4 Environmental Compliance*

(a) SPR offerors must ensure that vessels used to transport SPR oil comply with all applicable statutes, including, among others, the Ports and Waterways Safety Act of 1972; the Port and Tanker Safety Act of 1978; the Act to Prevent Pollution from Ships of 1980 (implementing Annexes I, II, and V of MARPOL 73/78), and the Oil Pollution Act of 1990. Offerors also must ensure that vessels used to transport SPR oil comply with all applicable regulations, including 33 CFR parts 151, 153, 155, 157, 159, and 160–169, and 46 CFR chapter I, subchapter D.

(b) To transport SPR oil, a purchaser or the purchaser's subcontractors must use only those tank vessels for which the vessel's owner, operator, or demise charter has made a showing of financial responsibility under 33 CFR part 138, *Financial Responsibility for Water Pollution (Vessels)*.

(c) Failure of the purchaser or purchaser's subcontractor to comply with all applicable statutes and regulations in the transportation of SPR petroleum will be considered a failure to comply with the terms of any contract containing these SSPs, and may result in termination for default, unless, in accordance with Provision C.25, such failure was beyond the control and without the fault or negligence of the purchaser, its affiliates, or subcontractors.

*C.5 Delivery and Transportation Scheduling*

(a) Unless otherwise instructed in the notification of ASO, each purchaser shall submit a proposed vessel lifting program and/or pipeline delivery schedule to the SPR/PMO point of contact identified in the NS, no later than the fifteenth day prior to the earliest delivery date offered by the NS. The vessel lifting program shall specify the requested three-day loading window for each tanker and the quantity to be lifted. The pipeline schedule will specify the five day shipment ranges (*i.e.*, day 1–5, 6–10, 11–15, etc.) for which deliveries are to be tendered to the pipeline and the quantity to be tendered for each date. In the event conflicting requests are received, preference will be given to such requests in descending order, the highest offered price first. The SPR/PMO will respond to each purchaser no later than the tenth day prior to the start of deliveries, either confirming the schedule as originally submitted or proposing alterations. The purchaser shall be deemed to have agreed to those alterations unless the purchaser requests the SPR/PMO to reconsider within two days after receipt of such alterations. The SPR/PMO will use its best efforts to accommodate such requests, but its decision following any such reconsideration shall be final and binding.

(b) In order to expedite the scheduling process, at the time of submission of each vessel lifting program or pipeline delivery schedule, each purchaser shall provide the DOE Contracting Officer's Representative with a written notice of the intended destination for each cargo scheduled, if such destination is known at that time. For pipeline deliveries, the purchaser shall also include, if known, the name of each pipeline in the routing to the final destination.

(c) Notwithstanding paragraph (a) of this provision, ASOs and purchasers may request early deliveries, *i.e.*, deliveries commencing prior to the contractual delivery period. DOE will use its best efforts to honor such requests, unless unacceptable costs might be incurred or SPR schedules might be adversely affected or other circumstances make it unreasonable to honor such requests. DOE's decision following any such consideration for a change shall be final and binding. Requests accepted by DOE will be handled on a first-come, first-served basis, except that where conflicting requests are received on the same day, the highest-priced offer will be given preference. Requests that include both a change in delivery method and an early delivery date may also be accommodated subject to Provision C.6. DOE may not be able to confirm requests for early deliveries until 24 hours prior to the delivery date.

(d) Not withstanding paragraphs (a) and (c) of this provision, in no event will schedules be confirmed prior to award of contracts.

*C.6 Contract Modification—Alternate Delivery Line Items*

(a) A purchaser may request a change in delivery method after the issuance of the NA. Such requests may be made either orally (to be confirmed in writing within 24 hours) or in writing, but will require written modification of the contract by the Contracting Officer. Such modification shall be permitted by DOE, provided, in the sole judgment of DOE, the change is viewed as reasonable and would not interfere with the delivery plans of other purchasers, and further provided that the purchaser agrees to pay all increased costs incurred by DOE because of such modification.

(b) Changes in delivery method will only be considered after the initial confirmation of schedules described in Provision C.5(a).

*C.7 Application Procedures for ''Jones Act'' and Construction Differential Subsidy Waivers*

(a) Unless otherwise specified in the Notice of Sale, an ASO or purchaser seeking a waiver of the ''Jones Act'' should submit a request by letter or electronic means to: U.S. Bureau of Customs and Border Protection,

Office of Regulations and Rulings, Chief, Entry Procedures and Carriers Branch, Washington, DC 20229, Telephone: (202) 572–8724.

(b) A purchaser seeking a waiver to use a vessel built with a Construction Differential Subsidy should have the vessel owner submit a waiver request by letter or electronic means to: Associate Administrator for Ship Financial Assistance and Cargo Preference, Maritime Administration, U.S. Department of Transportation, 400 7th Street, SW., Washington, DC 20590.

For speed and brevity, the request may incorporate by reference appropriate contents of any earlier ''Jones Act'' waiver request by the purchaser. Under 46 U.S.C. App. 1223, a hearing is also required for any intervenor, and a waiver may not be approved if it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service.

(c) Copies of the Jones Act or CDS waiver requests should also be sent, as appropriate, to:

(1) Associate Administrator for Port, Intermodal and Environmental Activities, Maritime Administration, U.S. Department of Transportation, 400 7th Street, SW., Washington, DC 20590.

(2) U.S. Department of Energy, ATTN: Deputy Assistant Secretary for Petroleum Reserves, FE–40, 1000 Independence Avenue, SW., Washington, DC 20585.

(3) Contracting Officer, FE–4451, Strategic Petroleum Reserve Project Management Office, Acquisition and Sales Division, 900 Commerce Road East, New Orleans, LA 70123.

(d) In addition to the addresses in paragraph (c), copies of the ''Jones Act'' request should also be sent to: Office of the Under Secretary of Defense (Acquisition, Technology and Logistics), U.S. Department of Defense, Washington, DC 20301–3020.

(e) Any request for waiver should include the following information:

(1) Name, address and telephone number of requestor;

(2) Purpose for which waiver is sought, *e.g.*, to take delivery of so many barrels of SPR crude oil, with reference to the SPR NS number and the provisional or assigned contract number;

(3) Name and flag of registry of vessel for which waiver is sought, if known at the time of waiver request, and the scheduled 3-day delivery window(s), if available, or delivery period applicable to the contract;

(4) The intended number of voyages, including the ports for loading and discharging;

(5) Estimated period of time for which vessel will be employed; and

(6) Reason for not using qualified U.S.-flag vessel, including documentary evidence of good faith effort to obtain suitable U.S.-flag vessel and responses received from that effort. Such evidence would include copies of correspondence and telephone conversation summaries. Requests for waivers by electronic transmittals may reference such documentary evidence, with copies to be provided by mail, postmarked no more than one business day after the transmission requesting the waiver.

(7) For waivers to use Construction Differential Subsidy vessels, the request must also contain a specific agreement for Construction Differential Subsidies payback pursuant to section 506 of the Merchant Marine Act of 1936 and must be signed by an official of the vessel owner authorized to make a payback commitment.

(f) If there are shown to be ''Jones Act'' vessels available and in a position to meet the loading dates required, no waivers may be approved.

(g) The names of any vessel(s) to be employed under a ''Jones Act'' waiver must be provided to the U.S. Bureau of Customs and Border Protection no later than 3 days prior to the beginning of the 3-day loading window scheduled in accordance with Provision C.5.

*C.8 Vessel Loading Procedures*

(a) After notification of ASO, each ASO shall provide the SPR/PMO a proposed schedule of vessel loading windows in accordance with Provision C.5.

(b) The length of the scheduled loading window shall be 3 days. If the purchaser schedules more than one window, the average quantity to be lifted during any single loading window will be no less than DOE's minimum lot quantity.

(c) Tankships, ITBs, and self-propelled barges shall be capable of sustaining a minimum average load rate commensurate with receiving an entire full cargo within twenty-four (24) hours pumping time. Barges with a load rate of not less than 4,000 BPH shall be permitted at the Sun Terminal barge docks. With the consent of the SPR/PMO, lower loading rates and the use of barges at suitably equipped tankship docks at other terminals supporting the SPR may be permitted if such do not interfere with DOE's obligations to other parties.

(d) At least 7 days in advance of the beginning of the scheduled loading window, the purchaser shall furnish the SPR/PMO with vessel nominations specifying:

(i) Name and size of vessel or advice that the vessel is ''To Be Nominated'' at a later date (such date to be no later than 3 days before commencement of the loading window);

(ii) Estimated date of arrival (to be narrowed to a firm date not later than 72 hours prior to the first day of the vessel's 3-day window, as provided in paragraph (f) of this provision);

(iii) Quantity to be loaded and contract number; and

(iv) Other relevant information requested by the SPR/PMO including but not limited to ship's specifications, last three ports and cargoes, vessel owner/operator and flag, any known deficiencies, and on board quantities of cargo and slops.

DOE will advise the purchaser, in writing, of the acceptance or rejection of the nominated vessel within 24 hours of such nomination. If no advice is furnished within 24 hours, the nomination will be firm. Once established, changes in such nomination details may be made only by mutual agreement of the parties, to be confirmed by DOE in writing. The purchaser shall be entitled to substitute another vessel of similar size for any vessel so nominated, subject to DOE's approval. DOE must be given at least 3 days' notice prior to the first day of the 3-day loading window of any such substitution. DOE shall make a reasonable effort to accept any nomination for which notice has not been given in strict accordance with this provision.

(e) In the event the purchaser intends to use more than one vessel to take delivery of the contract quantity scheduled to be delivered during a loading window, the information in paragraphs (d) and (f) of this provision shall be provided for each vessel.

(f) The vessel or purchaser shall notify the SPR/PMO of the expected day of arrival 72 hours before the beginning of his scheduled 3-day loading window. This notice establishes the firm agreed-upon date of arrival which is the 1-day window for the purposes of vessel demurrage (see Provision C.9). If the purchaser fails to make notification of the expected day of arrival, the 1-day window will be deemed to be the middle day of the scheduled 3-day window. The vessel shall also notify the SPR/PMO of the expected hour of arrival 72, 48 and 24 hours in advance of arrival, and after the first notice, to advise of any variation of more than 4 hours. With the first notification of the hour of arrival, the Master shall advise the SPR/PMO:

(i) Cargo loading rate requested;

(ii) Number, size, and material of vessel's manifold connections; and

(iii) Defects in vessel or equipment affecting performance or maneuverability.

(g) Notice of Readiness shall be tendered upon arrival at berth or at customary anchorage which is deemed to be any anchorage within 6 hours vessel time to the SPR dock. The preferred anchorages are identified in *Exhibit B*. The Notice of Readiness shall be confirmed promptly in writing to the SPR/PMO and the terminal responsible for coordination of crude oil loading operations. Such notice shall be effective only if given during customary port operating hours. If notice is given after customary business hours of the port, it shall be effective as of the beginning of customary business hours on the next business day.

(h) DOE shall use its best efforts to berth the purchaser's vessel as soon as possible after receipt of the Notice of Readiness.

(i) Standard hose and fittings (American Standard Association standard connections) for loading shall be provided by DOE. Purchasers must arrange for line handling, deballasting, tug boat and pilot services, both for arrival and departure, through the terminal or ship's agent, and bear all costs associated with such services.

(j) Tankships, ITBs, and self-propelled barges shall be allowed berth time of 36 hours. Barges shall be allowed berth time of three (3) hours plus the quotient determined by dividing the cargo size (gross standard volume barrels) by four thousand (4,000). Vessels loading cargo quantities in excess of 500,000 barrels shall be allowed berth time of 36 hours plus 1 hour for each 20,000 barrels to be loaded in excess of 500,000 barrels. Conditions of this provision excepted, however, the vessel shall not remain at berth more than 6 hours after completion of cargo loading unless hampered by tide or weather.

(1) Berth time shall commence with the vessel's first line ashore and shall continue until loading of the vessel, or vessels in case more than one vessel is loaded, is completed and the last line is off. In addition, allowable berth time will be increased by the amount of any delay occurring subsequent to the commencement of berth time and resulting from causes due to adverse weather, labor disputes, force majeure and the like, decisions made by port authorities affecting loading operations, actions of DOE, its contractors and agents resulting in delay of loading operations (providing this action does not arise through the fault of the purchaser or purchaser's agent), and customs and immigration clearance. The time required by the vessel to discharge oily wastes or to moor multiple vessels sequentially into berth shall count as used berth time.

(2) For all hours of berth time used by the vessel in excess of allowable berth time as provided for in this provision, the purchaser shall be liable for dock demurrage and also shall be subject to the conditions of Provision C.11.

*C.9 Vessel Laytime and Demurrage*

(a) The laytime allowed DOE for handling of the purchaser's vessel shall be 36 running hours. For vessels with cargo quantities in excess of 500,000 barrels, laytime shall be 36 running hours plus 1 hour for each 20,000 barrels of cargo to be loaded in excess of 500,000 barrels. Vessel laytime shall commence when the vessel is moored alongside (all fast) the loading berth or 6 hours after receipt of a Notice of Readiness, whichever occurs first. It shall continue 24 hours per day, seven days per week without interruption from its commencement until loading of the

vessel is completed and cargo hoses or loading arms are disconnected. Any delay to the vessel in reaching berth caused by the fault or negligence of the vessel or purchaser, delay due to breakdown or inability of the vessel's facilities to load, decisions made by vessel owners or operators or by port authorities affecting loading operations, discharge of ballast or slops, customs and immigration clearance, weather, labor disputes, force majeure and the like shall not count as used laytime. In addition, movement in roads shall not count as used laytime.

(b) If the vessel is tendered for loading on a date earlier than the firm agreed-upon arrival date, established in accordance with Provision C.8, and other vessels are loading or have already been scheduled for loading prior to the purchaser's vessel, the purchaser's vessel shall await its turn and vessel laytime shall not commence until the vessel moors alongside (all fast), or at 0600 hours local time on the firm agreed-upon date of arrival, whichever occurs first. If the vessel is tendered for loading later than 2400 hours on the firm agreed-upon date of arrival, DOE will use its best efforts to have the vessel loaded as soon as possible in its proper turn with other scheduled vessels, under the circumstances prevailing at the time. In such instances, vessel laytime shall commence when the vessel moors alongside (all fast).

(c) For all hours or any part thereof of vessel laytime that elapse in excess of the allowed vessel laytime for loading provided for in this provision, demurrage shall be paid by DOE, for U.S.-flag vessels, at the lesser of the demurrage rate in the tanker voyage or charter party agreement, or the most recently available United States Freight Rate Average (USFRA) for a hypothetical tanker with a deadweight in long tons equal to the weight in long tons of the petroleum loaded, multiplied by the most recent edition of the American Tanker Rate Schedule rate for such hypothetical tanker and voyage. For foreign flag vessels, demurrage shall be as determined in this provision, except that the London Tanker Brokers' Panel Average Freight Rate Assessment (AFRA) and most recent edition of the New Worldwide Tanker Nominal Freight Scale ''Worldscale'' shall be used as appropriate, if less than the charter party rate. For all foreign flag vessel loadings that commence during a particular calendar month, the applicable AFRA shall be the one that is determined on the basis of freight assessments for the period ended on the 15th day of the preceding month. The demurrage rate for barges will be the lesser of the hourly rate contained in the charter of a chartered barge, or a rate determined by DOE as a fair rate under prevailing conditions. If demurrage is incurred because of breakdown of machinery or equipment of DOE or its contractors (other than the purchaser), the rate of demurrage shall be reduced to one-half the rate stipulated herein per running hour and pro rata of such reduced rate for part of an hour for demurrage so incurred. Demurrage payable by DOE, however, shall in no event exceed the actual demurrage expense incurred by the purchaser as the result of the delay.

(d) In the event the purchaser is using more than one vessel to load the contract quantity scheduled to be delivered during a single loading window, the terms of this provision and the Government's liability for demurrage apply only to the first vessel presenting its Notice of Readiness in accordance with (a) of this provision.

(e) The primary source document and official record for demurrage calculations is the SPRCODR (see Provision C.19).

*C.10 Vessel Loading Expedition Options*

(a) Notwithstanding Provision C.8(j)(1), in order to avoid disruption in the SPR distribution process, the Government may limit berthing time for any vessel receiving SPR petroleum to that period required for loading operations and the physical berthing/unberthing of the vessel. At the direction of the Government, activities not associated with the physical loading of the vessel (*e.g.*, preparing documentation, gauging, sampling, etc.) may be required to be accomplished away from the berth. Time consumed by these activities will not be for the Government's account. If berthing time is to be restricted, the Government will so advise the vessel prior to berthing of the vessel.

(b) In addition to paragraph (a) of this provision, the Government may limit vessels calling at SPR terminals to a total of 24 hours for petroleum transfer operations. In such an event, the loading will be considered completed if the vessel has loaded 95 percent or more of the nominated quantity within a total of 24 hours. If the vessel has loaded less than 95 percent of its nominated quantity, then Provision C.11 shall apply.

*C.11 Purchaser Liability for Excessive Berth Time*

The Government reserves the right to direct a vessel loading SPR petroleum at a delivery point specified in the NS, to vacate its SPR berth, and absorb all costs associated with this movement, should such vessel, through its operational inability to receive oil at the average rates provided for in Provision C.8, cause the berth to be unavailable for an already scheduled follow-on vessel. Furthermore, should a breakdown of the vessel's propulsion system prevent its getting under way on its own power, the Government may cause the vessel to be removed from the berth with all costs to be borne by the purchaser.

*C.12 Pipeline Delivery Procedures*

(a) The purchaser shall nominate his delivery requirements to the pipeline carrier, to include the total quantity to be moved and his preferred five-day shipment range(s) as specified in C.5. The purchaser shall provide confirmation of the carrier's acceptance of the nominated quantity (in thousands of barrels per day) and shipment ranges to the SPR/PMO no later than the last day of the month preceding the month of delivery. The purchaser shall also furnish the SPR/PMO with the name, telephone number, and e-mail address of the pipeline point of contact with whom the SPR/PMO should coordinate the delivery.

(b) The SPR/PMO will ensure oil is made available to the carrier within the shipment date range(s) established in accordance with Provision C.5. Once established, the pipeline delivery schedule can only be changed with SPR/PMO's prior written consent. Should the schedule established in accordance with (a) of this provision vary from the original schedule established in accordance with Provision C.5, the Government will provide its best efforts to accommodate this revised schedule but will incur no liability for failure to provide delivery on the dates requested.

(c) Three days prior to the beginning of any five-day shipping range in which the purchaser is to receive delivery, the purchaser shall furnish the SPR/PMO the firm date within that range on which the movement is to commence, the quantity to be moved, and the contract number.

(d) The date of delivery, which will be recorded on the CODR (see Provision C.19), is the date delivery commenced to the custody transfer point, as identified in the NS.

(e) The purchaser shall receive pipeline deliveries at a minimum average rate of 100,000 barrels per day. The purchaser is solely responsible for making the necessary arrangements with pipeline carriers, including storage, to achieve the stated minimum.

*C.13 Title and Risk of Loss*

Unless otherwise provided in the NS, title to and risk of loss for SPR petroleum will pass to the purchaser at the delivery point as follows:

(a) For vessel shipment—when the petroleum passes from the dock loading equipment connections to the vessel's permanent hose connection.

(b) For pipeline shipment—as identified in the NS.

*C.14 Acceptance of Crude Oil*

(a) When practical, the NS shall update the SPR crude oil stream characteristics shown in *Exhibit A*, SPR Crude Oil Comprehensive Analysis. However, the purchaser shall accept the crude oil delivered regardless of characteristics. Except as provided in this provision, DOE assumes no responsibility for deviations in quality.

(b) In the event that the crude oil stream delivered both has a total sulfur content (by weight) in excess of 2.0 percent if a sour crude oil stream, or 0.50 percent if a sweet crude oil stream, and, in addition, has an API gravity less than 28°API if a sour crude oil stream, or 32°API if a sweet crude oil stream, the purchaser shall accept the crude oil delivered and either pay the contract price adjusted in accordance with Provision C.16, or request negotiation of the contract price. Unless the purchaser submits a written request for negotiation of the contract price to the Contracting Officer within 10 days from the date of invoice, the purchaser shall be deemed to have accepted the adjustment of the price in accordance with Provision C.16. Should the purchaser request a negotiation of the price and the parties be unable to agree as to that price, the dispute shall be settled in accordance with Provision C.32.

*C.15 Delivery Acceptance and Verification*

(a) The purchaser shall provide written confirmation to SPR/PMO, no later than 72 hours prior to the scheduled date of the first delivery under the contract, the name(s) of the authorized agent(s) given signature authority to sign/endorse the delivery documentation (CODR, etc.) on the purchaser's behalf. Any changes to this listing of names must be provided to the SPR/PMO in writing no later than 72 hours before the first delivery to which such change applies. In the event that an independent surveyor (separate from the authorized signatory agent) is appointed by the purchaser to witness the delivery operation (gauging, sampling, testing, etc.), written notification must be provided to SPR/PMO, no later than 72 hours prior to the scheduled date of each applicable cargo delivery.

(b) Absence of the provision of the name(s) of bona fide agent(s) and the signature of such agent on the delivery documentation constitutes acceptance of the delivery quantity and quality as determined by DOE and/or its agents.

*C.16 Price Adjustments for Quality Differentials*

(a) The NS will specify quality price adjustments applicable to the crude oil streams offered for sale. Unless otherwise specified by the NS, quality price adjustments will be applied only to the amount of variation by which the API gravity of the crude oil delivered differs by more than plus or minus five-tenths of one degree API (±0.5°API) from the API gravity of the crude oil stream contracted for as published in the NS.

(b) Price adjustments for SPR crude oil are expected to be similar to one or more commercial crude oil postings for equivalent quality crude oil. The contract price per barrel shall be increased by that amount if the API gravity of the crude oil delivered exceeds the published API gravity by more than 0.5°API and decreased by that amount if the API gravity of the crude oil delivered falls below the published API gravity by more than 0.5°API.

*C.17 Determination of Quality*

(a) The quality of the crude oil delivered to the purchaser will be determined from samples taken from the delivery tanks in accordance with API Manual of Petroleum Measurement Standards, Chapter 8.1, Manual Sampling of Petroleum and Petroleum Products (ASTM D4057), latest edition; or from a representative sample collected by an automatic sampler whose performance has been proven in accordance with the API Manual of Petroleum Measurement Standards, Chapter 8.2, Automatic Sampling of Petroleum and Petroleum Products (ASTM D4177), latest edition. Preference will be given to samples collected by means of an automatic sampler when such a system is available and operational. Tests to be performed by DOE or its authorized contractor are:

(1) Sediment and Water

Primary methods: API Manual of Petroleum Measurement Standards, Chapter 10.1, Determination of Sediment in Crude Oils and Fuel Oils by the Extraction Method (ASTM D473) (IP53), latest edition; or API Manual of Petroleum Measurement Standards, Chapter 10.8, Sediment in Crude Oil by Membrane Filtration (ASTM D4807), latest edition; and API Manual of Petroleum Measurement Standards, Chapter 10.2, Determination of Water in Crude Oil by Distillation (ASTM D4006) (IP358), latest edition; or API Manual of Petroleum Measurement Standards, Chapter 10.9, Water in Crude Oil by Coulometric Karl Fischer Titration (ASTM D4928) (IP 386), latest edition.

Alternate methods: API Manual of Petroleum Measurement Standards, Chapter 10.3, Determination of Water and Sediment in Crude Oil by the Centrifuge Method (Laboratory Procedure) (ASTM D4007) (IP 359), latest edition.

(2) Sulfur

Primary method: ASTM D4294, Sulfur in Petroleum Products by Energy-Dispersive X-ray Fluorescence Spectrometry, latest edition.

Alternate method: ASTM D2622, Sulfur in Petroleum Products by Wavelength Dispersive X-ray Fluorescence Spectrometry.

(3) API Gravity

Primary methods: API Manual of Petroleum Measurement Standards, Chapter 9.1, Density, Relative Density (Specific Gravity), or API Gravity of Crude Petroleum and Liquid Petroleum Products by Hydrometer Method (ASTM D1298) (IP 160), latest edition; or Density and Relative Density of Crude Oils by Digital Density Analyzer (ASTM D5002), latest edition.

Alternate method: API Gravity of Crude Petroleum and Petroleum Products (Hydrometer Method) (ASTM D287), latest edition.

To the maximum extent practicable, the primary methods will be used for determination of SPR crude oil quality characteristics. However, because of conditions prevailing at the time of delivery, it may be necessary to use alternate methods of test for one or more of the quality characteristics. The Government's test results will be binding in any dispute over quality characteristics of SPR petroleum.

(b) The purchaser or his representative may arrange to witness and verify testing simultaneously with the U.S. government representative. Such services, however, will be for the account of the purchaser. Any disputes will be settled in accordance with Provision C.32. Should the purchaser opt not to witness the testing, then the Government findings will be binding on the purchaser.

*C.18 Determination of Quantity*

(a) The quantity of crude oil delivered to the purchaser will be determined by opening and closing tank gauges with adjustment for opening and closing free water and sediment and water as determined from shore tank samples where an automatic sampler is not available, or delivery meter reports. All volumetric measurements will be corrected to net standard volume in barrels at 60 °F, using the API Manual of Petroleum Measurement Standards, Chapter 11.1, Volume 1, Volume Correction Factors (ASTM D1250) (IP 200); Table 5A—Generalized Crude Oils, Correction of Observed API Gravity to API Gravity at 60 °F; Table 6A—Generalized Crude Oils, Correction of Volume to 60 °F Against API Gravity at 60 °F, latest edition, and by deducting the tanks' free water, and the entrained sediment and water as determined by the testing of composite all-levels samples taken from the delivery tanks; or by deducting the sediment and water as determined by testing a representative portion of the sample collected by a certified automatic sampler, and also corrected by the applicable pressure correction factor and meter factor.

(b) The quantity measurements shall be performed and certified by the DOE contractor responsible for delivery operations,

and witnessed by the U.S. government representative at the delivery point. The purchaser shall have the right to have representatives present at the gauging/metering, sampling, and testing. Should the purchaser arrange for additional inspection services, such services will be for the account of the purchaser. Any disputes shall be settled in accordance with Provision C.32. Should the purchaser not arrange for additional services, then DOE's quantity determination shall be binding on the purchaser.

*C.19 Delivery Documentation*

The quantity and quality determination shall be documented on the SPR/PMO Crude Oil Delivery Report (SPRCODR), SPRPMO–F–6110.2–14b (Rev 8/91) (see *Exhibit E* for copy of this form). The SPRCODR will be signed by the purchaser's agent to acknowledge receipt of the quantity and quality of crude oil indicated. In addition, for vessel deliveries, the time statement on the SPRCODR will be signed by the vessel's Master when loading is complete. Copies of the completed SPRCODR, with applicable supporting documentation (i.e., metering or tank gauging tickets and appropriate calculation worksheets), will be furnished to the purchaser and/or the purchaser's authorized representative after completion of delivery. They will serve as the basis for invoicing and/or reconciliation invoicing for the sale of petroleum as well as for any associated services that may be provided.

*C.20 Contract Amounts*

The contract quantities and dollar value stated in the NA are estimates. The per barrel unit price is subject to adjustment due to variation in the API gravity from the published characteristics, changes in delivery mode and price index values, if applicable. In addition, due to conditions of vessel loading and shipping or pipeline transmission, the quantity actually delivered may vary by ±10 percent for each shipment. However, a purchaser is not required to engage additional transportation capacity if sufficient capacity to take delivery of at least 90 percent of the contract quantity has been engaged.

*C.21 Payment and Performance Letter of Credit*

(a) Within five business days of receipt of notification of Apparently Successful Offeror, the Purchaser must provide to the Contracting Officer an ''Irrevocable Standby Letter of Credit'' established in favor of the United States Department of Energy equal to 100 percent of the contract awarded value and containing the substantive provisions set out in *Exhibit D*. The purchaser must furnish an acceptable letter of credit before DOE will execute the NA. The letter of credit MUST NOT VARY IN SUBSTANCE from the sample at *Exhibit D*. If the letter of credit contains any provisions at variance with *Exhibit D* or fails to include any provisions contained in *Exhibit D*, nonconforming provisions must be deleted and missing substantive provisions must be added or the letter of credit will not be accepted. The letter of credit must be effective on or before the first delivery under the contract and remain in effect for a period of 120 days, must permit multiple partial drawings, and must contain the contract number. The original of the letter of credit must be sent to the Contracting Officer.

(b) The letter of credit must be issued by a depository institution located in and authorized to do business in any state of the United States or the District of Columbia, and authorized to issue letters of credit by the banking laws of the United States or any state of the United States or the District of Columbia. The depository institution must be an account holder with the Federal Reserve Banking system and a participant (online) in the Fed's Fedwire Deposit System Network funds transfer system. The issuing bank must provide documentation indicating that the person signing the letter of credit is authorized to do so, in the form of corporate minutes, the Authorized Signature List, or the General Resolution of Signature Authority.

(c) All letter of credit costs will be borne by the purchaser.

(d) The letter of credit must be maintained at 100 percent of the contract value of the petroleum remaining to be delivered as well as delivered quantities for which payment has not been remitted, plus any other charges owed to the Government under the contract. In the event the letter of credit falls below the level specified, or at the discretion of the Contracting Officer must be increased because of the effect of the price indexing mechanism provided for in Provision B.2, DOE reserves the right to demand the purchaser modify the letter of credit to a level deemed sufficient by the Contracting Officer. The purchaser shall make such modification within two business days of being notified by the Contracting Officer by express mail or electronic means. The purchaser is deemed to have received such notification the next business day after its dispatch. If such modification is not made within two days after purchaser is deemed to have received the notice, the Contracting Officer may, on the 3rd business day, without prior notice to the purchaser, withhold deliveries in whole or in part under the contract and/or terminate the contract in whole or in part under Provision C.25.

(e) Within 30 calendar days after final payment under the contract, the Contracting Officer shall authorize the cancellation of the letter of credit and shall return it to the

bank or financial institution issuing the letter of credit. A copy of the notice of cancellation will be provided to the purchaser.

*C.22 Billing and Payment*

(a) The Government will invoice the Purchaser at the conclusion of each delivery.

(b) Payment is due in full on the 20th of the month following each delivery month. Should the 20th of the month fall on a Saturday, Sunday, or Federal holiday, payment will be due and payable in full on the last business day preceding the 20th of the month.

(c) If an invoice is not paid in full, the Government may provide the Purchaser oral or written notification that Purchaser is delinquent in its payments; draw against the letter of credit for all quantities for which unpaid invoices are outstanding; withhold all or any part of future deliveries under the contract; and/or terminate the contract, in whole or in part, in accordance with Provision C.25.

(d) In the event that the bank refuses to honor the draft against the letter of credit, the purchaser shall be responsible for paying the principal and any interest due (see Provision C.24) from the due date.

*C.23 Method of Payments*

(a) All amounts payable by the purchaser shall be paid by either:

(1) Deposit to the account of the U.S. Treasury by wire transfer of funds over the Fedwire Deposit System Network. The information to be included in each wire transfer will be provided in the NS.

(2) Electronic funds transfer through the Automated Clearing House (ACH) network, using the Federal Remittance Express Program. The information to be included in each transfer will be provided in the NS.

All wire deposit electronic funds transfer costs will be borne by the purchaser.

(b) If the purchaser disagrees with the amounts invoiced by the Government, the purchaser shall immediately pay the amount invoiced, and notify the Contracting Officer of the basis for its disagreement. The Contracting Officer will receive and act upon any such objection. Failure to agree to any adjustment shall be a dispute, and a purchaser shall file a claim promptly in accordance with Provision C.32.

(c) DOE may designate another place, different timing, or another method of payment after reasonable written notice to the purchaser.

(d) Notwithstanding any other contract provision, DOE may via a draft message request a wire transfer of funds against the standby letter of credit at any time for payment of monies due under the contract and remaining unpaid in violation of the terms of the contract. These would include but not be limited to interest, liquidated damages, demurrage, amounts owing for any services provided under the contract, and the difference between the contract price and price received on the resale of undelivered petroleum as defined in Provision C.25. If the invoice is for delinquent payments, interest shall accrue from the payment due date.

(e) No payment due DOE hereunder shall be subject to reduction or set-off for any claim of any kind against the United States arising independently of the contract.

*C.24 Interest*

(a) Amounts due and payable by the purchaser or its bank that are not paid in accordance with the provisions governing such payments shall bear interest from the date due until the date payment is received by the Government.

(b) Interest shall be computed on a daily basis. The interest rate shall be in accordance with the Current Value of Funds rate as established by the Department of the Treasury in accordance with the Debt Collection Improvement Act of 1997 and published periodically in Bulletins to the Treasury Fiscal Requirements Manual and in the FEDERAL REGISTER.

*C.25 Termination*

(a) Immediate termination.

(1) The Contracting Officer may terminate this contract in whole or in part, without liability of DOE, by written notice to the purchaser effective upon its being deposited in the U.S. Postal System addressed to the purchaser as provided in Provision C.31 in the event that the purchaser either notifies the Contracting Officer that it will not be able to accept, or fails to accept, any delivery line item in accordance with the terms of the contract. Such notice shall invite the purchaser to submit information to the Contracting Officer as to the reasons for the failure to accept the delivery line item in accordance with the terms of the contract.

(2) Within 10 business days after the issuance of the notice of termination, the Contracting Officer may determine that such termination was a termination for default under paragraph (b)(1)(ii) of this provision. In the absence of information which persuades the Contracting Officer that the purchaser's failure to accept the delivery line item was excusable, the fact of such failure may be the basis for the Contracting Officer determining the purchaser to be in default, without first determining under paragraphs (b)(2) and (b)(3) whether such failure was excusable under the terms of the contract. The Contracting Officer shall promptly give the purchaser written notice of such determination.

(3) Any immediate termination other than one determined to be a termination for default in accordance with paragraph (a)(2) and paragraph (b) of this provision shall be a termination for the convenience of DOE without liability of the Government.

(b) Termination for Default.

(1) Subject to the provisions of paragraphs (b)(2) and (b)(3), the Contracting Officer may terminate the contract in whole or in part for purchaser default, without liability of DOE, by written notice to the purchaser, effective upon its being deposited in the U.S. Postal System, addressed to the purchaser as provided in Provision C.31 in the event that:

(i) The Government does not receive payment in accordance with any payment provision of the contract;

(ii) The purchaser fails to accept delivery of petroleum in accordance with the terms of the contract; or

(iii) The purchaser fails to comply with any other term or condition of the contract within 5 business days after the purchaser is deemed to have received written notice of such failure from the Contracting Officer.

(2) Except with respect to defaults of subcontractors, the purchaser shall not be determined to be in default or be charged with any liability to DOE under circumstances which prevent the purchaser's acceptance of delivery hereunder due to causes beyond the control and without the fault or negligence of the purchaser as determined by the Contracting Officer. Such causes shall include but are not limited to:

(i) Acts of God or the public enemy;

(ii) Acts of the Government acting in its sovereign or contractual capacity;

(iii) Fires, floods, earthquakes, explosions, unusually severe weather, or other catastrophes; or

(iv) Strikes.

(3) If the failure to perform is caused by the default of a subcontractor, the purchaser shall not be determined to be in default or to be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the purchaser to meet the delivery schedule, if:

(i) Such default arises out of causes beyond the control of the purchaser and its subcontractor, and without the fault or negligence of either of them; or

(ii) Such default arises out of causes within the control of a transportation subcontractor, not an affiliate of the purchaser, hired to transport the purchaser's petroleum by vessel or pipeline, and such causes are beyond the purchaser's control, without the fault or negligence of the purchaser, and notwithstanding the best efforts of the purchaser to avoid default.

(4) In the event that the contract is terminated in whole or in part for default, the purchaser shall be liable to DOE for:

(i) The difference between the contract price on the contract termination date and any lesser price the Contracting Officer obtained upon resale of the petroleum; and

(ii) Liquidated damages as specified in Provision C.27 as fixed, agreed, liquidated damages for each day of delay until the petroleum is delivered to a purchaser under either a resolicitation for the sale of the quantities of oil defaulted on, or an NS issued after the date of default that specifies that it is for the sale of quantities of oil defaulted on. In no event shall liquidated damages be assessed for more than 30 days.

(5) In the event that the Government exercises its right of termination for default, and it is later determined that the purchaser's failure to perform was excused in accordance with paragraphs (2) and (3), the rights and obligations of the parties shall be the same as if such termination was a termination for convenience without liability of the Government under paragraph (c).

(c) Termination for convenience.

(1) In addition to any other right or remedy provided for in the contract, the Government may terminate this contract at any time in whole or in part whenever the Contracting Officer shall determine that such termination is in the best interest of the Government. Such termination shall be without liability of the Government if such termination arises out of causes specified in paragraphs (a)(1) or (b)(1) of this provision, acts of the Government in its sovereign capacity, or causes beyond the control and without the fault or negligence of the Government, its contractors (other than the purchaser of SPR crude oil under this contract) and agents. For any other termination for convenience, the Government shall be liable for such reasonable costs incurred by the purchaser in preparing to perform the contract, but under no circumstances shall the Government be liable for consequential damages or lost profits as the result of such termination.

(2) The purchaser will be given immediate written notice of any decrease of petroleum deliveries greater than 10 percent, or of termination, under this paragraph (c). The termination or reduction shall be effective upon its notice being deposited in the U.S. Postal System unless otherwise specified in the notice. The purchaser is deemed to have received a mailed notice on the second day after its dispatch and an electronic or express mail notice on the day after dispatch.

(3) Termination for the convenience of the Government shall not excuse the purchaser from liquidated damages accruing prior to the effective date of the termination.

(d) Nothing herein contained shall limit the Government in the enforcement of any

legal or equitable remedy that it might otherwise have, and a waiver of any particular cause for termination shall not prevent termination for the same cause occurring at any other time or for any other cause.

(e) In the event that the Government exercises its right of termination, as provided in paragraphs (a), (b), or (c)(1) of this provision, the Contracting Officer may sell any undelivered petroleum under such terms and conditions as he deems appropriate.

(f) DOE's ability to deliver petroleum on the date on which the defaulted purchaser was scheduled to accept delivery, under another contract awarded prior to the date of the contractor's default, shall not excuse a purchaser that has been terminated for default from either liquidated damages or the difference between the contract price and any lesser price obtained on resale.

(g) Any disagreement with respect to the amount due the Government for either resale costs or liquidated damages shall be deemed to be a dispute and will be decided by the Contracting Officer pursuant to Provision C.32.

(h) The term ''subcontractor'' or ''subcontractors'' includes subcontractors at any tier.

*C.26 Other Government Remedies*

(a) The Government's rights under this provision are in addition to any other right or remedy available to it by law or by virtue of this contract.

(b) The Government may, without liability on its part, withhold deliveries of petroleum under this contract or any other contract the purchaser may have with DOE if payment is not made in accordance with this contract.

(c) If the purchaser fails to take delivery of petroleum in accordance with the delivery schedule developed under the terms of the contract, and such tardiness is not excused under the terms of Provision C.25, but the Government does not elect to terminate that item for default, the purchaser nonetheless shall be liable to the Government for liquidated damages in the amount established by Provision C.27 for each calendar day of delay or fraction thereof until such time as it accepts delivery of the petroleum. In no event shall such damages be assessed for longer than 30 days. No purchaser that fails to perform in accordance with the terms of the contract shall be excused from liability for liquidated damages by virtue of the fact that DOE is able to deliver petroleum on the date on which the non-performing purchaser was scheduled to accept delivery, under another contract awarded prior to the date of default.

*C.27 Liquidated Damages*

(a) In case of failure on the part of the purchaser to perform within the time fixed in the contract or any extension thereof, the purchaser shall pay to the Government liquidated damages in the amount of 1 percent of the contract price of the undelivered petroleum per calendar day of delay or fraction thereof in accordance with Provision C.25(b) and Provision C.26(c).

(b) As provided in (a) of this provision, liquidated damages will be assessed for each day or fraction thereof a purchaser is late in accepting delivery of petroleum in accordance with this contract, unless such tardiness is excused under Provision C.25. For petroleum to be lifted by vessel, damages will be assessed in the event that the vessel has not commenced loading by 11:59 p.m. on the second day following the last day of the 3-day delivery window established under Provision C.5, unless the vessel has arrived in roads and its Master has presented a notice of readiness to the Government or its agents. Liquidated damages shall continue until the vessel presents its notice of readiness. For petroleum to be moved by pipeline, if delivery arrangements have not been made by the last day of the month prior to delivery, liquidated damages shall commence on the 3rd day of the delivery month until such delivery arrangements are completed; if delivery arrangements have been made, then liquidated damages shall begin on the 3rd day after the scheduled delivery date if delivery is not commenced and shall continue until delivery is commenced.

(c) Any disagreement with respect to the amount of liquidated damages due the Government will be deemed to be a dispute and will be decided by the Contracting Officer pursuant to Provision C.32.

*C.28 Failure To Perform Under SPR Contracts*

In addition to the usual debarment procedures, 10 CFR 625.3 provides procedures to make purchasers that fail to perform in accordance with these provisions ineligible for future SPR contracts.

C.29 Government Options in Case of Impossibility of Performance

(a) In the event that DOE is unable to deliver petroleum contracted for to the purchaser due either to events beyond the control of the Government, including actions of the purchaser, or to acts of the Government, its agents, its contractors or subcontractors at any tier, the Government at its option may do either of the following:

(1) Terminate for the convenience of the Government under Provision C.25; or

(2) Offer different SPR crude oil streams or delivery times to the purchaser in substitution for those specified in the contract.

(b) In the event that a different SPR crude oil stream than originally contracted for is offered to the purchaser, the contract price will be negotiated between the parties. In no event shall the negotiated price be less than the minimum acceptable price established for the same or similar crude oil streams at the time of contract award.

(c) DOE's obligation in such circumstances is to use its best efforts, and DOE under no circumstances shall be liable to the purchaser for damages arising from DOE's failure to offer alternate SPR crude oil streams or delivery times.

(d) If the parties are unable to reach agreement as to price, crude oil streams or delivery times, DOE may terminate the contract for the convenience of the Government under Provision C.25.

*C.30 Limitation of Government liability*

DOE's obligation under these SSPs and any resultant contract is to use its best efforts to perform in accordance therewith. The Government under no circumstances shall be liable thereunder to the purchaser for the conduct of the Government's contractors or subcontractors or for indirect, consequential, or special damages arising from its conduct, except as provided herein; neither shall the Government be liable thereunder to the purchaser for any damages due in whole or in part to causes beyond the control and without the fault or negligence of the Government, including but not restricted to, acts of God or public enemy, acts of the Government acting in its sovereign capacity, fires, floods, earthquakes, explosions, unusually severe weather, other catastrophes, or strikes.

*C.31 Notices*

(a) Any notices required to be given by one party to the contract to the other in writing shall be forwarded to the addressee, prepaid, by U.S. registered, return receipt requested mail, express mail, or electronic means as provided in the NS. Parties shall give each other written notice of address changes.

(b) Notices to the purchaser shall be forwarded to the purchaser's address as it appears in the offer and in the contract.

(c) Notices to the Contracting Officer shall be forwarded to the following address: U.S. Department of Energy, Strategic Petroleum Reserve, Project Management Office, Acquisition and Sales Division, Mail Stop FE–4451, 900 Commerce Road East, New Orleans, Louisiana 70123.

*C.32 Disputes*

(a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601 *et seq.*). If a dispute arises relating to the contract, the purchaser may submit a claim to the Contracting Officer, who shall issue a written decision on the dispute in the manner specified in 48 CFR 1–33.211.

(b) ''Claim'' means:

(1) A written request submitted to the Contracting Officer;

(2) For payment of money, adjustment of contract terms, or other relief;

(3) Which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government; and

(4) For which a Contracting Officer's decision is demanded.

(c) In the case of dispute requests or amendments to such requests for payment exceeding $50,000, the purchaser shall certify at the time of submission as a claim, as follows:

I certify that the claim is made in good faith, that the supporting data are current, accurate and complete to the best of my knowledge and belief and that the amount requested accurately reflects the contract adjustment for which the purchaser believes the Government is liable.

Purchaser's Name
Signature
Title

(d) The Government shall pay to the purchaser interest on the amount found due to the purchaser on claims submitted under this provision at the rate established by the Department of the Treasury from the date the amount is due until the Government makes payment. The Contract Disputes Act of 1978 and the Prompt Payment Act adopt the interest rate established by the Secretary of the Treasury under the Renegotiation Act as the basis for computing interest on money owed by the Government. This rate is published semi-annually in the FEDERAL REGISTER.

(e) The purchaser shall pay to DOE interest on the amount found due to the Government and unpaid on claims submitted under this provision at the rate specified in Provision C.24 from the date the amount is due until the purchaser makes payment.

(f) The decision of the Contracting Officer shall be final and conclusive and shall not be subject to review by any forum, tribunal, or Government agency unless an appeal or action is commenced within the times specified by the Contract Disputes Act of 1978.

(g) The purchaser shall comply with any decision of the Contracting Officer and at the direction of the Contracting Officer shall proceed diligently with performance of this contract pending final resolution of any request for relief, claim, appeal, or action related to this contract.

*C.33 Assignment*

The purchaser shall not make or attempt to make any assignment of a contract that incorporates these SSPs or any interest therein contrary to the provisions of Federal

law, including the Anti-Assignment Act (41 U.S.C. 15), which provides:

No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

*C.34 Order of Precedence*

In the event of an inconsistency between the terms of the various parts of this contract, the inconsistency shall be resolved by giving precedence in the following order:

(a) The NA and written modifications thereto;

(b) The NS;

(c) Those provisions of the SSPs made applicable to the contract by the NS;

(d) Instructions provided in the Crude Oil Sales Offer Program; and

(e) The successful offer.

*C.35 Gratuities*

(a) The Government, by written notice to the purchaser, may terminate the right of the purchaser to proceed under this contract if it is found, after notice and hearing, by the Secretary of Energy or his duly authorized representative, that gratuities (in the form of entertainment, gifts, or otherwise) were offered by or given by the purchaser, or any agent or representative of the purchaser, to any officer or employee of the Government with a view toward securing a contract or securing favorable treatment with respect to the awarding, amending, or making of any determinations with respect to the performing of such contract; provided, that the existence of the facts upon which the Secretary of Energy or his duly authorized representative makes such findings shall be in issue and may be reviewed in any competent court.

(b) In the event that this contract is terminated as provided in paragraph (a) hereof, the Government shall be entitled (1) to pursue the same remedies against the purchaser as it could pursue in the event of a breach of the contract by purchaser, and (2) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary of Energy or his duly authorized representative) which shall not be less than three nor more than 10 times the cost incurred by the purchaser in providing any such gratuities to any such officer or employee.

(c) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

EXHIBITS:

A—SPR Crude Oil Comprehensive Analysis
B—SPR Delivery Point Data
C—Offer Standby Letter of Credit
D—Payment and Performance Letter of Credit
E—Strategic Petroleum Reserve Crude Oil Delivery Report—SPRPMO–F–6110.2–14b 1/87 REV. 8/91

EXHIBIT B—SPR DELIVERY POINT DATA

*SEAWAY FREEPORT TERMINAL*

(Formerly Phillips Terminal)

*LOCATION:* Brazoria County, Texas (three miles southwest of Freeport, Texas on the Old Brazos River, four miles from the sea buoy)

*CRUDE OIL STREAMS:* Bryan Mound Sweet and Bryan Mound Sour.

*DELIVERY POINTS:* Seaway Terminal marine dock facility number 2.

*MARINE DOCK FACILITIES AND VESSEL RESTRICTIONS:*

*TANKSHIP DOCKS:* 2 Docks: Nos. 2 and 3.

MAXIMUM LENGTH

*OVERALL (LOA):* Docks 2 and 3—820 feet (up to 900 feet with pilot approval) during daylight and 615 feet during hours of darkness.

*MAXIMUM BEAM:* Docks 2 and 3—145 feet.

*MAXIMUM DRAFT:* Docks 2 and 3—42 feet salt water; subject to change due to weather and silting conditions.

*MAXIMUM AIR DRAFT:* None.

*MAXIMUM DEADWEIGHT TONS (DWT):* Dock Nos. 2 and 3 can accommodate up to 120,000 DWT if they meet other port restrictions. Maximum DWT is theoretical berth handling capability; however, purchasers are cautioned that varying harbor and channel physical constraints are the controlling factors as to vessel size, and they are responsible for confirming that proposed vessels can be accommodated.

*BARGE LOADING CAPABILITY:* None.

*OILY WASTE RECEPTION FACILITIES:* Facilities are available for oily bilge water and sludge wastes. Purchasers are responsible for making arrangements with the terminal and for bearing costs associated with such arrangements.

*CUSTOMARY ANCHORAGE:* Freeport Harbor sea-buoy approximately 4.5 miles from the terminal.

*SEAWAY TEXAS CITY TERMINAL (Formerly ARCO Texas City)*

*LOCATION:* Docks 11 and 12, Texas City Harbor, Galveston County, Texas.

*CRUDE OIL STREAMS:* Bryan Mound Sweet and Bryan Mound Sour.

*DELIVERY POINTS:* Marine Docks (11 and 12) and connections to local commercial pipelines.

*MARINE DOCK FACILITIES AND VESSEL RESTRICTIONS:*

*TANKSHIP DOCKS:* 2 Docks: Nos. 11 and 12.

MAXIMUM LENGTH

*OVERALL (LOA):* 1,020 feet. Maximum bow to manifold centerline distance is 468 feet.

*MAXIMUM BEAM:* Dock 11—180 feet; Dock 12—220 feet.

*MAXIMUM DRAFT:* 39.5 feet brackish water; subject to change due to weather and silting conditions.

*MAXIMUM AIR DRAFT:* None.

*MAXIMUM DEADWEIGHT TONS (DWT):* 150,000 DWT each. Terminal permission is required for less than 30,000 DWT or greater than 150,000 DWT. Vessels larger than 120,000 DWT are restricted to daylight transit. Purchasers are cautioned that varying harbor and channel physical constraints are the controlling factors as to vessel size, and they are responsible for confirming that proposed vessels can be accommodated.

*BARGE LOADING CAPABILITY:* None.

OILY WASTE RECEPTION FACILITIES: Facilities are available for oily bilge water and sludge wastes. Purchasers are responsible for making arrangements with the terminal and for bearing all costs associated with such arrangements.

*CUSTOMARY ANCHORAGE:* Bolivar Roads (breakwater) or Galveston sea-buoy.

*SUNOCO LOGISTICS TERMINAL*

*LOCATION:* Nederland, Texas (on the Neches River at Smiths Bluff in southwest Texas, 47.6 nautical miles from the bar).

*CRUDE OIL STREAMS:* West Hackberry Sweet and West Hackberry Sour.

*DELIVERY POINTS:* Sun Terminal marine dock facility and Sun Terminal connections to local commercial pipelines.

*MARINE DOCK FACILITIES AND VESSEL RESTRICTIONS:*

*TANKSHIP DOCKS:* 5 Docks: Nos. 1, 2, 3, 4 and 5.

MAXIMUM LENGTH

*OVERALL (LOA):* 1000 feet.

*MAXIMUM BEAM:* 150 feet.

*MAXIMUM DRAFT:* 40 feet fresh water.

*MAXIMUM AIR DRAFT:* 136 feet.

*MAXIMUM DEADWEIGHT TONS (DWT):* Maximum DWT at Dock No. 1 is 85,000 DWT. Dock Nos. 2, 3, 4 and 5 can accommodate up to 150,000 DWT. Vessels larger than 85,000 DWT, 875 feet LOA, or 125 feet beam are restricted to daylight transit. Maximum DWT is theoretical berth handling capability; however, purchasers are cautioned that varying harbor and channel physical constraints are the controlling factors as to vessel size, and they are responsible for confirming that proposed vessels can be accommodated.

*BARGE LOADING CAPABILITY:* 3 Barge Docks: A, B and C. Each is capable of handling barges up to 25,000 barrels capacity.

*OILY WASTE RECEPTION FACILITIES:* Facilities are available for oily bilge water and sludge wastes. Purchasers are responsible for making arrangements with the terminal and for bearing costs associated with such arrangements.

*CUSTOMARY ANCHORAGE:* South of Sabine Bar-Buoy. There is an additional anchorage at the Sabine Bar for vessels with draft of 39 feet of less.

*SHELL 22-INCH/DOE LAKE CHARLES PIPELINE CONNECTION*

*LOCATION:* Lake Charles Upper Junction, located in Section 36, Township 10 South, Range 10 West, Calcasieu Parish, (Lake Charles) Louisiana.

*CRUDE OIL STREAMS:* West Hackberry Sweet and West Hackberry Sour.

*DELIVERY POINT:* Shell 22-Inch/DOE Lake Charles Pipeline Connection.

*MARINE DISTRIBUTION FACILITIES:* None.

*SHELL SUGARLAND TERMINAL*

*LOCATION:* St. James Parish, Louisiana (30 miles southwest of Baton Rouge on the west bank of the Mississippi River at milemarker 158.3).

*CRUDE OIL STREAMS:* Bayou Choctaw Sweet and Bayou Choctaw Sour.

*DELIVERY POINTS:* Sugarland Terminal marine dock facility and LOCAP and Capline Terminals (connections to Capline interstate pipeline system and local commercial pipelines).

*MARINE DOCK FACILITIES AND VESSEL RESTRICTIONS:*

*TANKSHIP DOCKS:* 2 Docks: Nos. 1 and 2.

MAXIMUM LENGTH

*OVERALL (LOA):* 940 feet.

*MAXIMUM BEAM:* None.

*MAXIMUM DRAFT:* 45 feet fresh water.

*MAXIMUM AIR DRAFT:* 153 feet less the river stage.

*MAXIMUM DEADWEIGHT TONS (DWT):* 100,000 DWT. Maximum DWT is theoretical berth handling capability; however, purchasers are cautioned that varying harbor and channel physical constraints are the controlling factors as to vessel size, and they are responsible for confirming that proposed vessels can be accommodated.

*BARGE LOADING CAPABILITY:* Dock 1.

*OILY WASTE RECEPTION FACILITIES:* Facilities are available for oily bilge water and sludge wastes. Purchasers are responsible for making arrangements and for bearing all

costs associated with such arrangements. Terminal can provide suitable contacts.

*CUSTOMARY ANCHORAGE:* Grandview Reach approximately 11 miles from the terminal.

*UNOCAL BEAUMONT TERMINAL*

*LOCATION:* Beaumont Terminal, located downstream south bank of the Neches River, approximately 8 miles SE of Beaumont, Texas.

*CRUDE OIL STREAMS:* Big Hill Sweet and Big Hill Sour.

*DELIVERY POINTS:* Unocal Beaumont Terminal No. 2 Crude Dock and connections to local commercial pipelines.

*MARINE DOCK FACILITIES AND VESSEL RESTRICTIONS:*

*TANKSHIP DOCKS:* 1 Dock (No. 2).

MAXIMUM LENGTH

*OVERALL (LOA):* 1,020 feet.

*MAXIMUM BEAM:* 150 feet.

*MAXIMUM DRAFT:* 40 feet fresh water.

*MAXIMUM AIR DRAFT:* 136 feet.

*MAXIMUM DEADWEIGHT TONS (DWT):* Maximum DWT at Dock No. 2 is 150,000 DWT. Vessels larger than 85,000 DWT, 875 feet LOA, or 125 feet beam are restricted to daylight transit. Maximum DWT is theoretical berth handling capability; however, purchasers are cautioned that varying harbor and channel physical constraints are the controlling factors as to vessel size and they are responsible for confirming that proposed vessels can be accommodated.

*BARGE LOADING CAPABILITY:* None.

*OILY WASTE RECEPTION FACILITIES:* Facilities are available for oily bilge water and sludge wastes. Purchasers are responsible for making arrangements with the terminal and for bearing costs associated with such arrangements.

*CUSTOMARY ANCHORAGE:* South of Sabine Bar-Buoy. There is an additional anchorage at the Sabine Bar for vessels with draft of 39 feet or less.

*SHELL 20-INCH PIPELINE (SPL)*

*LOCATION:* Jefferson County, Texas, Seven miles west and one mile north of FM 365 and Old West Port Arthur Road.

*CRUDE OIL STREAMS:* Big Hill Sweet and Big Hill Sour.

*DELIVERY POINT:* SPL East Houston Terminal, Exxon Junction (Channelview), Oil Tanking Junction.

*MARINE DISTRIBUTION FACILITIES:* None.

EXHIBIT C

*SAMPLE—OFFER GUARANTEE STANDBY LETTER OF CREDIT*

BANK LETTERHEAD

IRREVOCABLE STANDBY LETTER OF CREDIT

Date: _____

To: Acquisition and Sales Division, Mail Stop FE–4451, Strategic Petroleum Reserve, Project Management Office, U.S. Department of Energy, 900 Commerce Road East, New Orleans, LA 70123

AMOUNT OF LETTER OF CREDIT: _____
U.S. $ (_____)
CONTRACTOR: _____
NOTICE OF SALE NO: _____
LETTER OF CREDIT NO: _____
EXPIRATION DATE: _____
AMERICAN BANKERS ASSOCIATION (ABA) NO: _____

Gentlemen:

We hereby establish in the U.S. Department of Energy's favor our irrevocable standby Letter of Credit effective immediately for the account of our customer in response to the above U.S. Department of Energy's Notice of Sale, including any amendments thereto, for the sale of Strategic Petroleum Reserve petroleum. This Letter of Credit expires 60 days from the date set for receipt of offers.

This letter of credit is available by your draft/s at sight, drawn on us and accompanied by a manually signed statement that the signer is an authorized representative of the Department of Energy, and the following statement:

''THIS DRAWING OF U.S. $_____ (_____) AGAINST YOUR LETTER OF CREDIT NUMBERED _____, DATED _____, IS DUE THE U.S. GOVERNMENT BECAUSE OF THE FAILURE OF (*CONTRACTOR*) TO HONOR ITS OFFER TO ENTER INTO A CONTRACT FOR THE PURCHASE OF PETROLEUM FROM THE STRATEGIC PETROLEUM RESERVE, IN ACCORDANCE WITH THE U.S. GOVERNMENT'S NOTICE OF SALE NO. _____, INCLUDING ANY AMENDMENTS THERETO.''

Drafts must be presented for payment on or before the expiration date of this Letter of Credit at our bank. The Government may make multiple drafts against this Letter of Credit.

Upon receipt of the U.S. Department of Energy's demand by hand, mail express delivery, or other means, at our office located at _____, we will honor the demand and make payment, by 3 p.m. Eastern Time of the next business day following receipt of the demand, by either wire transfer

of funds as a deposit to the account of the U.S. Treasury over the Fedwire Deposit System Network, or by electronic funds transfer through the Automated Clearing House Network, using the Federal Remittance Express Program. The information to be included in each transfer will be as provided in the above referenced Notice of Sale.

This Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits (1993 Revision, International Chamber of Commerce Publication no. 500) and except as may be inconsistent therewith, to the Uniform Commercial Code in effect on the date of issuance of this Letter of Credit in the state in which the issuer's head office within the United States is located.

We hereby agree with the drawers, endorsers and bona fide holders that all drafts drawn under and in compliance with the terms of this Letter of Credit will be duly honored upon presentation and delivery of the above documents for payment at our bank on or before the expiration date.

Address all communications regarding this Letter of Credit to (*name and phone number*).

Very truly yours,

_____

(Authorized Signature)

_____

(Typed Name and Title)

INSTRUCTIONS FOR OFFER LETTER OF CREDIT

1. The depository institution must be an account holder with the Federal Reserve Banking System and a participant (on line) in the Fed's Fedwire Deposit System Network funds transfer system.

2. Letter of Credit must not vary in substance from this attachment. Provide a copy of this attachment to your bank.

3. Banks shall fill in blanks except those in the drawing statement. The drawing statement is in bold print with double underlines for the blanks. Do not fill in double underlined blanks.

4. The information to be included and format to be used either for a wire transfer as a deposit over the Fedwire Deposit System Network or electronic funds transfer through the Automated Clearing House network, using the Federal Remittance Express Program, will be provided in the Contract.

5. Type name and title under authorized signature.

EXHIBIT D

*SAMPLE—PAYMENT AND PERFORMANCE LETTER OF CREDIT*

BANK LETTERHEAD

IRREVOCABLE STANDBY LETTER OF CREDIT

Date: _____

To: Acquisition and Sales Division, Mail Stop FE–4451, Strategic Petroleum Reserve, Project Management Office, U.S. Department of Energy, 900 Commerce Road East, New Orleans, LA 70123

AMOUNT OF LETTER OF CREDIT U.S. $: __ (_____)

CONTRACTOR: _____

CONTRACT NO: _____

LETTER OF CREDIT NO: _____

EXPIRATION DATE: _____

AMERICAN BANKERS ASSOCIATION (ABA) NO: _____

Gentlemen:

We hereby establish in the U.S. Department of Energy's favor our irrevocable standby Letter of Credit effective immediately for the account of our customer's above contract with the U.S. Department of Energy for the sale of Strategic Petroleum Reserve petroleum.

This letter of credit is available by your draft/s at sight, drawn on us and accompanied by a manually signed statement that the signer is an authorized representative of the Department of Energy, and one or both of the following statements:

a. ''I HEREBY CERTIFY THAT THE UNITED STATES GOVERNMENT HAS DELIVERED CRUDE OIL UNDER THE TERMS OF CONTRACT NUMBER _____ AND THAT (*CONTRACTOR*) HAS NOT PAID UNDER THE TERMS OF THAT CONTRACT, AND AS A RESULT OWES THE U.S. GOVERNMENT U.S. $_____.''

b. ''I HEREBY CERTIFY THAT (*CONTRACTOR*) HAS FAILED TO TAKE DELIVERY OF CRUDE OIL UNDER THE TERMS OF CONTRACT NUMBER _____, AND AS A RESULT OWES THE U.S. GOVERNMENT U.S. $_____.''

Drafts must be presented for payment on or before the expiration date of this Letter of Credit at our bank. The Government may make multiple drafts against this Letter of Credit.

Upon receipt of the U.S. Department of Energy's demand by hand, mail express delivery, or other means, at our office located at _____, we will honor the demand and make payment, by 3 p.m. Eastern Time of the next business day following receipt of the demand, by either wire transfer of funds as a deposit to the account of the U.S. Treasury over the Fedwire Deposit System Network, or by electronic funds transfer through the Automated Clearing House Network, using the Federal Remittance Express Program. The information to be included in each transfer will be as provided in the above referenced contract.

This Letter of Credit is subject to the Uniform Customs and Practice for Documentary

Credits (1993 Revision, International Chamber of Commerce Publication no. 500) and except as may be inconsistent therewith, to the Uniform Commercial Code in effect on the date of issuance of this Letter of Credit in the state in which the issuer's head office within the United States is located.

We hereby agree with the drawers, endorsers and bona fide holders that all drafts drawn under and in compliance with the terms of this Letter of Credit will be duly honored upon presentation and delivery of the above documents for payment at our bank on or before the expiration date.

Address all communications regarding this Letter of Credit to (*name and phone number*).

Very truly yours,

_____

(Authorized Signature)

_____

(Typed Name and Title)

INSTRUCTIONS FOR PAYMENT AND PERFORMANCE

*Letter of Credit*

1. The depository institution must be an account holder with the Federal Reserve Banking system and a participant (on line) in the Fed's Fedwire Deposit System Network funds transfer system.

2. Letter of Credit must not vary in substance from this attachment. Provide a copy of this attachment to your bank.

3. Banks shall fill in blanks except those in the drawing statements. The drawing statements are in bold print with double underlines for the blanks. Do not fill in double underlined blanks.

4. The information to be included and format to be used either for a wire transfer as a deposit over the Fedwire Deposit System Network or electronic funds transfer through the Automated Clearing House network, using the Federal Remittance Express Program, will be provided in the Contract.

5. Type name and title under authorized signature.

**Exhibit E**

**STRATEGIC PETROLEUM RESERVE CRUDE OIL DELIVERY REPORT**

| 1. SALES CONTRACT NUMBER | 2. TERMINAL REPORT NUMBER | 3. CARGO NUMBER |
|---|---|---|
| | | |

| 4. DATE DELIVERED | 5. TRANSPORTATION MODE | 6. ACCEPTANCE POINT | 7. PRICE DATE |
|---|---|---|---|
| | ☐ TANKER ☐ BARGE ☐ PIPELINE | ☐ ORIGIN ☐ DESTINATION | |

| 8. SHIPPING SPR SITE/TERMINAL | 9. PURCHASER-NAME AND ADDRESS | 10. CARRIER |
|---|---|---|
| | | |

| 11. CONTRACT LINE ITEM | | 12. DESCRIPTION OF CRUDE OIL AND GROSS BBLS | 13. API GRAVITY | 14. TOTAL SULPHUR % | 15. DEL'D NET BBLS @ 60°F | 16. UNIT PRICE | 17. AMOUNT DUE |
|---|---|---|---|---|---|---|---|
| MLI | DLI | | | | | | |
| | | | | | | | |
| | | 18. QUALITY ADJUSTMENT – INCREASE/(DECREASE) | | | | | |
| | | 18A. NET GRAVITY ADJUSTMENT FROM 18B(5)____.__° | | | | | |

| 18B. CALCULATION OF GRAVITY ADJUSTMENT | |
|---|---|
| (1) ADVERTISED API GRAVITY | |
| (2) DELIVERED API GRAVITY | |
| (3) VARIANCE—(2) MINUS (1) | |
| (4) ALLOWABLE VARIANCE | |
| (5) NET VARIANCE—(3) MINUS (4) | |

19. NET AMOUNT DUE

20. THE DELIVERED NET BARRELS, UNIT PRICE, PRICE DATE, QUALITY ADJUSTMENT AND NET AMOUNT DUE HAVE BEEN VERIFIED.

SIGNATURE: _____

ACCOUNTABLE OFFICER

22. REMARKS

| 21. TIME STATEMENT | DATE | TIME |
|---|---|---|
| NOTICE OF READINESS TO LOAD | | |
| VESSEL ARRIVED IN ROADS | | |
| PILOT ON BOARD | | |
| WEIGHED ANCHOR | | |
| FIRST LINE ASHORE | | |
| MOORED ALONGSIDE | | |
| STARTED BALLAST DISCHARGE | | |
| FINISHED BALLAST DISCHARGE | | |
| INSPECTED AND READY TO LOAD | | |
| CARGO HOSES CONNECTED | | |
| COMMENCED LOADING | | |
| STOPPED LOADING | | |
| RESUMED LOADING | | |
| FINISHED LOADING | | |
| CARGO HOSES REMOVED | | |
| VESSEL RELEASED BY INSPECTOR | | |
| COMMENCED BUNKERING | | |
| FINISHED BUNKERING | | |
| VESSEL LEFT BERTH (ACTUAL OR ESTIMATED) | | |

23. GOVERNMENT INSPECTOR'S CERTIFICATE:

I HEREBY CERTIFY THAT THE (VESSEL CARGO) (PIPELINE SHIPMENT) WAS INSPECTED, DELIVERED AND ACCEPTED AS SHOWN HEREON.

DATE_____ SIGNATURE_____

NAME TYPED/PRINTED

24. RECEIPT IS ACKNOWLEDGED FOR THE QUANTITY AND QUALITY SHOWN HEREON:

DATE RECEIVED:_____

AGENT:_____

BY:_____

NAME TYPED/PRINTED

25. I CERTIFY THAT THE TIME STATEMENT SHOWN HEREON IS CORRECT.

SIGNATURE_____

MASTER OF VESSEL

SPRPMO-F-6110.2-14b 1/87 REV. 8/91

[70 FR 39367, July 7, 2005]

# PART 626—PROCEDURES FOR ACQUISITION OF PETROLEUM FOR THE STRATEGIC PETROLEUM RESERVE

Sec.
626.1 Purpose.

626.2 Definitions.
626.3 Applicability.
626.4 General acquisition strategy.
626.5 Acquisition procedures-general.
626.6 Acquiring oil by direct purchase.
626.7 Royalty transfer and exchange.
626.8 Deferrals of contractually scheduled deliveries.

AUTHORITY: 42 U.S.C. 6240(c); 42 U.S.C. 7101, *et seq.*

SOURCE: 71 FR 65380, Nov. 8, 2006, unless otherwise noted.

### § 626.1 Purpose.

This part establishes the procedures for acquiring petroleum for, and deferring contractually scheduled deliveries to, the Strategic Petroleum Reserve. The procedures do not represent actual terms and conditions to be contained in the contracts for the acquisition of SPR petroleum.

### § 626.2 Definitions.

*Backwardation* means a market situation in which prices are progressively lower in succeeding delivery months than in earlier months.

*Contango* means a market situation in which prices are progressively higher in the succeeding delivery months than in earlier months.

*Contract* means the agreement under which DOE acquires SPR petroleum, consisting of the solicitation, the contract form signed by both parties, the successful offer, and any subsequent modifications, including those granting requests for deferrals.

*Contracting Officer* means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings, including entering into sales contracts on behalf of the Government. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer.

*DEAR* means the Department of Energy Acquisition Regulation.

*Deferral* means a process whereby petroleum scheduled for delivery to the SPR in a specific contract period is rescheduled for later delivery, outside of that period and encompasses the future delivery of the originally scheduled quantity plus an in-kind premium.

*DOE* means the Department of Energy.

*DOI* means the Department of the Interior.

*Exchange* means a process whereby petroleum owned by or due to the SPR is provided to a person or contractor in return for petroleum of comparable quality plus a premium quantity of petroleum delivered to the SPR in the future, or when SPR petroleum is traded for petroleum of a different quality for operational reasons based on the relative values of the quantities traded.

*FAR* means the Federal Acquisition Regulation.

*Government* means the United States Government, and includes DOE as its representative.

*International Energy Program* means the program established by the Agreement on an International Energy Program, signed by the United States on November 18, 1974, including any subsequent amendments and additions to that Agreement.

*OPR* means the Office of Petroleum Reserves within the DOE Office of Fossil Energy, whose responsibilities include the operation of the Strategic Petroleum Reserve.

*Petroleum* means crude oil, residual fuel oil, or any refined product (including any natural gas liquid, and any natural gas liquid product) owned, or contracted for, by DOE and in storage in any permanent SPR facility, or temporarily stored in other storage facilities.

*Secretary* means the Secretary of Energy.

*Strategic Petroleum Reserve* or *SPR* means the DOE program established by Title I, Part B, of the Energy Policy and Conservation Act, 42 U.S.C. 6201 *et seq.*

### § 626.3 Applicability.

The procedures in this part apply to the acquisition of petroleum by DOE for the Strategic Petroleum Reserve through direct purchase or transfer of royalty-in-kind oil, as well as to deferrals of contractually scheduled deliveries.

### § 626.4 General acquisition strategy.

(a) *Criteria for commencing acquisition.* To reduce the potential for negative

impacts from market participation, DOE shall review the following factors prior to commencing acquisition of petroleum for the SPR:

(1) The current inventory of the SPR;

(2) The current level of private inventories;

(3) Days of net import protection;

(4) Current price levels for crude oil and related commodities;

(5) The outlook for international and domestic production levels;

(6) Existing or potential disruptions in supply or refining capability;

(7) The level of market volatility;

(8) Futures market price differentials for crude oil and related commodities; and

(9) Any other factor the consideration of which the Secretary deems to be necessary or appropriate.

(b) *Review of rate of acquisition.* DOE shall review the appropriate rate of oil acquisition each time an open market acquisition has been suspended for more than three months, and every six months in the case of ongoing or suspended royalty-in-kind transfers.

(c) *Acquisition through other Federal agencies.* DOE may enter into arrangements with another Federal agency for that agency to acquire oil for the SPR on behalf of DOE.

### § 626.5 Acquisition procedures—general.

(a) *Notice of acquisition.* (1) Except when DOE has determined there is good cause to do otherwise, DOE shall provide advance public notice of its intent to acquire petroleum for the SPR. The notice of acquisition is usually in the form of a solicitation. DOE shall state in the notice of acquisition the general terms and details of DOE's crude oil acquisition and, to the extent feasible, shall inform the public of its overall fill goals, so that they may be factored into market participants' plans and activities.

(2) The notice of acquisition generally states:

(i) The method of acquisition to be employed;

(ii) The time that the solicitations will be open;

(iii) The quantity of oil that is sought;

(iv) The minimum crude oil quality requirements;

(v) The acceptable delivery locations; and

(vi) The necessary instructions for the offer process.

(b) *Method of acquisition.* (1) DOE shall define the method of crude oil acquisition, direct purchase or royalty-in-kind transfer and exchange, in the notice of acquisition.

(2) DOE shall determine the method of crude oil acquisition after taking into account the availability of appropriated funds, current market conditions, the availability of oil from the Department of the Interior, and other considerations DOE deems to be relevant.

(c) *Solicitation.* (1) To secure the economic benefit and security of a diversified base of potential suppliers of petroleum to the SPR, DOE shall maintain a listing, developed through online registration and personal contact, of interested suppliers. Upon the issuance of a solicitation, DOE shall notify potential suppliers via their registered e-mail addresses.

(2) DOE shall make the solicitation publicly available on the Web sites of the DOE Office of Fossil Energy *http://www.fe.doe.gov/programs/reserves* and the OPR *http://www.spr.doe.gov*.

(d) *Timing and duration of solicitation.* (1) DOE shall determine crude oil requirements on nominal six-month cycles, and shall review and update these requirements prior to each solicitation cycle.

(2) DOE may terminate all solicitations and contracts pertaining to the acquisition of crude oil at the convenience of the Government, and in such event shall not be responsible for any costs incurred by suppliers, other than costs for oil delivered to the SPR and for reasonable, customary, and applicable costs incurred by the supplier in the performance of a valid contract for delivery before the effective date of termination of such contract. In no event shall the Government be liable for consequential damages or the contractor's lost profits as a result of such termination.

(e) *Quality.* (1) DOE shall define minimum crude oil quality specifications for the SPR. DOE shall include such

specifications in acquisition solicitations, and shall make them available on the Web sites of the DOE Office of Fossil Energy *http://www.fe.doe.gov/programs/reserves* and the OPR *http://www.spr.doe.gov*.

(2) DOE shall periodically review the quality specifications to ensure, to the greatest extent practicable, the crude oil mix in storage matches the demand of the United States refining system.

(f) *Quantity*. In determining the quantities of oil to be delivered to the SPR, DOE shall:

(1) Take into consideration market conditions and the availability of transportation systems; and

(2) Seek to avoid adversely affecting other market participants or crude oil market fundamentals.

(g) *Offer and evaluation procedures*. (1) Each solicitation shall provide necessary instructions on offer format and submission procedures. The details of the offer, evaluation and award procedures may vary depending on the method of acquisition.

(2) DOE shall use relative crude values and time differentials to the maximum extent practicable to manage acquisition and delivery schedules to reduce acquisition costs.

(3) DOE shall evaluate offers based on prevailing market prices of specific crude oils, and shall award contracts on a competitive basis.

(4) Whether acquisition is by direct purchase or royalty transfer and exchange on a term contract basis, DOE shall use a price index to account for fluctuations in absolute and relative market prices at the time of delivery to reduce market risk to all parties throughout the contract term.

(h) *Scheduling and delivery*. (1) Except as provided in paragraph (h)(4) of this section, DOE shall accept offers for crude oil delivered to specified SPR storage sites via pipeline or as waterborne cargos delivered to the terminals serving those sites.

(2) Except as provided in paragraph (h)(4) of this section, DOE shall generally establish schedules that allow for evenly spaced deliveries of economically-sized marine and pipeline shipments within the constraints of SPR site and commercial facilities receipt capabilities.

(3) DOE shall strive to maximize U.S. flag carrier utilization through the terms of its supply contracts.

(4) DOE reserves the right to accept offers for other methods of delivery if, in DOE's sole judgment, market conditions and logistical constraints require such other methods.

### § 626.6 Acquiring oil by direct purchase.

(a) *General*. For the direct purchase of crude oil, DOE shall, through certified contracting officers, conduct crude oil acquisitions in accordance with the FAR and the DEAR.

(b) *Acquisition strategy*. (1) DOE solicitations:

(i) May be either continuously open or fixed for a period of time (usually no longer than 6 months); and

(ii) May provide either for prompt delivery or for delivery at future dates.

(2) DOE may alter the acquisition plan to take advantage of differentials in prices for different qualities of oil, based on a consideration of the availability of storage capacity in the SPR sites, the logistics of changing delivery streams, and the availability of ships, pipelines and terminals to move and receive the oil.

(3) Based on the market analysis described in paragraph (d) of this section, DOE may refuse offers or suspend the acquisition process on the basis of Government estimates that project substantially lower oil prices in the future than those contained in offers. If DOE determines there is a high probability that the cost to the Government can be reduced without significantly affecting national energy security goals, DOE may either contract for delivery at a future date or delay purchases to take advantage of projected future lower prices. Conversely, DOE may increase the rate of purchases if prices fall below recent price trends or futures markets present a significant contango and prices offer the opportunity to reduce the average cost of oil acquisitions in anticipation of higher prices.

(4) Based on the market analysis described in paragraph (d) of this section, DOE may refuse offers, decrease the

rate of purchase, or suspend the acquisition process if DOE determines acquisition will add significant upward pressure to prices either regionally or on a world-wide basis. DOE may consider recent price changes, private inventory levels, oil acquisition by other stockpiling entities, the outlook for world oil production, incipient disruptions of supply or refining capability, logistical problems for moving petroleum products, macroeconomic factors, and any other considerations that may be pertinent to the balance of petroleum supply and demand.

(c) *Fill requirements determination.* DOE shall develop SPR fill requirements for each solicitation based on an assessment of national energy security goals, the availability of storage capacity, and the need for specific grades and quantities of crude oil.

(d) *Market analysis.* (1) DOE shall establish a market value for each crude type to be acquired based on a market analysis at the time of contract award.

(2) In conducting the market analysis, DOE may use prices on futures markets, spot markets, recent price movements, current and projected shipping rates, forecasts by the DOE Energy Information Administration, and any other analytic tools available to DOE to determine the most desirable purchase profile.

(3) A market analysis may also consider recent price changes, private inventory levels, oil acquisition by other stockpiling entities, the outlook for world oil production, incipient disruptions of supply or refining capability, logistical problems for moving petroleum products, macroeconomic factors, and any other considerations that may be pertinent to the balance of petroleum supply and demand.

(e) *Evaluation of offers.* (1) DOE shall evaluate offers using:

(i) The criteria and requirements stated in the solicitation; and

(ii) The market analysis under paragraph (d) of this section.

(2) DOE shall require financial guarantees from contractors, in the form of a letter of credit or equivalent financial assurance.

## § 626.7 Royalty transfer and exchange.

(a) *General.* DOE shall conduct royalty transfers pursuant to an agreement between DOE and DOI for the transfer of royalty oil.

(b) *Acquisition strategy.* (1) DOE and DOI shall select a royalty volume from specified leases for transfer usually over six-month periods.

(2) If logistics and crude oil quality are compatible with SPR receipt capabilities and requirements respectively, DOE may take the royalty oil directly from DOI and place it in SPR storage sites. Otherwise, DOE may competitively solicit suppliers to deliver oil of comparable value to the SPR in exchange for the receipt of royalty-in-kind oil.

(3) If, based on the market analysis described in paragraph (d) of this section, DOE determines there is a high probability that the cost to the Government can be reduced without significantly affecting national energy security goals, DOE may contract for delivery at a future date in expectation of lower prices and a higher quantity of oil in exchange. Conversely, it may schedule deliveries at an earlier date under the contract in anticipation of higher prices at later dates.

(4) Based on the market analysis in paragraph (d) of this section, DOE may, after consultation with DOI, suspend the transfer of royalty oil to DOE if it appears the added demand for oil will add significant upward pressure to prices either regionally or on a worldwide basis.

(c) *Fill requirements determination.* DOE shall develop SPR fill requirements for each solicitation based on an assessment of national energy security goals, the availability of royalty oil and storage capacity, and need for specific grades and quantities of crude oil.

(d) *Market analysis.* (1) DOE may use prices on futures markets, spot markets, recent price movements, current and projected shipping rates, forecasts by the DOE Energy Information Administration, and any other analytic tools to determine the most desirable acquisition profile.

(2) A market analysis may also consider recent price changes, private inventory levels, oil acquisition by other stockpiling entities, the outlook for

world oil production, incipient disruptions of supply or refining capability, logistical problems for moving petroleum products, macroeconomic factors, and any other considerations that may be pertinent to the balance of petroleum supply and demand.

(e) *Evaluation of royalty exchange offers.* (1) DOE shall evaluate offers using:

(i) The criteria and requirements stated in the solicitation; and

(ii) The market analysis under paragraph (d) of this section.

(2) DOE shall require financial guarantees from contractors in the form of a letter of credit or equivalent financial assurance.

### § 626.8 Deferrals of contractually scheduled deliveries.

(a) *General.* (1) DOE prefers to take deliveries of petroleum for the SPR at times scheduled under applicable contracts. However, in the event the market is distorted by disruption to supply or other factors, DOE may defer scheduled deliveries or request or entertain deferral requests from contractors.

(2) A contractor seeking to defer scheduled deliveries of oil to the SPR may submit a deferral request to DOE.

(b) *Deferral criteria.* DOE shall only grant a deferral request for negotiation under paragraph (c) of this section if it determines that DOE can receive a premium for the deferral paid in additional barrels of oil and, based on DOE's deferral analysis, that at least one of the following conditions exists:

(1) DOE can reduce the cost of its oil acquisition per barrel and increase the volume of oil being delivered to the SPR by means of the premium barrels required by the deferral process.

(2) DOE anticipates private inventories are approaching a point where unscheduled outages may occur.

(3) There is evidence that refineries are reducing their run rates for lack of feedstock.

(4) There is an unanticipated disruption to crude oil supply.

(c) *Negotiating terms.* (1) If DOE decides to negotiate a deferral of deliveries, DOE shall estimate the market value of the deferral and establish a strategy for negotiating with suppliers the minimum percentage of the market value to be taken by the Government. During these negotiations, if the deferral request was initiated by DOE, DOE may consider any reasonable, customary, and applicable costs already incurred by the supplier in the performance of a valid contract for delivery. In no event shall such consideration account for any consequential damages or lost profits suffered by the supplier as a result of such deferral.

(2) DOE shall only agree to amend the contract if the negotiation results in an agreement to give the Government a fair and reasonable share of the market value.

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## PARTS 700–705 [RESERVED]

## PART 706—SECURITY POLICIES AND PRACTICES RELATING TO LABOR-MANAGEMENT RELATIONS

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AUTHORITY: Sec. 161, 68 Stat. 948, as amended; 42 U.S.C. 2201.

SOURCE: 41 FR 56776, Dec. 30, 1976, unless otherwise noted.

GENERAL

### § 706.1 Purpose.

The purpose of this part is to set forth Department of Energy, hereinafter ''DOE,'' security policies and practices in the area of labor-management relations.

### § 706.2 Basis and scope.

The specific policies contained in this part are worked out within the framework of DOE's general objectives for labor-management relations in the DOE program, namely:

(a) Wholehearted acceptance by contractors and by labor and its representatives of the moral responsibility inherent in participation in the DOE program;

(b) Development of procedures to assure (1) that all participants in the program are loyal to the United States including those whose participation involves the exercise of negotiating and disciplinary authority over bargaining units, and (2) that determination of unit, jurisdiction, and similar questions will not breach security;

(c) Continuity of production at vital DOE installations;

(d) Consistent with DOE's responsibility under the law, the least possible governmental interference with the efficient management expected from DOE contractors;

(e) Minimum interference with the traditional rights and privileges of American labor.

SECURITY POLICIES AND PROCEDURES IN NATIONAL LABOR RELATIONS BOARD PROCEEDINGS

### § 706.10 Policy.

It is policy of DOE that NLRB cases falling within the scope of the Labor Management Relations Act at the various DOE installations should be conducted in normal fashion whereever possible, on the basis of open hearings, unclassified records and published decisions. This policy does not preclude adoption of special arrangements which may be required for reasons of program security at any stage of the proceedings in particular areas.

### § 706.11 Consent elections.

In accordance with the recommendation of the President's Commission on Labor Relations in the Atomic Energy Installations, it is the policy of DOE to encourage every effort by management and labor at DOE installations to determine bargaining units and representatives by agreement and consent elections in preference to contested proceedings before the National Labor Relations Board.

### § 706.12 Administrative Law Judges.

By agreement with the National Labor Relations Board, a panel of cleared NLRB administrative law judges is maintained to facilitate resolution of questions as to the materiality of classified information in NLRB hearings and to facilitate preparation of an unclassified record. The assignment of individual administrative law judges to DOE cases remains a matter

within the discretion of the National Labor Relations Board.

### § 706.13 Clearance of counsel.

It is recognized that clearance of counsel for the parties is sometimes desirable for proper preparation of a case even though the record is to be unclassified. Clearance of counsel makes possible their participation in any closed discussions needed preparatory to making an unclassified record. Each party is responsible for requesting clearance of its counsel well in advance so that clearance requirements will not delay the proceeding. The clearance of temporary special counsel will be terminated on completion of the proceeding.

### § 706.14 DOE's role in proceedings.

If controversies within the scope of the Labor Management Relations Act arise which cannot be adjusted by mutual agreement, and contested proceedings before NLRB result, each party to such proceedings will present his own position and the evidence in support thereof with due regard for existing security rules. DOE will be continuously informed of the progress of such proceedings and will act as may appear desirable (a) to assure the protection of classified information; (b) to assure that material and relevant information is not withheld from the record on grounds of security if such information can be supplied in unclassified form; and (c) to assist in determining appropriate action where a decision may turn on data which can be expressed only in classified form.

## LOYALTY OF PARTICIPANTS

### § 706.20 Policy.

Loyalty to the United States is a paramount factor applicable to all participants in DOE program including those whose participation (although not requiring access to restricted data) involves the exercise of administrative, negotiating and disciplinary authority over bargaining units composed of employees engaged on classified work. Individuals involved in questions of loyalty will be given full opportunity to explore the questions with DOE. DOE will take such further steps as may be appropriate in the circumstances.

## CONTRACT NEGOTIATION AND ADMINISTRATION

### § 706.30 Clearance of certain local union representatives.

It is recognized that security clearance of certain union representatives may be necessary to assure opportunity for effective representation of employees in collective bargaining relationships with DOE contractors. Accordingly, DOE managers may authorize investigation for ''Q'' clearance of union officials whose functions as representatives of employees may reasonably be expected to require access to Restricted Data under NLRB and other procedures according to applicable law (LMRA, 1947); to effectively perform their representation functions in the resolution of grievances and in other collective bargaining relationships with contractors; to effectuate the recommendation of the President's Commission on Labor Relations in the Atomic Energy Installations in respect to integration of the union into the plant organization ''as to two-way channel of communication and a medium of understanding between management and workers''.

(a) In the pre-contract stage of union-management relations, the requirements of the Labor Management Relations Act normally will be the applicable criteria for determining which bargaining representatives, if any, will need access to classified material in the exercise of their functions as employee representatives.

(b) After a bargaining relationship has been established between the contractor and the representatives of its employees the nature of this relationship and the procedures followed in it normally will be the controlling criteria for determination of the access to be granted to particular persons in carrying out their functions as employee representatives. For example, many contract grievance procedures designate by title certain union and management officials who are to have definite roles in the resolution of grievances under the procedure. Investigation for ''Q'' clearance will normally be

in order for such officials, both company and union, employee, and non-employee. In addition, persons not so designated may be investigated for clearance where the company and the union advise DOE manager that their established relationships contemplate access for such persons.

### § 706.31 Clearance of conciliators and arbitrators.

Conciliators and arbitrators who are regularly assigned to DOE cases may be processed for ''Q'' clearance at the discretion of the local DOE manager, either on the manager's initiative or at the request of a contractor.

### § 706.32 Security indoctrination of non-employee representatives.

All collective bargaining representatives, company and union, who are to have access to Restricted Data, will be given appropriate security indoctrination.

### § 706.40 Final responsibility of DOE in security matters.

On all matters of security at all Government-owned, privately operated DOE installations, DOE retains absolute and final authority, and neither the security rules nor their administration are matters for collective bargaining between management and labor, insofar as DOE security regulations affect the collective bargaining process, the security policies and regulations will be made known to both parties. To the fullest extent feasible DOE will consult with representatives of management and labor in formulating security rules and regulations that affect the collective bargaining process.

# PART 707—WORKPLACE SUBSTANCE ABUSE PROGRAMS AT DOE SITES

## Subpart A—General Provisions

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707.14 Action pursuant to a determination of illegal drug use.
707.15 Collective bargaining.
707.16 Records.
707.17 Permissible actions in the event of contractor noncompliance.

AUTHORITY: 41 U.S.C. 701 *et seq.;* 42 U.S.C. 2012, 2013, 2051, 2061, 2165, 2201b, 2201i, and 2201p; 42 U.S.C. 5814 and 5815; 42 U.S.C. 7151, 7251, 7254, and 7256; 50 U.S.C. 2401 *et seq.*

SOURCE: 57 FR 32656, July 22, 1992, unless otherwise noted.

## Subpart A—General Provisions

### § 707.1 Purpose.

The Department of Energy (DOE) promulgates this part in order to protect the environment, maintain public health and safety, and safeguard the national security. This part establishes policies, criteria, and procedures for developing and implementing programs that help to maintain a workplace free from the use of illegal drugs. It applies to DOE contractors and subcontractors performing work at sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954, as amended, and to individuals with unescorted access to the control areas of certain DOE reactors. The procedures include detection of the use of illegal drugs by current or prospective contractor employees in testing designated positions.

### § 707.2 Scope.

(a) This part applies to the following contracts with DOE, at sites owned or controlled by DOE which are operated

under the authority of the Atomic Energy Act of 1954, as amended:

(1) Management and operating contracts; and

(2) Other contracts or subcontracts with a value of $25,000 or more, and which have been determined by DOE to involve:

(i) Access to or handling of classified information or special nuclear materials;

(ii) High risk of danger to life, the environment, public health and safety, or national security; or

(iii) Transportation of hazardous materials to or from a DOE site.

(b) Individuals described in § 707.7 (b) and (c) will be subject to random drug testing; to drug testing as a result of an occurrence, as described in § 707.9; and to drug testing on the basis of reasonable suspicion, as described in § 707.10.

(c) Applicants for employment in testing designated positions will be tested in accordance with § 707.8.

### § 707.3 Policy.

It is the policy of DOE to conduct its programs so as to protect the environment, maintain public health and safety, and safeguard the national security. This policy is advanced in this rule by requiring contractors and subcontractors within its scope to adopt procedures consistent with the baseline requirements of this part, and to impose significant sanctions on individuals in testing designated positions or with unescorted access to the control areas of certain DOE reactors, who use or are involved with illegal drugs.

### § 707.4 Definitions.

For the purposes of this part, the following definitions apply:

*Collection Site Person* means a technician or other person trained and qualified to take urine samples and to secure urine samples for later laboratory analysis.

*Confirmed Positive Test* means, for drugs, a finding based on a positive initial or screening test result, confirmed by another positive test on the same sample. The confirmatory test must be by the gas chromatography/mass spectrometry method.

*Counseling* means assistance provided by qualified professionals to employees, especially, but not limited to those employees whose job performance is, or might be, impaired as a result of illegal drug use or a medical-behavioral problem; such assistance may include short-term counseling and assessment, crisis intervention, referral to outside treatment facilities, and follow-up services to the individual after completion of treatment and return to work.

*Drug Certification* means a written assurance signed by an individual with known past illegal drug involvement, as a condition for obtaining or retaining a DOE access authorization, stating that the individual will refrain from using or being involved with illegal drugs while employed in a position requiring DOE access authorization (security clearance).

*Employee Assistance* means a program of counseling, referral, and educational services concerning illegal drug use and other medical, mental, emotional, or personal problems of employees, particularly those which adversely affect behavior and job performance.

*Hazardous Material* means any material subject to the placarding requirements of 49 CFR 172.504, table 1, and materials presenting a poison-inhalation hazard that must be placarded under the provisions of 49 CFR 172.505.

*Head of DOE Field Element* means an individual who is the manager or head of the DOE operations office or field office.

*Illegal Drug* means a controlled substance, as specified in Schedules I through V of the Controlled Substances Act, 21 U.S.C. 811, 812. The term ''illegal drugs'' does not apply to the use of a controlled substance in accordance with terms of a valid prescription, or other uses authorized by law.

*Management and Operating Contract* means an agreement for the operation, maintenance, or support, on behalf of the Government, of a Government-owned or controlled research, development, special production, or testing establishment wholly or principally devoted to one or more major programs of DOE.

*Medical Review Officer* (MRO) means a licensed physician, approved by DOE to perform certain functions under this

part. The MRO is responsible for receiving laboratory results generated by an employer's drug testing program, has knowledge of illegal drug use and other substance abuse disorders, and has appropriate medical training to interpret and evaluate an individual's positive test result, together with that person's medical history and any other relevant biomedical information. For purposes of this part a physician from the site occupational medical department may be the MRO.

*Occurrence* means any event or incident that is a deviation from the planned or expected behavior or course of events in connection with any Department of Energy or Department of Energy-controlled operation, if the deviation has environmental, public health and safety, or national security protection significance. Incidents having such significance include the following, or incidents of a similar nature:

(1) Injury or fatality to any person involving actions of a Department of Energy contractor employee.

(2) Involvement of nuclear explosives under Department of Energy jurisdiction which results in an explosion, fire, the spread of radioactive material, personal injury or death, or significant damage to property.

(3) Accidental release of pollutants which results or could result in a significant effect on the public or environment.

(4) Accidental release of radioactive material above regulatory limits.

*Random Testing* means the unscheduled, unannounced urine drug testing of randomly selected individuals in testing designated positions, by a process designed to ensure that selections are made in a non-discriminatory manner.

*Reasonable Suspicion* means a suspicion based on an articulable belief that an employee uses illegal drugs, drawn from particularized facts and reasonable inferences from those facts, as detailed further in § 707.10.

*Referral* means the direction of an individual toward an employee assistance program or to an outside treatment facility by the employee assistance program professional, for assistance with prevention of illegal drug use, treatment, or rehabilitation from illegal drug use or other problems. Referrals to an employee assistance program can be made by the individual (self-referral), by contractor supervisors or managers, or by a bargaining unit representative.

*Rehabilitation* means a formal treatment process aimed at the resolution of behavioral-medical problems, including illegal drug use, and resulting in such resolution.

*Special Nuclear Material* has the same meaning as in section 11aa of the Atomic Energy Act of 1954 (42 U.S.C. 2014(aa)).

*Specimen Chain of Custody Form* is a form used to document the security of the specimen from time of collection until receipt by the laboratory. This form, at a minimum, shall include specimen identifying information, date and location of collection, name and signature of collector, name of testing laboratory, and the names and signatures of all individuals who had custody of the specimen from time of collection until the specimen was prepared for shipment to the laboratory.

*Testing Designated Position* names a position whose incumbents are subject to drug testing under this part.

[57 FR 32656, July 22, 1992, as amended at 80 FR 5008, Jan. 30, 2015]

## Subpart B—Procedures

### § 707.5 Submission, approval, and implementation of a baseline workplace substance abuse program.

(a) Each contractor subject to this part shall develop a written program consistent with the requirements of this part and the guidelines of the Department of Health and Human Services and subsequent amendments to those guidelines (''Mandatory Guidelines for Federal Workplace Drug Testing Programs,'' 53 FR 11970, April 11, 1988; hereinafter ''HHS Mandatory Guidelines''), and applicable to appropriate DOE sites. Such a program shall be submitted to DOE for review and approval, and shall include at least the following baseline elements:

(1) Prohibition of the use; possession, sale, distribution, or manufacture of illegal drugs at sites owned or controlled by DOE;

(2) Plans for instruction of supervisors and employees concerning problems of substance abuse, including illegal drug use, and the availability of assistance through the employee assistance program and referrals to other resources, and the penalties that may be imposed upon employees for drug-related violations occurring on the DOE owned or controlled site;

(3) Provision for distribution to all employees engaged in performance of the contract on the DOE owned or controlled site of a statement which sets forth the contractor's policies prohibiting the possession, sale, distribution, or manufacture of illegal drugs at the DOE owned or controlled site. The statement shall include notification to all employees that as a condition of employment under the contract, the employee will:

(i) Abide by the terms of the statement; and

(ii) Notify the employer in writing of the employee's conviction under a criminal drug statute for a violation occurring on the DOE owned or controlled site no later than 10 calendar days after such conviction;

(4) Provision for written notification to the DOE contracting officer within 10 calendar days after receiving notice under paragraph (a)(3)(ii) of this section, from an employee or otherwise receiving actual notice of an employee's conviction of a drug-related offense;

(5) Provision for imposing one of the following actions, with respect to any employee who is convicted of a drug-related violation occurring in the workplace, within 30 calendar days after receiving such notice of conviction under paragraph (a)(4) of this section;

(i) Taking appropriate personnel action against such employee, up to and including termination; or

(ii) Offering such employee, consistent with the contractor's policies, an opportunity to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency. If the employee does not participate in such a rehabilitation program, the contractor must take appropriate personnel action, up to and including termination, in accordance with the contractor's policies.

(6) Commitment to make a good faith effort to maintain a workplace free of substance abuse through implementation of paragraphs (a)(1) through (a)(5) of this section.

(b) In addition, the following baseline elements must be included in programs developed by contractors that have identified testing designated positions (see § 707.7(b));

(1) Notification to DOE of the positions subject to drug testing;

(2) Prohibition of individuals in testing designated positions who are not free from the use of illegal drugs from working in those positions;

(3) Sanctions for individuals in testing designated positions who violate the prohibitions of paragraphs (a)(1) or (b)(2) of this section;

(4) Provision for:

(i) Notification, at least 60 days in advance of initiating testing, to those individuals subject to drug testing, unless the contractor is currently conducting a testing program.

(ii) Urine drug analysis of applicants for testing designated positions before final selection for employment or assignment;

(iii) Random urine drug analysis for employees in testing designated positions;

(iv) Urine drug analysis for employees in testing designated positions on the basis of reasonable suspicion, as a result of an occurrence, or as a follow-up to rehabilitation; and

(v) Random urine drug analysis and urine drug analysis on the basis of reasonable suspicion or as the result of an occurrence, for any individual with unescorted access to the control areas of certain DOE reactors (see § 707.7(c)).

(vi) Written notice to the contractor by an employee in a testing designated position of a drug-related arrest or conviction, or receipt of a positive drug test result regarding that employee, as soon as possible but within 10 calendar days of such arrest, conviction, or receipt; and

(vii) Appropriate action, if any, to be taken regarding an employee who:

(A) is arrested for or convicted of a drug-related offense; or

(B) has a positive drug test result (consistent with § 707.14).

(5) Provision to employees of the opportunity for rehabilitation, consistent with the contractor's policies, under circumstances as provided in this part (see § 707.14(b));

(6) Immediate notification to DOE security officials whenever the circumstances in connection with procedures under this part raise a security concern as provided in DOE Orders, rules and regulations; such circumstances including, but are not necessarily limited to, a determination that an individual holding a DOE access authorization has used an illegal drug.

(c) Each contractor's written policy and procedures under this part shall comply with the requirements of 10 CFR part 710, ''Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Significant Quantities of Special Nuclear Material.''

(d) Contractors are required to submit all subcontracts they believe to be within the scope of this part to the Head of DOE Field Element for a determination as to whether the subcontract falls within the scope of this part. Subcontractors so determined to be within the scope of this part shall be required to agree to comply with its requirements, as a condition of eligibility for performing the subcontract work. Each subcontractor subject to this part shall submit its plan to the appropriate prime contractor for approval; the contractor shall be responsible for periodically monitoring the implementation of the subcontractor's program for effectiveness and compliance with this part.

(e) In reviewing each proposed workplace substance abuse plan, the Head of DOE Field Element shall decide whether the program meets the applicable baseline requirements established by this part. The responsible Head of DOE Field Element will reject proposed workplace substance abuse plans that are deemed not to meet the baseline requirements. The Head of DOE Field Element shall provide the contractor with a written notification regarding the decision as to the acceptability of the plan. Nothing in this rule is intended to prohibit any contractor subject to this part from implementing workplace substance abuse requirements additional to those of the baseline, including drug testing employees and applicants for employment in any position and testing for any illegal drugs. However, the contractor shall inform Head of DOE Field Element of such additional requirements at least 30 days prior to implementation.

(f) DOE shall periodically review and evaluate each contractor's program, including the contractor's oversight of the covered subcontractors, to assure effectiveness and compliance with this part.

(g) Contractors or proposers will submit their program to the appropriate Head of DOE Field Element for review within 30 days of notification by the appropriate Head of DOE Field Element that the contract or proposed contract falls within the scope of this part. Workplace substance abuse programs, as provided in this part, shall be implemented within 30 days of approval by the Head of DOE Field Element. The Head of DOE Field Element may grant an extension to the notification or implementation period, as warranted by local conditions. Implementation may require changes to collective bargaining agreements as discussed in § 707.15 of this part.

(h) To assure consistency of application, The Head of DOE Field Element shall periodically review designated contracts and testing designated positions included in the workplace substance abuse plans approved by The Head of DOE Field Element. The Head of DOE Field Element will also periodically review implementation of programs conducted by prime contractors, to assure consistency of application among prime contracts (and subcontracts where appropriate).

(i) This part preempts any State or local law, rule, regulation, order, or standard to the extent that:

(1) compliance with both the State or local requirement and any requirements in this part is not possible; or

(2) compliance with the State or local requirement is an obstacle to the

accomplishments and execution of any requirement in this part.

[57 FR 32656, July 22, 1992,, as amended at 80 FR 5008, Jan. 30, 2015]

### § 707.6 Employee assistance, education, and training.

Contractor programs shall include the following or appropriate alternatives:

(a) Employee assistance programs emphasizing preventive services, education, short-term counseling, coordination and referral to outside agencies, and follow-up. These services shall be available to all contractor on-site employees involved in the DOE contract. The contractor has no obligation to pay the costs of any individual's counseling, treatment, or rehabilitation beyond those services provided by the contractor's employee assistance program, except as provided for in the contractor's benefits programs. DOE undertakes no obligation to pay for any individual's counseling, rehabilitation, or treatment, unless specifically provided for by contract.

(b) Education and training programs for on-site employees on a periodic basis, which will include, at a minimum, the following subjects:

(1) For all on-site employees: Health aspects of substance abuse, especially illegal drug use; safety, security, and other workplace-related problems caused by substance abuse, especially illegal drug use; the provisions of this rule; the employer's policy; and available employee assistance services.

(2) For managers and supervisors:

(i) The subjects listed in paragraph (b)(1) of this section;

(ii) Recognition of deteriorating job performance or judgment, or observation of unusual conduct which may be the result of possible illegal drug use;

(iii) Responsibility to intervene when there is deterioration in performance, or observed unusual conduct, and to offer alternative courses of action that can assist the employee in returning to satisfactory performance, judgment, or conduct, including seeking help from the employee assistance program;

(iv) Appropriate handling and referral of employees with possible substance abuse problems, especially illegal drug use; and

(v) Employer policies and practices for giving maximum consideration to the privacy interests of employees and applicants.

### § 707.7 Random drug testing requirements and identification of testing designated positions.

(a)(1) Each workplace substance abuse program will provide for random testing for evidence of the use of illegal drugs of employees in testing designated positions identified in this section.

(2) Programs developed under this part for positions identified in paragraph (b)(3) of this section shall provide for random tests at a rate equal to 30 percent of the total number of employees in testing designated positions for each 12 month period. Employees in the positions identified in paragraphs (b)(1), (b)(2), and (c) of this section will be subject to random testing at a rate equal to 100 percent of the total number of employees identified, and those identified in paragraphs (b)(1) and (b)(2) of this section may be subject to additional drug tests.

(b) The testing designated positions subject to random drug testing are:

(1) Positions determined to be covered by the Human Reliability Program (HRP), codified at 10 CFR part 712. HRP employees will be subject to the drug testing standards of this part and any additional requirements of the HRP rule.

(2) Positions identified by the contractor which entail duties where failure of an employee adequately to discharge his or her position could significantly harm the environment, public health or safety, or national security, such as:

(i) Pilots;

(ii) Firefighters;

(iii) Protective force personnel, exclusive of those covered in paragraphs (b)(1) or (b)(2) of this section, in positions involving use of firearms where the duties also require potential contact with, or proximity to, the public at large;

(iv) Personnel directly engaged in construction, maintenance, or operation of nuclear reactors; or

(v) Personnel directly engaged in production, use, storage, transportation,

or disposal of hazardous materials sufficient to cause significant harm to the environment or public health and safety.

(3) Other positions determined by the DOE, after consultation with the contractor, to have the potential to significantly affect the environment, public health and safety, or national security.

(c) Each contractor shall require random testing of any individual, whether or not an employee, who is allowed unescorted access to the control areas of the following DOE reactors: Advanced Test Reactor (ATR) and High Flux Isotope Reactor (HFIR). A confirmed positive test shall result in such an individual being denied unescorted access. If such an individual is not an employee of the contractor, that individual may be granted unescorted access only after the individual meets the conditions established in § 707.14(d) of this part. If, after restoration of unescorted access, such an individual is determined to have used illegal drugs for a second time, unescorted access shall be denied for a period of not less than three (3) years. Such an individual thereafter shall be granted unescorted access only upon a determination by the Head of DOE Field Element that a grant of unescorted access to the individual presents no unacceptable safety or security risk. If such an individual is an employee, that individual is subject to the other requirements of this part, including appropriate disciplinary measures.

(d) A position otherwise subject to testing under this part may be exempted from such testing if it is within the scope of another comparable Federal drug testing program, as determined by DOE, after consultation with the contractor, to avoid unnecessary multiple tests.

[57 FR 32656, July 22, 1992, as amended at 73 FR 3863, Jan. 23, 2008; 80 FR 5008, Jan. 30, 2015]

### § 707.8 Applicant drug testing.

An applicant for a testing designated position will be tested for the use of illegal drugs before final selection for employment or assignment to such a position. Provisions of this part do not prohibit contractors from conducting drug testing on applicants for employment in any position.

### § 707.9 Drug testing as a result of an occurrence.

When there is an occurrence which is required to be reported to DOE by the contractor, under contract provisions incorporating applicable DOE Orders, rules, and regulations, it may be necessary to test individuals in testing designated positions, or individuals with unescorted access to the control areas of the DOE reactors listed in § 707.7(c), for the use of illegal drugs, if such individuals could have caused or contributed to the conditions which caused the occurrence. For an occurrence requiring immediate notification or reporting as required by applicable DOE Orders, rules, and regulations, the contractor will require testing as soon as possible after the occurrence but within 24 hours of the occurrence, unless DOE determines that it is not feasible to do so. For other occurrences requiring notifications to DOE as required by applicable DOE Orders, rules, and regulations, the contractor may require testing.

### § 707.10 Drug testing for reasonable suspicion of illegal drug use.

(a)(1) It may be necessary to test any employee in a testing designated position, or individuals with unescorted access to the control areas of the DOE reactors listed in § 707.7(c), for the use of illegal drugs, if the behavior of such an individual creates the basis for reasonable suspicion of the use of illegal drugs. Two or more supervisory or management officials, at least one of whom is in the direct chain of supervision of the employee, or is a physician from the site occupational medical department, must agree that such testing is appropriate. Reasonable suspicion must be based on an articulable belief that an employee uses illegal drugs, drawn from particularized facts and reasonable inferences from those facts.

(2) Such a belief may be based upon, among other things:

(i) Observable phenomena, such as direct observation of:

(A) The use or possession of illegal drugs; or

(B) The physical symptoms of being under the influence of drugs;

(ii) A pattern of abnormal conduct or erratic behavior;

(iii) Arrest for a conviction of a drug related offense, or the identification of the individual as the focus of a criminal investigation into illegal drug possession use, or trafficking;

(iv) Information that is either provided by a reliable and credible source or is independently corroborated;

(v) Evidence that an employee has tampered with a drug test; or

(vi) Temperature of the urine specimen is outside the range of 32–38 degrees centigrade or 90–100 degrees Fahrenheit.

(b) The fact that an employee had a confirmed positive test for the use for the use of illegal drugs at some prior time, or has undergone a period of rehabilitation or treatment, will not, in and of itself, be grounds for testing on the basis of reasonable suspicion.

(c) The requirements of this part relating to the testing for the use of illegal drugs are not intended to prohibit the contractor from pursuing other existing disciplinary procedures or from requiring medical evaluation of any employee exhibiting aberrant or unusual behavior.

[57 FR 32656, July 22, 1992, as amended at 80 FR 5008, Jan. 30, 2015]

### § 707.11 Drugs for which testing is performed.

Where testing is performed under this part, at a minimum, contractors will be required to test for the use of the following drugs or classes of drugs: marijuana; cocaine; opiates; phencyclidine; and amphetamines. However, when conducting reasonable suspicion or occurrence testing, the contractor may test for any drug listed in Schedules I or II of the Controlled Substances Act.

### § 707.12 Specimen collection, handling and laboratory analysis for drug testing.

(a) Procedures for providing urine specimens must allow individual privacy, unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided. Contractors shall utilize a chain of custody procedure for maintaining control and accountability from point of collection to final disposition of specimens, and testing laboratories shall use appropriate cutoff levels in screening specimens to determine whether they are negative or positive for a specific drug, consistent with the HHS Mandatory Guidelines (see § 707.5(a)). The contractor shall ensure that only testing laboratories certified by the Department of Health and Human Services, are utilized.

(b)(1) If the individual refuses to cooperate with the urine collection (e.g., refusal to provide a specimen, or to complete paperwork), then the collection site person shall inform the MRO and shall document the non-cooperation on the specimen chain of custody form. The MRO shall report the failure to cooperate to the appropriate management authority, who shall report to DOE if the individual holds an access authorization. Individuals so failing to cooperate shall be treated in all respects as if they had been tested and had been determined to have used an illegal drug. The contractor may apply additional sanctions consistent with its disciplinary policy.

(2) The collection site person shall ascertain that there is a sufficient amount of urine to conduct an initial test, a confirmatory test, and a retest, in accordance with the HHS Mandatory Guidelines. If there is not a sufficient amount of urine, additional urine will be collected in a separate container. The individual may be given reasonable amounts of liquid and a reasonable amount of time in which to provide the specimen required. The individual and the collection site person must keep the specimen in view at all times. In the event that the individual fails to provide a sufficient amount of urine, the amount collected will be noted on the ''Urine Sample Custody Document.'' In this case, the collection site person will telephone the individual's supervisor who will determine the next appropriate action. This may include deciding to reschedule the individual for testing, to return the individual to

his or her work site and initiate disciplinary action, or both.

[57 FR 32656, July 22, 1992, as amended at 73 FR 3863, Jan. 23, 2008; 80 FR 5008, Jan. 30, 2015]

### § 707.13 Medical review of results of tests for illegal drug use.

(a) All test results shall be submitted for medical review by the MRO. A confirmed positive test for drugs shall consist of an initial test performed by the immunoassay method, with positive results on that initial test confirmed by another test, performed by the gas chromatography/mass spectrometry method (GC/MS). This procedure is described in the HHS Mandatory Guidelines.

(b) The Medical Review Officer will consider the medical history of the employee or applicant, as well as any other relevant biomedical information. When there is a confirmed positive test result, the employee or applicant will be given an opportunity to report to the MRO the use of any prescription or over-the-counter medication. If the MRO determines that there is a legitimate medical explanation for a confirmed positive test result, consistent with legal and non-abusive drug use, the MRO will certify that the test results do not meet the conditions for a determination of use of illegal drugs. If no such certification can be made, the MRO will make a determination of use of illegal drugs. Determinations of use of illegal drugs will be made in accordance with the criteria provided in the Medical Review Officer Manual issued by the Department of Health and Human Services.

[57 FR 32656, July 22, 1992, as amended at 80 FR 5008, Jan. 30, 2015]

### § 707.14 Action pursuant to a determination of illegal drug use.

(a) When an applicant for employment has been tested and determined to have used an illegal drug, processing for employment will be terminated and the applicant will be so notified.

(b)(1) When an employee who is in a testing designated position has been tested and determined to have used an illegal drug, the contractor shall immediately remove that employee from the testing designated position; if such employee also holds, or is an applicant for, an access authorization, then the contractor shall immediately notify DOE security officials for appropriate adjudication. If this is the first determination of use of illegal drugs by that employee (for example, the employee has not previously signed a DOE drug certification, and has not previously tested positive for use of illegal drugs), the employee may be offered a reasonable opportunity for rehabilitation, consistent with the contractor's policies. If rehabilitation is offered, the employee will be placed in a non-testing designated position, which does not require a security clearance, provided there is such an acceptable position in which the individual can be placed during rehabilitation; if there is no acceptable non-testing designated position, the employee will be placed on sick, annual, or other leave status, for a reasonable period sufficient to permit rehabilitation. However, the employee will not be protected from disciplinary action which may result from violations of work rules other than a positive test result for illegal drugs.

(2) Following a determination by the site occupational medical department, after counseling or rehabilitation, that the employee can safely return to duty, the contractor may offer the employee reinstatement, in the same or a comparable position to the one held prior to the removal, consistent with the contractor's policies and the requirements of 10 CFR part 710. Failure to take the opportunity for rehabilitation, if it has been made available, for the use of illegal drugs, will require significant disciplinary action up to and including removal from employment under the DOE contract, in accordance with the contractor's policies. Any employee who is twice determined to have used illegal drugs shall in all cases be removed from employment under the DOE contract. Also, if an employee who has signed a DOE drug certification violates the terms of the certification, DOE shall conduct a timely review of the circumstances of such violation, and the individual's continued eligibility for a DOE access authorization shall be determined under the provisions of 10 CFR part 710,

''Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Significant Quantities of Special Nuclear Material.''

(c) An employee who has been removed from a testing designated position because of the use of illegal drugs may not be returned to such position until that employee has:

(1) Successfully completed counseling or a program of rehabilitation;

(2) Undergone a urine drug test with a negative result; and

(3) Been evaluated by the site occupational medical department, which has determined that the individual is capable of safely returning to duty.

(d) An individual who is not an employee of a contractor who has been denied unescorted access because of the use of illegal drugs may not have the unescorted access reinstated until that individual has:

(1) Provided evidence of successful completion of counseling or a program of rehabilitation;

(2) Undergone a urine drug test with a negative result; and

(3) Been evaluated by the site occupational medical department, which has determined that the individual is capable of being permitted unescorted access to a reactor control area.

(e) If a DOE access authorization is involved, DOE must be notified of a contractor's intent to return to a testing designated position an employee removed from such duty for use of illegal drugs. Positions identified in § 707.7(b)(1) and (2) will require DOE approval prior to return to a testing designated position.

(f) An individual who has been notified of a positive test result may request a retest of the same sample at the same or another certified laboratory. The individual shall bear the costs of transportation and/or testing of the specimen. The contractor will inform employees of their right to request a retest under the provisions of this paragraph.

(g) After an employee determined to have used illegal drugs has been returned to duty, the employee shall be subject to unannounced drug testing, at intervals, for a period of 12 months.

[57 FR 32656, July 22, 1992,, as amended at 80 FR 5008, Jan. 30, 2015]

### § 707.15 Collective bargaining.

When establishing drug testing programs, contractors who are parties to collective bargaining agreements will negotiate with employee representatives, as appropriate, under labor relations laws or negotiated agreements. Such negotiation, however, cannot change or alter the requirements of this rule because DOE security requirements themselves are non-negotiable under the security provisions of DOE contracts. Employees covered under collective bargaining agreements will not be subject to the provisions of this rule until those agreements have been modified, as necessary; provided, however, that if one year after commencement of negotiation the parties have failed to reach agreement, an impasse will be determined to have been reached and the contractor will unilaterally implement the requirements of this rule.

### § 707.16 Records.

(a) Confirmed positive test results shall be provided to the Medical Review Officer and other contractor and DOE officials with a need to know. Any other disclosure may be made only with the written consent of the individual.

(b) Contractors shall maintain maximum confidentiality of records related to illegal drug use, to the extent required by applicable statutes and regulations (including, but not limited to, 42 U.S.C. 290dd–3, 42 U.S.C. 290ee–3, and 42 CFR part 2). If such records are sought from the contractor for criminal investigations, or to resolve a question or concern relating to the Personnel Assurance Program certification or access authorization under 10 CFR part 710, any applicable procedures in statute or regulation for disclosure of such information shall be followed. Moreover, owing to DOE's express environmental, public health and safety, and national security interests, and the need to exercise proper contractor oversight, DOE must be kept fully apprised of all aspects of the contractor's program, including such information as incidents involving reasonable suspicion, occurrences, and

confirmed test results, as well as information concerning test results in the aggregate.

(c) Unless otherwise approved by DOE, the contractors shall ensure that all laboratory records relating to positive drug test results, including initial test records and chromatographic tracings, shall be retained by the laboratory in such a manner as to allow retrieval of all information pertaining to the individual urine specimens for a minimum period of five years after completion of testing of any given specimen, or longer if so instructed by DOE or by the contractor. In addition, a frozen sample of all positive urine specimens shall be retained by the laboratory for at least six months, or longer if so instructed by DOE.

(d) The contractor shall maintain as part of its medical records copies of specimen chain of custody forms.

(e) The specimen chain of custody form will contain the following information:

(1) Date of collection;

(2) Tested person's name;

(3) Tested employee/applicant's social security number or other identification number unique to the individual;

(4) Specimen number;

(5) Type of test (random, applicant, occurrence, reasonable suspicion, follow-up, or other);

(6) Temperature range of specimen;

(7) Remarks regarding unusual behavior or conditions;

(8) Collector's signature; and

(9) Certification signature of specimen provider certifying that specimen identified is in fact the specimen the individual provided.

### § 707.17 Permissible actions in the event of contractor noncompliance.

Actions available to DOE in the event of contractor noncompliance with the provisions of this part or otherwise performing in a manner inconsistent with its approved program include, but are not limited to, suspension or debarment, contract termination, or reduction in fee in accordance with the contract terms.

# PART 708—DOE CONTRACTOR EMPLOYEE PROTECTION PROGRAM

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AUTHORITY: 42 U.S.C. 2201(b), 2201(c), 2201(i), and 2201(p); 42 U.S.C. 5814 and 5815; 42 U.S.C. 7251, 7254, 7255, and 7256; and 5 U.S.C. Appendix 3.

SOURCE: 64 FR 12870, Mar. 15, 1999, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 708 appear at 78 FR 52391, Aug. 23, 2013.

## Subpart A—General Provisions

### § 708.1 What is the purpose of this part?

This part provides procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers for disclosure of information concerning danger to public or worker health or safety, substantial violations of law, or gross mismanagement; for participation in Congressional proceedings; or for refusal to participate in dangerous activities.

### § 708.2 What are the definitions of terms used in this part?

For purposes of this part:

*Contractor* means a seller of goods or services who is a party to:

(1) A management and operating contract or other type of contract with DOE to perform work directly related to activities at DOE-owned or -leased facilities, or

(2) A subcontract under a contract of the type described in paragraph (1) of this definition, but only with respect to work related to activities at DOE-owned or -leased facilities.

*Day* means a calendar day.

*Discovery* means a process used to enable the parties to learn about each other's evidence before a hearing takes place, including oral depositions, written interrogatories, requests for admissions, inspection of property and requests for production of documents.

*DOE Official* means any officer or employee of DOE whose duties include program management or the investigation or enforcement of any law, rule, or regulation relating to Government contractors or the subject matter of a contract.

*EC Director* means the Director of the Office of Employee Concerns at DOE Headquarters, or any official to whom the Director delegates his or her functions under this part.

*Employee* means a person employed by a contractor, and any person previously employed by a contractor if that person's complaint alleges that employment was terminated for conduct described in § 708.5 of this subpart.

*Field element* means a DOE field-based office that is responsible for the management, coordination, and administration of operations at a DOE facility.

*Head of Field Element* means the manager or head of a DOE operations office or field office, or any official to whom those individuals delegate their functions under this part.

*Administrative Judge* means an individual appointed by the OHA Director to conduct a hearing on a complaint filed under this part.

*Management and operating contract* means an agreement under which DOE contracts for the operation, maintenance, or support of a Government-owned or -leased research, development, special production, or testing establishment that is wholly or principally devoted to one or more of the programs of DOE.

*Mediation* means an informal, confidential process in which a neutral third person assists the parties in reaching a mutually acceptable resolution of their dispute; the neutral third person does not render a decision.

*OHA Director* means the Director of the Office of Hearings and Appeals, or any official to whom the Director delegates his or her functions under this part.

*Party* means an employee, contractor, or other party named in a proceeding under this part.

*Retaliation* means an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (*e.g.*, discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities described in § 708.5 of this subpart.

*You* means the employee who files a complaint under this part, or the complainant.

### § 708.3 What employee complaints are covered?

This part applies to a complaint of retaliation filed by an employee of a contractor that performs work on behalf of DOE, directly related to activities at a DOE-owned or -leased site, if the complaint stems from a disclosure, participation, or refusal described in § 708.5.

### § 708.4 What employee complaints are not covered?

If you are an employee of a contractor, you may not file a complaint against your employer under this part if:

(a) The complaint is based on race, color, religion, sex, age, national origin, or other similar basis; or

(b) The complaint involves misconduct that you, acting without direction from your employer, deliberately caused, or in which you knowingly participated; or

(c) Except as provided in § 708.15(a), the complaint is based on the same facts for which you have chosen to pursue a remedy available under:

(1) Department of Labor regulations at 29 CFR part 24, ''Procedures for the Handling of Discrimination Complaints under Federal Employee Protection Statutes;''

(2) Federal Acquisition Regulations, 48 CFR part 3, ''Federal Acquisition Regulation; Whistleblower Protection for Contractor Employees (Ethics);'' or

(3) State or other applicable law, including final and binding grievance-arbitration, as described in § 708.15 of subpart B; or

(d) The complaint is based on the same facts in which you, in the course of a covered disclosure or participation, improperly disclosed Restricted Data, national security information, or any other classified or sensitive information in violation of any Executive Order, statute, or regulation. This part does not override any provision or requirement of any regulation pertaining to Restricted Data, national security information, or any other classified or sensitive information; or

(e) The complaint deals with ''terms and conditions of employment'' within the meaning of the National Labor Relations Act, except as provided in § 708.5.

### § 708.5 What employee conduct is protected from retaliation by an employer?

If you are an employee of a contractor, you may file a complaint against your employer alleging that you have been subject to retaliation for:

(a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals—

(1) A substantial violation of a law, rule, or regulation;

(2) A substantial and specific danger to employees or to public health or safety; or

(3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or

(b) Participating in a Congressional proceeding or an administrative proceeding conducted under this part; or

(c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would—

(1) Constitute a violation of a federal health or safety law; or

(2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

[57 FR 7541, Mar. 3, 1992, as amended at 65 FR 6319, Feb. 9, 2000]

### § 708.6 What constitutes "a reasonable fear of serious injury?"

Participation in an activity, policy, or practice may cause an employee to have a reasonable fear of serious injury that justifies a refusal to participate if:

(a) A reasonable person, under the circumstances that confronted the employee, would conclude there is a substantial risk of a serious accident, injury, or impairment of health or safety resulting from participation in the activity, policy, or practice; or

(b) An employee, because of the nature of his or her employment responsibilities, does not have the training or skills needed to participate safely in the activity or practice.

[57 FR 7541, Mar. 3, 1992, as amended at 65 FR 6319, Feb. 9, 2000]

### § 708.7 What must an employee do before filing a complaint based on retaliation for refusal to participate?

You may file a complaint for retaliation for refusing to participate in an activity, policy, or practice only if:

(a) Before refusing to participate in the activity, policy, or practice, you asked your employer to correct the violation or remove the danger, and your employer refused to take such action; and

(b) By the 30th day after you refused to participate, you reported the violation or dangerous activity, policy, or practice to a DOE official, a member of Congress, another government official with responsibility for the oversight of the conduct of operations at the DOE site, your employer, or any higher tier contractor, and stated your reasons for refusing to participate.

### § 708.8 Does this part apply to pending cases?

The procedures in this part apply prospectively in any complaint proceeding pending on the effective date of this part.

### § 708.9 When is a complaint or other document considered to be "filed" under this part?

Under this part, a complaint or other document is considered ''filed'' on the date it is mailed or on the date it is personally delivered to the specified official or office.

## Subpart B—Employee Complaint Resolution Process

### § 708.10 Where does an employee file a complaint?

(a) If you were employed by a contractor whose contract is handled by a contracting officer located in DOE Headquarters when the alleged retaliation occurred, you must file two copies of your written complaint with the EC Director.

(b) If you were employed by a contractor at a DOE field facility or site when the alleged retaliation occurred, you must file two copies of your written complaint with the Head of Field Element at the DOE field element with jurisdiction over the contract.

### § 708.11 Will an employee's identity be kept confidential if the employee so requests?

No. The identity of an employee who files a complaint under this part appears on the complaint. A copy of the complaint is provided to the contractor and it becomes a public document.

### § 708.12 What information must an employee include in a complaint?

Your complaint does not need to be in any specific form but must be signed by you and contain the following:

(a) A statement specifically describing

(1) The alleged retaliation taken against you and

(2) The disclosure, participation, or refusal that you believe gave rise to the retaliation;

(b) A statement that you are not currently pursuing a remedy under State or other applicable law, as described in § 708.15 of this subpart;

(c) A statement that all of the facts that you have included in your complaint are true and correct to the best of your knowledge and belief; and

(d) An affirmation, as described in § 708.13 of this subpart, that you have exhausted (completed) all applicable grievance or arbitration procedures.

### § 708.13 What must an employee do to show that all grievance-arbitration procedures have been exhausted?

(a) To show that you have exhausted all applicable grievance-arbitration procedures, you must:

(1) State that all available opportunities for resolution through an applicable grievance-arbitration procedure have been exhausted, and provide the date on which the grievance-arbitration procedure was terminated and the reasons for termination; or

(2) State that you filed a grievance under applicable grievance-arbitration procedures, but more than 150 days have passed and a final decision on it has not been issued, and provide the date that you filed your grievance; or

(3) State that your employer has established no grievance-arbitration procedures.

(b) If you do not provide the information specified in § 708.13(a), your complaint may be dismissed for lack of jurisdiction as provided in § 708.17 of this subpart.

### § 708.14 How much time does an employee have to file a complaint?

(a) You must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation.

(b) The period for filing a complaint does not include time spent attempting to resolve the dispute through an internal company grievance-arbitration procedure. The time period for filing stops running on the day the internal grievance is filed and begins to run again on the earlier of:

(1) The day after such dispute resolution efforts end; or

(2) 150 days after the internal grievance was filed if a final decision on the grievance has not been issued.

(c) The period for filing a complaint does not include time spent resolving jurisdictional issues related to a complaint you file under State or other applicable law. The time period for filing stops running on the date the complaint under State or other applicable law is filed and begins to run again the day after a final decision on the jurisdictional issues is issued.

(d) If you do not file your complaint during the 90-day period, the Head of Field Element or EC Director (as applicable) will give you an opportunity to show any good reason you may have for not filing within that period, and that official may, in his or her discretion, accept your complaint for processing.

### § 708.15 What happens if an employee files a complaint under this part and also pursues a remedy under State or other law?

(a) You may not file a complaint under this part if, with respect to the same facts, you choose to pursue a remedy under State or other applicable law, including final and binding grievance-arbitration procedures, unless:

(1) Your complaint under State or other applicable law is dismissed for lack of jurisdiction;

(2) Your complaint was filed under 48 CFR part 3, Subpart 3.9 and the Inspector General, after conducting an initial inquiry, determines not to pursue it; or

(3) You have exhausted grievance-arbitration procedures pursuant to § 708.13, and issues related to alleged retaliation for conduct protected under § 708.5 remain.

(b) Pursuing a remedy other than final and binding grievance-arbitration procedures does not prevent you from filing a complaint under this part.

(c) You are considered to have filed a complaint under State or other applicable law if you file a complaint, or other pleading, with respect to the same facts in a proceeding established or mandated by State or other applicable law, whether you file such complaint before, concurrently with, or after you file a complaint under this part.

(d) If you file a complaint under State or other applicable law after filing a complaint under this part, your complaint under this regulation will be dismissed under § 708.17(c)(3).

[57 FR 7541, Mar. 3, 1992, as amended at 65 FR 6319, Feb. 9, 2000]

### § 708.16 Will a contractor or a labor organization that represents an employee be notified of an employee's complaint and be given an opportunity to respond with information?

(a) By the 15th day after receiving your complaint, the Head of Field Element or EC Director (as applicable) will provide your employer a copy of your complaint. Your employer has 10 days from receipt of your complaint to submit any comments it wishes to make regarding the allegations in the complaint.

(b) If you are part of a bargaining unit represented for purposes of collective bargaining by a labor organization, the Head of Field Element or EC Director (as applicable) will provide your representative a copy of your complaint by the 15th day after receiving it. The labor organization will be advised that it has 10 days from the receipt of your complaint to submit any comments it wishes to make regarding the allegations in the complaint.

### § 708.17 When may DOE dismiss a complaint for lack of jurisdiction or other good cause?

(a) The Head of Field Element or EC Director (as applicable) may dismiss your complaint for lack of jurisdiction or for other good cause after receiving your complaint, either on his or her own initiative or at the request of a party named in your complaint. Such decisions are generally issued by the 15th day after the receipt of your employer's comments.

(b) The Head of Field Element or EC Director (as applicable) will notify you by certified mail, return receipt requested, if your complaint is dismissed for lack of jurisdiction or other good cause, and give you specific reasons for the dismissal, and will notify other parties of the dismissal.

(c) Dismissal for lack of jurisdiction or other good cause is appropriate if:

(1) Your complaint is untimely; or

(2) The facts, as alleged in your complaint, do not present issues for which relief can be granted under this part; or

(3) You filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this part; or

(4) Your complaint is frivolous or without merit on its face; or

(5) The issues presented in your complaint have been rendered moot by subsequent events or substantially resolved; or

(6) Your employer has made a formal offer to provide the remedy that you request in your complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under this part.

### § 708.18 How can an employee appeal dismissal of a complaint for lack of jurisdiction or other good cause?

(a) If your complaint is dismissed by the Head of Field Element or EC Director, the administrative process is terminated unless you appeal the dismissal to the OHA Director by the 10th day after you receive the notice of dismissal as evidenced by a receipt for delivery of certified mail.

(b) If you appeal a dismissal to the OHA Director, you must send copies of your appeal to the Head of Field Element or EC Director (as applicable) and all parties. Your appeal must include a copy of the notice of dismissal, and state the reasons why you think the dismissal was erroneous.

(c) The OHA Director will issue a decision on your appeal and notify the parties of the decision by the 30th day after it is received.

(d) The OHA Director's decision, either upholding the dismissal by the Head of Field Element or EC Director or ordering further processing of your complaint, is the final decision on your appeal, unless a party files a petition for Secretarial review by the 30th day after receiving the appeal decision.

### § 708.19 How can a party obtain review by the Secretary of Energy of a decision on appeal of a dismissal?

(a) By the 30th day after receiving a decision on an appeal under § 708.18 from the OHA Director, any party may file a petition for Secretarial review of a dismissal with the Office of Hearings and Appeals.

(b) By the 15th day after filing the petition for Secretarial review, a party must file a statement setting forth the arguments in support of its position. A copy of the statement must be served on the other parties, who may file a response by the 20th day after receipt of the statement. Any response must also be served on the other parties.

(c) All submissions permitted under this section must be filed with the Office of Hearings and Appeals.

(d) After a petition for Secretarial review is filed, the Secretary (or his or her delegee) will issue the final agency decision on jurisdiction over the complaint. The Secretary will reverse or revise an appeal decision by the OHA Director only under extraordinary circumstances. In the event he or she determines that a revision in the appeal decision is appropriate, the Secretary will direct the OHA Director to issue an order either upholding the dismissal by the Head of Field Element or EC Director or ordering further processing of your complaint.

### § 708.20 Will DOE encourage the parties to resolve the complaint informally?

(a) Yes. The Head of Field Element or EC Director (as applicable) may recommend that the parties attempt to resolve the complaint informally, for example, through mediation.

(b) The period for attempting informal resolution of the complaint may not exceed 30 days from the date you filed your complaint, unless the parties agree to extend the time.

(c) The 30-day period permitted for informal resolution of the complaint stops running when a request to dismiss your complaint on jurisdictional grounds is filed with the Head of Field Element or EC Director, and begins to run again on the date the OHA Director returns the complaint to the Head of Field Element or EC Director for further processing.

(d) If the parties resolve the complaint informally, the Head of Field Element or EC Director (as applicable) must be given a copy of the settlement agreement or a written statement from you withdrawing the complaint.

## Subpart C—Investigation, Hearing and Decision Process

### § 708.21 What are the employee's options if the complaint cannot be resolved informally?

(a) If the attempt at informal resolution is not successful, the Head of Field Element or EC Director (as applicable) will notify you in writing that you have the following options:

(1) Request that your complaint be referred to the Office of Hearings and Appeals for a hearing without an investigation; or

(2) Request that your complaint be referred to the Office of Hearings and Appeals for an investigation followed by a hearing.

(b) You must notify the Head of Field Element or EC Director (as applicable), in writing, by the 20th day after receiving notice of your options, whether you request referral of your complaint to the Office of Hearings and Appeals for a hearing without an investigation, or an investigation followed by a hearing.

(c) If the Head of Field Element or EC Director does not receive your response to the notice of options by the 20th day after your receipt of that notice, DOE will consider your complaint withdrawn.

(d) If you timely request referral to the Office of Hearings and Appeals, the Head of Field Element or EC Director

(as applicable) will forward your complaint to the OHA Director by the 5th day after receipt of your request.

(e) The Head of the Field Element or EC Director (as applicable) will notify all parties that the complaint has been referred to the Office of Hearings and Appeals, and state whether you have requested a hearing without an investigation or requested an investigation followed by a hearing.

### § 708.22 What process does the Office of Hearings and Appeals use to conduct an investigation of the complaint?

(a) If you request a hearing without an investigation, the OHA Director will not initiate an investigation even if another party requests one.

(b) If you request an investigation followed by a hearing, the OHA Director will appoint a person from the Office of Hearings and Appeals to conduct the investigation. The investigator may not participate or advise in the initial or final agency decision on your complaint.

(c) The investigator will determine the appropriate scope of investigation based on the circumstances of the complaint. The investigator may enter and inspect places and records; make copies of records; interview persons alleged to have been involved in retaliation and other employees of the charged contractor who may have relevant information; take sworn statements; and require the production of any documents or other evidence.

(d) A contractor must cooperate fully with the investigator by making employees and all pertinent evidence available upon request.

(e) A person being interviewed in an investigation has the right to be represented by a person of his or her choosing.

(f) Parties to the complaint are not entitled to be present at interviews conducted by an investigator.

(g) If a person other than the complainant requests that his or her identity be kept confidential, the investigator may grant confidentiality, but must advise such person that confidentiality means that the Office of Hearings and Appeals will not identify the person as a source of information to anyone outside the Office of Hearings and Appeals, except as required by statute or other law, or as determined by the OHA Director to be unavoidable.

### § 708.23 How does the Office of Hearings and Appeals issue a report of investigation?

(a) The investigator will complete the investigation and issue a report of investigation by the 60th day after the complaint is received by the Office of Hearings and Appeals, unless the OHA Director, for good cause, extends the investigation for no more than 30 days.

(b) The investigator will provide copies of the report of investigation to the parties. The investigation will not be reopened after the report of investigation is issued.

(c) If the parties informally resolve the complaint (e.g., through mediation) after an investigation is started, you must notify the OHA Director in writing of your decision to withdraw the complaint.

### § 708.24 Will there always be a hearing after a report of investigation is issued?

(a) No. An employee may withdraw a hearing request after the report of investigation is issued. However, the hearing may be canceled only if all parties agree that they do not want a hearing.

(b) If the hearing is canceled, the Administrative Judge will issue an initial agency decision pursuant to § 708.31 of this subpart.

### § 708.25 Who will conduct the hearing?

(a) The OHA Director will appoint a Administrative Judge from the Office of Hearings and Appeals to conduct a hearing.

(b) The Administrative Judge may not be subject to the supervision or direction of the investigator.

### § 708.26 When and where will the hearing be held?

(a) The Administrative Judge will schedule a hearing to be held by the 90th day after receipt of the complaint, or issuance of the report of investigation, whichever is later. Any extension of the hearing date must be approved by the OHA Director.

(b) The Administrative Judge will schedule the hearing for a location near the site where the alleged retaliation occurred or your place of employment, or at another location that is appropriate considering the circumstances of a particular case.

### § 708.27 May the Administrative Judge recommend mediation to the parties?

The Administrative Judge may recommend, but may not require, that the parties attempt to resolve the complaint through mediation or other informal means at any time before issuance of an initial agency decision on the complaint.

### § 708.28 What procedures govern a hearing conducted by the Office of Hearings and Appeals?

(a) In all hearings under this part:

(1) The parties have the right to be represented by a person of their choosing or to proceed without representation. The parties are responsible for producing witnesses in their behalf, including requesting the issuance of subpoenas, if necessary;

(2) Testimony of witnesses is given under oath or affirmation, and witnesses must be advised of the applicability of 18 U.S.C. 1001 and 1621, dealing with the criminal penalties associated with false statements and perjury;

(3) Witnesses are subject to cross-examination;

(4) Formal rules of evidence do not apply, but OHA may use the Federal Rules of Evidence as a guide; and

(5) A court reporter will make a transcript of the hearing.

(b) The Administrative Judge has all powers necessary to regulate the conduct of proceedings:

(1) The Administrative Judge may order discovery at the request of a party, based on a showing that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint;

(2) The Administrative Judge may permit parties to obtain discovery by any appropriate method, including deposition upon oral examination or written questions; written interrogatories; production of documents or things; permission to enter upon land or other property for inspection and other purposes; and requests for admission;

(3) The Administrative Judge may issue subpoenas for the appearance of witnesses on behalf of either party, or for the production of specific documents or other physical evidence;

(4) The Administrative Judge may rule on objections to the presentation of evidence; exclude evidence that is immaterial, irrelevant, or unduly repetitious; require the advance submission of documents offered as evidence; dispose of procedural requests; grant extensions of time; determine the format of the 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; 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;

(5) The Administrative Judge may, at the request of a party or on his or her own initiative, dismiss a claim, defense, or party and make adverse findings upon the failure of a party or the party's representative to comply with a lawful order of the Administrative Judge, or, without good cause, to attend a hearing;

(6) The Administrative Judge, upon request of a party, may allow the parties a reasonable time to file pre-hearing briefs or written statements with respect to material issues of fact or law. Any pre-hearing submission must be limited to the issues specified and filed within the time prescribed by the Administrative Judge.

(7) The parties are entitled to make oral closing arguments, but post-hearing submissions are only permitted by direction of the Administrative Judge.

(8) Parties allowed to file written submissions must serve copies upon the other parties within the time prescribed by the Administrative Judge.

(9) The Administrative Judge is prohibited, beginning with his or her appointment and until a final agency decision is issued, from initiating or otherwise engaging in *ex parte* (private) discussions with any party on the merits of the complaint.

### § 708.29 What must the parties to a complaint prove?

The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal.

### § 708.30 What process does the Administrative Judge follow to issue an initial agency decision?

(a) The Administrative Judge will issue an initial agency decision on your complaint by the 60th day after the later of:

(1) The date the Administrative Judge approves the parties' agreement to cancel the hearing;

(2) The date the Administrative Judge receives the transcript of the hearing; or

(3) The date the Administrative Judge receives post-hearing submissions permitted under § 708.28(b)(7) of this subpart.

(b) The Administrative Judge will serve the initial agency decision on all parties.

(c) An initial agency decision issued by the Administrative Judge will contain appropriate findings, conclusions, an order, and the factual basis for each finding, whether or not a hearing has been held on the complaint. In making such findings, the Administrative Judge may rely upon, but is not bound by, the report of investigation.

(d) If the Administrative Judge determines that an act of retaliation has occurred, the initial agency decision will include an order for any form of relief permitted under § 708.36.

(e) If the Administrative Judge determines that an act of retaliation has not occurred, the initial agency decision will state that the complaint is denied.

### § 708.31 If no hearing is conducted, what is the process for issuing an initial agency decision?

(a) If no party wants a hearing after the issuance of a report of investigation, the Administrative Judge will issue an initial agency decision by the 60th day after the hearing is canceled pursuant to § 708.24. The standards in § 708.30, governing the issuance of an initial agency decision, apply whether or not a hearing has been held on the complaint.

(b) The Administrative Judge will serve the initial agency decision on all parties.

### § 708.32 Can a dissatisfied party appeal an initial agency decision?

(a) Yes. By the 15th day after receiving an initial agency decision from the Administrative Judge, any party may file a notice of appeal with the OHA Director requesting review of the initial agency decision.

(b) A party who appeals an initial agency decision (the appellant) must serve a copy of the notice of appeal on all other parties.

(c) A party who receives an initial agency decision by a Administrative Judge has not exhausted its administrative remedies until an appeal has been filed with the OHA Director and a decision granting or denying the appeal has been issued.

### § 708.33 What is the procedure for an appeal?

(a) By the 15th day after filing a notice of appeal under § 708.32, the appellant must file a statement identifying the issues that it wishes the OHA Director to review. A copy of the statement must be served on the other parties, who may file a response by the 20th day after receipt of the statement. Any response must also be served on the other parties.

(b) In considering the appeal, the OHA Director:

(1) May initiate an investigation of any statement contained in the request for review and utilize any relevant facts obtained by such investigation in conducting the review of the initial agency decision;

(2) May solicit and accept submissions from any party that are relevant

to the review. The OHA Director may establish appropriate times to allow for such submissions;

(3) May consider any other source of information that will advance the evaluation, provided that all parties are given an opportunity to respond to all third person submissions; and

(4) Will close the record on appeal after receiving the last submission permitted under this section.

### § 708.34 What is the process for issuing an appeal decision?

(a) If there is no appeal of an initial agency decision, and the time for filing an appeal has passed, the initial agency decision becomes the final agency decision.

(b) If there is an appeal of an initial agency decision, the OHA Director will issue an appeal decision based on the record of proceedings by the 60th day after the record is closed.

(1) An appeal decision issued by the OHA Director will contain appropriate findings, conclusions, an order, and the factual basis for each finding, whether or not a hearing has been held on the complaint. In making such findings, the OHA Director may rely upon, but is not bound by, the report of investigation and the initial agency decision.

(2) If the OHA Director determines that an act of retaliation has occurred, the appeal decision will include an order for any form of relief permitted under § 708.36.

(3) If the OHA Director determines that the contractor charged has not committed an act of retaliation, the appeal decision will deny the complaint.

(c) The OHA Director will send an appeal decision to all parties and to the Head of Field Element or EC Director having jurisdiction over the contract under which you were employed when the alleged retaliation occurred.

(d) The appeal decision issued by the OHA Director is the final agency decision unless a party files a petition for Secretarial review by the 30th day after receiving the appeal decision.

### § 708.35 How can a party obtain review by the Secretary of Energy of an appeal decision?

(a) By the 30th day after receiving an appeal decision from the OHA Director, any party may file a petition for Secretarial review with the Office of Hearings and Appeals.

(b) By the 15th day after filing a petition for Secretarial review, the petitioner must file a statement identifying the issues that it wishes the Secretary to consider. A copy of the statement must be served on the other parties, who may file a response by the 20th day after receipt of the statement. Any response must also be served on the other parties.

(c) All submissions permitted under this section must be filed with the Office of Hearings and Appeals.

(d) After a petition for Secretarial review is filed, the Secretary (or his or her delegee) will issue the final agency decision on the complaint. The Secretary will reverse or revise an appeal decision by the OHA Director only under extraordinary circumstances. In the event the Secretary determines that a revision in the appeal decision is appropriate, the Secretary will direct the OHA Director to issue a revised decision which is the final agency action on the complaint.

### § 708.36 What remedies for retaliation may be ordered in initial and final agency decisions?

(a) *General remedies*. If the initial or final agency decision determines that an act of retaliation has occurred, it may order:

(1) Reinstatement;

(2) Transfer preference;

(3) Back pay;

(4) Reimbursement of your reasonable costs and expenses, including attorney and expert-witness fees reasonably incurred to prepare for and participate in proceedings leading to the initial or final agency decision; or

(5) Such other remedies as are deemed necessary to abate the violation and provide you with relief.

(b) *Interim relief*. If an initial agency decision contains a determination that

an act of retaliation occurred, the decision may order the contractor to provide you with appropriate interim relief (including reinstatement) pending the outcome of any request for review of the decision by the OHA Director. Such interim relief will not include payment of any money.

### § 708.37 Will an employee whose complaint is denied by a final agency decision be reimbursed for costs and expenses incurred in pursuing the complaint?

No. If your complaint is denied by a final agency decision, you may not be reimbursed for the costs and expenses you incurred in pursuing the complaint.

### § 708.38 How is a final agency decision implemented?

(a) The Head of Field Element having jurisdiction over the contract under which you were employed when the alleged retaliation occurred, or EC Director, will implement a final agency decision by forwarding the decision and order to the contractor, or subcontractor, involved.

(b) A contractor's failure or refusal to comply with a final agency decision and order under this regulation may result in a contracting officer's decision to disallow certain costs or terminate the contract for default. In the event of a contracting officer's decision to disallow costs or terminate a contract for default, the contractor may file a claim under the disputes procedures of the contract.

### § 708.39 Is a decision and order implemented under this regulation considered a claim by the government against a contractor or a decision by the contracting officer under sections 6 and 7 of the Contract Disputes Act?

No. A final agency decision and order issued pursuant to this regulation is not considered a claim by the government against a contractor or ''a decision by the contracting officer'' under sections 6 and 7 of the Contract Disputes Act (41 U.S.C. 605 and 606).

### § 708.40 Are contractors required to inform their employees about this program?

Yes. Contractors who are covered by this part must inform their employees about these regulations by posting notices in conspicuous places at the work site. These notices must include the name and address of the DOE office where you can file a complaint under this part.

[64 FR 37397, July 12, 1999]

### § 708.41 Will DOE ever refer a complaint filed under this part to another agency for investigation and a decision?

Notwithstanding the provisions of this part, the Secretary of Energy retains the right to request that a complaint filed under this part be accepted by another Federal agency for investigation and factual determinations.

[64 FR 37397, July 12, 1999]

### § 708.42 May the deadlines established by this part be extended by any DOE official?

Yes. The Secretary of Energy (or the Secretary's designee) may approve the extension of any deadline established by this part, and the OHA Director may approve the extension of any deadline under § 708.22 through § 708.34 of this subpart (relating to the investigation, hearing, and OHA appeal process).

[64 FR 37397, July 12, 1999]

### § 708.43 Does this rule impose an affirmative duty on DOE contractors not to retaliate?

Yes. DOE contractors may not retaliate against any employee because the employee (or any person acting at the request of the employee) has taken an action listed in §§ 708.5(a)–(c).

[65 FR 6319, Feb. 9, 2000; 65 FR 9201, Feb. 24, 2000]

## PART 709—COUNTERINTELLIGENCE EVALUATION PROGRAM

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### Subpart D—Polygraph Examination and Examiner Standards

709.31 DOE standards for polygraph examiners and polygraph examinations.
709.32 Training requirements for polygraph examiners.

AUTHORITY: 42 U.S.C. 2011, *et seq.*, 7101, *et seq.*, 7144b, *et seq.*, 7383h–1; 50 U.S.C. 2401, *et seq.*

SOURCE: 71 FR 57392, Sept. 29, 2006, unless otherwise noted.

## Subpart A—General Provisions

### § 709.1 Purpose.

This part:

(a) Describes the categories of individuals who are subject for counterintelligence evaluation processing;

(b) Provides guidelines for the counterintelligence evaluation process, including the use of counterintelligence-scope polygraph examinations, and for the use of event-specific polygraph examinations; and

(c) Provides guidelines for protecting the rights of individual DOE employees and DOE contractor employees subject to this part.

### § 709.2 Definitions.

For purposes of this part:

*Access authorization* means an administrative determination under the Atomic Energy Act of 1954, Executive Order 12968, or 10 CFR part 710 that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.

*Adverse personnel action* means:

(1) With regard to a DOE employee, the removal, suspension for more than 14 days, reduction in grade or pay, or a furlough of 30 days or less as described in 5 U.S.C. Chapter 75; or

(2) With regard to a contractor employee, the discharge, discipline, or denial of employment or promotion, or any other discrimination in regard to hire or tenure of employment or any term or condition of employment.

*Contractor* means any industrial, educational, commercial, or other entity, assistance recipient, or licensee, including an individual who has executed an agreement with DOE for the purpose of performing under a contract, license, or other agreement, and including any subcontractors of any tier.

*Counterintelligence or CI* means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document or communications security programs.

*Counterintelligence evaluation or CI evaluation* means the process, possibly including a counterintelligence scope polygraph examination, used to make

recommendations as to whether certain employees should have access to information or materials protected by this part.

*Counterintelligence program office* means the Office of Counterintelligence in the Office of Intelligence and Counterintelligence (and any successor office to which that office's duties and authorities may be reassigned).

*Counterintelligence-scope or CI-scope polygraph examination* means a polygraph examination using questions reasonably calculated to obtain counterintelligence information, including questions relating to espionage, sabotage, terrorism, unauthorized disclosure of classified information, deliberate damage to or malicious misuse of a United States Government information or defense system, and unauthorized contact with foreign nationals.

*Covered person* means an applicant for employment with DOE or a DOE contractor, a DOE employee, a DOE contractor employee, and an assignee or detailee to DOE from another agency.

*DOE* means the Department of Energy including the National Nuclear Security Administration (NNSA).

*Foreign nexus* means specific indications that a covered person is or may be engaged in clandestine or unreported relationships with foreign powers, organizations or persons, or international terrorists; contacts with foreign intelligence services; or other hostile activities directed against DOE facilities, property, personnel, programs or contractors by or on behalf of foreign powers, organizations or persons, or international terrorists.

*Human Reliability Program* means the program under 10 CFR part 712.

*Intelligence* means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations or foreign persons.

*Local commuting area* means the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual employment.

*Materials* means any ''nuclear explosive'' as defined in 10 CFR 712.3, and any ''special nuclear material,'' hazardous ''source material,'' and hazardous ''byproduct material'' as those terms are defined by the Atomic Energy Act of 1954 (42 U.S.C. 2014).

*National security information* means information that has been determined pursuant to Executive Order 12958, as amended by Executive Order 13292, or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.

*NNSA* means DOE's National Nuclear Security Administration.

*No opinion* means an evaluation of a polygraph test by a polygraph examiner in which the polygraph examiner cannot render an opinion.

*Polygraph examination* means all activities that take place between a Polygraph Examiner and an examinee (person taking the test) during a specific series of interactions, including the pretest interview, the use of the polygraph instrument to collect physiological data from the examinee while presenting a series of tests, the test data analysis phase, and the post-test phase.

*Polygraph examination records* means all records of the polygraph examination, including the polygraph report, audio-video recording, and the polygraph consent form.

*Polygraph instrument* means a diagnostic instrument used during a polygraph examination, which is capable of monitoring, recording and/or measuring at a minimum, respiratory, electrodermal, and cardiovascular activity as a response to verbal or visual stimuli.

*Polygraph report* means a document that may contain identifying data of the examinee, a synopsis of the basis for which the examination was conducted, the relevant questions utilized, and the examiner's conclusion.

*Polygraph test* means that portion of the polygraph examination during which the polygraph instrument collects physiological data based upon the individual's responses to questions from the examiner.

*Program Manager* means a DOE official designated by the Secretary or the

Head of a DOE Element to make an access determination under this part.

*Random* means a statistical process whereby eligible employees have an equal probability of selection for a CI evaluation each time the selection process occurs.

*Regular and routine* means access by individuals without further permission more than two times per calendar quarter.

*Relevant questions* are those questions used during the polygraph examination that pertain directly to the issues for which the examination is being conducted.

*Restricted data* means all data concerning the 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 does not include data declassified or removed from the restricted data category pursuant to section 142 of the Atomic Energy Act of 1954.

*Secret* means the security classification that is applied to DOE-generated information or material the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

*Secretary* means the Secretary of Energy or the Secretary's designee.

*Significant response* means an opinion that the analysis of the polygraph charts reveals consistent, significant, timely physiological responses to the relevant questions.

*Special Access Program or SAP* means a program established under Executive Order 12958 for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level.

*Suspend* means temporarily to withdraw an employee's access to information or materials protected under § 709.3 of this part.

*System Administrator* means any individual who has privileged system, data, or software access that permits that individual to exceed the authorization of a normal system user and thereby override, alter, or negate integrity verification and accountability procedures or other automated and/or technical safeguards provided by the systems security assets for normal users.

*Top Secret* means the security classification that is applied to DOE-generated information or material the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

*Unresolved issues* means an opinion by a CI evaluator that the analysis of the information developed during a CI evaluation remains inconclusive and needs further clarification before a CI access recommendation can be made.

### § 709.3 Covered persons subject to a CI evaluation and polygraph.

(a) *Mandatory CI evaluation*. Except as provided in § 709.5 of this part with regard to waivers, a CI evaluation, which may include a CI-scope polygraph examination, is required for any covered person in any category under paragraph (b) of this section who will have or has access to classified information or materials protected under this paragraph. Such an evaluation is required for covered persons who are incumbent employees at least once every five years. DOE, in its sole discretion, may require a CI-scope polygraph examination:

(1) If the CI evaluation reveals foreign nexus issues;

(2) If a covered person who is an incumbent employee is to be assigned within DOE to activities involving another agency and a polygraph examination is required as a condition of access to the activities by the other agency; or

(3) If a covered person who is an incumbent employee is proposed to be assigned or detailed to another agency and the receiving agency requests DOE to administer a polygraph examination as a condition of the assignment or detail.

(b) Paragraph (a) of this section applies to covered persons:

(1) In an intelligence or counterintelligence program office (or with programmatic reporting responsibility to an intelligence or counterintelligence program office) because of access to classified intelligence information, or sources, or methods;

(2) With access to Sensitive Compartmented Information;

(3) With access to information that is protected within a non-intelligence Special Access Program (SAP) designated by the Secretary;

(4) With regular and routine access to Top Secret Restricted Data;

(5) With regular and routine access to Top Secret National Security Information; and

(6) Designated, with approval of the Secretary, on the basis of a risk assessment consistent with paragraphs (e) and (f) of this section, by a Program Manager for the following DOE offices and programs (and any successors to those offices and programs): The Office of the Secretary; the Human Reliability Program; the National Nuclear Security Administration (including the Office of Emergency Operations); and the Office of Health, Safety and Security.

(c) *Random CI evaluation.* Except as provided in § 709.5 of this part with regard to waivers, DOE may require a CI evaluation, including a CI-scope polygraph examination, of covered persons who are incumbent employees selected on a random basis from the following:

(1) All covered persons identified in § 709.3(b);

(2) All employees in the Office of Independent Oversight (or any successor office) within the Office of Health, Safety and Security because of access to classified information regarding the inspection and assessment of safeguards and security functions, including cyber security, of the DOE;

(3) All employees in other elements of the Office of Health, Safety and Security (or any successor office) because of their access to classified information;

(4) All employees in the NNSA Office of Emergency Operations (OEO or any successor office) including DOE field offices or contractors who support OEO because of their access to classified information;

(5) All employees with regular and routine access to classified information concerning: The design and function of nuclear weapons use control systems, features, and their components (currently designated as Sigma 15); vulnerability of nuclear weapons to deliberate unauthorized nuclear detonation (currently designated as Sigma 14); and improvised nuclear device concepts or designs; and

(6) Any system administrator with access to a system containing classified information, as identified by the DOE or NNSA Chief Information Officer.

(d) *Specific incident polygraph examinations.* In response to specific facts or circumstances with potential counterintelligence implications with a defined foreign nexus, the Director of the Office of Intelligence and Counterintelligence (or, in the case of a covered person in NNSA, the Administrator of NNSA, after consideration of the recommendation of the Director, Office of Intelligence and Counterintelligence) may require a covered person with access to DOE classified information or materials to consent to and take an event-specific polygraph examination. Except as otherwise determined by the Secretary, on the recommendation of the appropriate Program Manager, if a covered person with access to DOE classified information or materials refuses to consent to or take a polygraph examination under this paragraph, then the Director of the Office of Intelligence and Counterintelligence (or, in the case of a covered person in NNSA, the Administrator of NNSA, after consideration of the recommendation of the Director, Office of Intelligence and Counterintelligence) shall direct the denial of access (if any) to classified information and materials protected under paragraphs (b) and (c) of this section, and shall refer the matter to the Office of Health, Safety and Security for a review of access authorization eligibility under 10 CFR part 710. In addition, in the circumstances described in this paragraph, any covered person with access to DOE classified information or material may request a polygraph examination.

(e) *Risk assessment.* For the purpose of deciding whether to designate or remove employees for mandatory CI evaluations under paragraph (b)(6) of this section, Program Managers may consider:

(1) Access on a non-regular and non-routine basis to Top Secret Restricted Data or Top Secret National Security

Information or the nature and extent of access to other classified information;

(2) Unescorted or unrestricted access to significant quantities or forms of special nuclear materials; and

(3) Any other factors concerning the employee's responsibilities that are relevant to determining risk of unauthorized disclosure of classified information or materials.

(f) Based on the risk assessments conducted under paragraph (e) of this section and in consultation with the Director of the Office of Intelligence and Counterintelligence, the Program Manager shall provide recommendations as to positions to be designated or removed under paragraph (b)(6) of this section for approval by the Secretary. Recommendations shall include a summary of the basis for designation or removal of the positions and of the views of the Director of the Office of Intelligence and Counterintelligence as to the recommendations.

(g) Not less than once every calendar year quarter, the responsible Program Manager must provide a list of all incumbent employees who are covered persons under paragraphs (b) and (c) of this section to the Director of the Office of Intelligence and Counterintelligence.

**§ 709.4 Notification of a CI evaluation.**

(a) If a polygraph examination is scheduled, DOE must notify the covered person, in accordance with § 709.21 of this part.

(b) Any job announcement or posting with respect to any position with access to classified information or materials protected under § 709.3(b) and (c) of this part should indicate that DOE may condition the selection of an individual for the position (709.3(b)) or retention in that position (709.3(b) and (c)) upon his or her successful completion of a CI evaluation, including a CI-scope polygraph examination.

(c) Advance notice will be provided to the affected Program Manager and laboratory/site/facility director of the covered persons who are included in any random examinations that are administered in accordance with provisions at § 709.3(c).

**§ 709.5 Waiver of polygraph examination requirements.**

(a) *General.* Upon a waiver request submitted under paragraph (b) of this section, DOE may waive the CI-scope polygraph examination under § 709.3 of this part for:

(1) Any covered person based upon certification from another Federal agency that the covered person has successfully completed a full scope or CI-scope polygraph examination administered within the previous five years;

(2) Any covered person who is being treated for a medical or psychological condition that, based upon consultation with the covered person and appropriate medical personnel, would preclude the covered person from being tested; or

(3) Any covered person in the interest of national security.

(b) *Submission of Waiver Requests.* A covered person may submit a request for waiver under this section, and the request shall assert the basis for the waiver sought and shall be submitted, in writing, to the Director, Office of Intelligence and Counterintelligence, at the following address: U.S. Department of Energy, Attn: Director, Office of Intelligence and Counterintelligence, 1000 Independence Avenue, SW., Washington, DC 20585.

(c) *Disposition of Waiver Requests.* The Director, Office of Intelligence and Counterintelligence, shall issue a written decision on a request for waiver prior to the administration of a polygraph examination. The Director shall obtain the concurrence of the Secretary in his or her decision on a request for waiver under § 709.5(a)(3) and shall obtain the concurrence of the Administrator of NNSA in a decision on a waiver request from an NNSA covered person under § 709.5(a)(1) and § 709.5(a)(2). Notification of approval of a waiver request will contain information regarding the duration of the waiver and any other relevant information. Notification of the denial of a waiver request will state the basis for the denial and state that the covered person may request reconsideration of the denial by the Secretary under § 709.5(d).

(d) *Reconsideration Rights.* If a waiver is denied, the covered person may file with the Secretary a request for reconsideration of the denial within 30 days of receipt of the decision, and the Secretary's decision will be issued prior to the administration of a polygraph examination.

## Subpart B—CI Evaluation Protocols and Protection of National Security

### § 709.10 Scope of a counterintelligence evaluation.

A counterintelligence evaluation consists of a counterintelligence-based review of the covered person's personnel security file and review of other relevant information available to DOE in accordance with applicable guidelines and authorities. As provided in § 709.3(b), DOE also may require a CI-scope polygraph examination. As provided for in § 709.3(c), a CI evaluation, if conducted on a random basis, will include a CI-scope polygraph examination. As set forth in § 709.15(b) and (c) of this part, a counterintelligence evaluation may also include other pertinent measures to address and resolve counterintelligence issues in accordance with Executive Order 12333, the DOE ''Procedures for Intelligence Activities,'' and other relevant laws, guidelines and authorities, as applicable.

### § 709.11 Topics within the scope of a polygraph examination.

(a) DOE may ask questions in a specific incident polygraph examination that are appropriate for a CI-scope examination or that are relevant to the counterintelligence concerns with a defined foreign nexus raised by the specific incident.

(b) A CI-scope polygraph examination is limited to topics concerning the covered person's involvement in espionage, sabotage, terrorism, unauthorized disclosure of classified information, unauthorized foreign contacts, and deliberate damage to or malicious misuse of a U.S. government information or defense system.

(c) DOE may not ask questions that:

(1) Probe a covered person's thoughts or beliefs;

(2) Concern conduct that has no CI implication with a defined foreign nexus; or

(3) Concern conduct that has no direct relevance to a CI evaluation.

### § 709.12 Defining polygraph examination questions.

The examiner determines the exact wording of the polygraph questions based on the examiner's pretest interview of the covered person, the covered person's understanding of the questions, established test question procedures from the Department of Defense Polygraph Institute, and other input from the covered person.

### § 709.13 Implications of refusal to take a polygraph examination.

(a) Subject to § 709.14 of this part, a covered person may refuse to take a polygraph examination pursuant to § 709.3 of this part, and a covered person being examined may terminate the examination at any time.

(b) If a covered person terminates a polygraph examination prior to the completion of the examination, DOE may treat that termination as a refusal to complete a CI evaluation under § 709.14 of this part.

### § 709.14 Consequences of a refusal to complete a CI evaluation including a polygraph examination.

(a) If a covered person is an applicant for employment or assignment or a potential detailee or assignee with regard to an identified position and the covered person refuses to complete a CI evaluation including a polygraph examination required by this part as an initial condition of access, DOE and its contractors must refuse to employ, assign, or detail that covered person with regard to the identified position.

(b) If a covered person is an incumbent employee in an identified position subject to a CI evaluation including a polygraph examination under § 709.3(b), (c), or (d), and the covered person refuses to complete a CI evaluation, DOE and its contractors must deny that covered person access to classified information and materials protected under § 709.3(b) and (c) and may take other actions consistent with the denial of access, including administrative

review of access authorization under 10 CFR part 710. If the covered person is a DOE employee, DOE may reassign or realign the DOE employee's duties, or take other action, consistent with that denial of access and applicable personnel regulations.

(c) If a DOE employee refuses to take a CI polygraph examination, DOE may not record the fact of that refusal in the employee's personnel file.

**§ 709.15 Processing counterintelligence evaluation results.**

(a) If the reviews under § 709.10 or a polygraph examination present unresolved foreign nexus issues that raise significant questions about the covered person's access to classified information or materials protected under § 709.3 of this part that justified the counterintelligence evaluation, DOE may undertake a more comprehensive CI evaluation that, in appropriate circumstances, may include evaluation of financial, credit, travel, and other relevant information to resolve any identified issues. Participation by Office of Intelligence and Counterintelligence personnel in any such evaluation is subject to Executive Order 12333, the DOE ''Procedures for Intelligence Activities,'' and other relevant laws, guidelines, and authorities as may be applicable with respect to such matters.

(b) The Office of Intelligence and Counterintelligence, in coordination with NNSA with regard to issues concerning a NNSA covered person, may conduct an in-depth interview with the covered person, may request relevant information from the covered person, and may arrange for the covered person to undergo an additional polygraph examination.

(c) Whenever information is developed by the Office of Health, Safety and Security indicating counterintelligence issues, the Director of that Office shall notify the Director, Office of Intelligence and Counterintelligence.

(d) If, in carrying out a comprehensive CI evaluation of a covered person under this section, there are significant unresolved issues, not exclusively related to polygraph examination results, indicating counterintelligence issues, then the Director, Office of Intelligence and Counterintelligence shall notify the DOE national laboratory director (if applicable), plant manager (if applicable) and program manager(s) for whom the individual works that the covered person is undergoing a CI evaluation pursuant to this part and that the evaluation is not yet complete.

(e) Utilizing the DOE security criteria in 10 CFR part 710, the Director, Office of Intelligence and Counterintelligence, makes a determination whether a covered person completing a CI evaluation has made disclosures that warrant referral, as appropriate, to the Office of Health, Safety and Security or the Manager of the applicable DOE/NNSA Site, Operations Office or Service Center.

**§ 709.16 Application of Counterintelligence Evaluation Review Boards in reaching conclusions regarding CI evaluations.**

(a) *General.* If the results of a counterintelligence evaluation are not dispositive, the Director of the Office of Intelligence and Counterintelligence may convene a Counterintelligence Evaluation Review Board to obtain the individual views of each member as assistance in resolving counterintelligence issues identified during a counterintelligence evaluation.

(b) *Composition.* A Counterintelligence Evaluation Review Board is chaired by the Director of the Office of Intelligence and Counterintelligence (or his/her designee) and includes representation from the appropriate line Program Managers, lab/site/facility management (if a contractor employee is involved), NNSA, if the unresolved issues involve an NNSA covered person, the DOE Office of Health, Safety and Security and security directors for the DOE or NNSA site or operations office.

(c) *Process.* When making a final recommendation under § 709.17 of this part, to a Program Manager, the Director of Intelligence and Counterintelligence shall report on the Counterintelligence Evaluation Review Board's views, including any consensus recommendation, or if the members are divided, a summary of majority and dissenting views.

### § 709.17 Final disposition of CI evaluation findings and recommendations.

(a) Following completion of a CI evaluation, the Director of the Office of Intelligence and Counterintelligence must recommend, in writing, to the appropriate Program Manager that the covered person's access be approved or retained, or denied or revoked.

(b) If the Program Manager agrees with the recommendation, the Program Manager notifies the covered person that the covered person's access has been approved or retained, or denied or revoked.

(c) If the Program Manager disagrees with the recommendation of the Director, Office of Intelligence and Counterintelligence, the matter is referred to the Secretary for a final decision.

(d) If the Program Manager denies or revokes a DOE employee's access, DOE may reassign the employee or realign the employee's duties within the local commuting area or take other actions consistent with the denial of access.

(e) If the Program Manager revokes the access of a covered person assigned or detailed to DOE, DOE may remove the assignee or detailee from access to the information that justified the CI evaluation and return the assignee or detailee to the agency of origin.

(f) Covered persons whose access is denied or revoked may request reconsideration by the head of the relevant DOE element.

(g) For cases involving a question of loyalty to the United States, the Director of the Office of Intelligence and Counterintelligence may refer the matter to the FBI as required by section 145d of the Atomic Energy Act of 1954. For cases indicating that classified information is being, or may have been, disclosed in an unauthorized manner to a foreign power or an agent of a foreign power, DOE is required by 50 U.S.C. 402a(e) to refer the matter to the Federal Bureau of Investigation.

## Subpart C—Safeguarding Privacy and Employee Rights

### § 709.21 Requirements for notification of a polygraph examination.

When a polygraph examination is scheduled, the DOE must notify the covered person, in writing, of the date, time, and place of the polygraph examination, the provisions for a medical waiver, and the covered person's right to obtain and consult with legal counsel or to secure another representative prior to the examination. DOE must provide a copy of this part to the covered person. The covered person must receive the notification at least ten days, excluding weekend days and holidays, before the time of the examination except when good cause is shown or when the covered person waives the advance notice provision.

### § 709.22 Right to counsel or other representation.

(a) At the covered person's own expense, a covered person has the right to obtain and consult with legal counsel or another representative. However, the counsel or representative may not be present during the polygraph examination. Except for interpreters and signers, no one other than the covered person and the examiner may be present in the examination room during the polygraph examination.

(b) A covered person has the right to consult with legal counsel or another representative at any time during an interview conducted in accordance with § 709.15 of this part.

### § 709.23 Obtaining consent to a polygraph examination.

DOE may not administer a polygraph examination unless DOE:

(a) Notifies the covered person of the polygraph examination in writing in accordance with § 709.21 of this part; and

(b) Obtains written consent from the covered person prior to the polygraph examination.

### § 709.24 Other information provided to a covered person prior to a polygraph examination.

Before administering the polygraph examination, the examiner must:

(a) Inform the covered person that audio and video recording of each polygraph examination session will be made, and that other observation devices, such as two-way mirrors and observation rooms, also may be employed;

(b) Explain to the covered person the characteristics and nature of the polygraph instrument and examination;

(c) Explain to the covered person the physical operation of the instrument and the procedures to be followed during the examination;

(d) Review with the covered person the relevant questions to be asked during the examination;

(e) Advise the covered person of the covered person right against self-incrimination; and

(f) Provide the covered person with a pre-addressed envelope, which may be used to submit a quality assurance questionnaire, comments or complaints concerning the examination.

### § 709.25 Limits on use of polygraph examination results that reflect "Significant Response" or "No Opinion".

DOE or its contractors may not:

(a) Take an adverse personnel action against a covered person or make an adverse access recommendation solely on the basis of a polygraph examination result of ''significant response'' or ''no opinion''; or

(b) Use a polygraph examination that reflects ''significant response'' or ''no opinion'' as a substitute for any other required investigation.

### § 709.26 Protection of confidentiality of CI evaluation records to include polygraph examination records and other pertinent documentation.

(a) DOE owns all CI evaluation records, including polygraph examination records and reports and other evaluation documentation.

(b) DOE maintains all CI evaluation records, including polygraph examination records and other pertinent documentation acquired in conjunction with a counterintelligence evaluation, in a system of records established under the Privacy Act of 1974 (5 U.S.C. 552a).

(c) DOE must afford the full privacy protection provided by law to information regarding a covered person's refusal to participate in a CI evaluation to include a polygraph examination and the completion of other pertinent documentation.

(d) With the exception of the polygraph report, all other polygraph examination records are destroyed ninety days after the CI evaluation is completed, provided that a favorable recommendation has been made to grant or continue the access to the position. If a recommendation is made to deny or revoke access to the information or involvement in the activities that justified conducting the CI evaluation, then all of the polygraph examination records are retained until the final resolution of any request for reconsideration by the covered person or the completion of any ongoing investigation.

## Subpart D—Polygraph Examination and Examiner Standards

### § 709.31 DOE standards for polygraph examiners and polygraph examinations.

(a) DOE adheres to the procedures and standards established by the Department of Defense Polygraph Institute (DODPI). DOE administers only DODPI approved testing formats.

(b) A polygraph examiner may administer no more than five polygraph examinations in any twenty-four hour period. This does not include those instances in which a covered person voluntarily terminates an examination prior to the actual testing phase.

(c) The polygraph examiner must be certified to conduct polygraph examinations under this part by the DOE Psychophysiological Detection of Deception/Polygraph Program Quality Control Official.

(d) To be certified under paragraph (c) of this section, an examiner must have the following minimum qualifications:

(1) The examiner must be an experienced CI or criminal investigator with extensive additional training in using computerized instrumentation in Psychophysiological Detection of Deception and in psychology, physiology, interviewing, and interrogation.

(2) The examiner must have a favorably adjudicated single-scope background investigation, complete a CI-scope polygraph examination, and must hold a ''Q'' access authorization, which is necessary for access to Secret

Restricted Data and Top Secret National Security Information. In addition, he or she must have been granted SCI access approval.

(3) The examiner must receive basic Forensic Psychophysiological Detection of Deception training from the DODPI.

### § 709.32 Training requirements for polygraph examiners.

(a) Examiners must complete an initial training course of thirteen weeks, or longer, in conformance with the procedures and standards established by DODPI.

(b) Examiners must undergo annual continuing education for a minimum of forty hours training within the discipline of Forensic Psychophysiological Detection of Deception.

(c) The following organizations provide acceptable curricula to meet the training requirement of paragraph (b) of this section:

(1) American Polygraph Association,

(2) American Association of Police Polygraphists, and

(3) Department of Defense Polygraph Institute.

# PART 710—PROCEDURES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED MATTER AND SPECIAL NUCLEAR MATERIAL

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APPENDIX A—ADJUDICATIVE GUIDELINES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED INFORMATION (DECEMBER 30, 2005)

AUTHORITY: 42 U.S.C. 2165, 2201, 5815, 7101, *et seq.*, 7383h–l; 50 U.S.C. 2401 *et seq.;* E.O. 10450, 3 CFR 1949–1953 comp., p. 936, as amended; E.O. 10865, 3 CFR 1959–1963 comp., p. 398, as amended, 3 CFR Chap. IV; E.O. 13526, 3 CFR 2010 Comp., pp. 298–327 (or successor orders); E.O. 12968, 3 CFR 1995 Comp., p. 391.

SOURCE: 81 FR 71335, Oct. 17, 2016, unless otherwise noted.

## Subpart A—General Provisions

### § 710.1 Purpose.

(a) This part establishes the procedures for determining the eligibility of individuals described in § 710.2 for access to classified matter or special nuclear material, pursuant to the Atomic Energy Act of 1954, or for access to national security information in accordance with Executive Order 13526 (Classified National Security Information).

(b) This part implements: Executive Order 12968, 60 FR 40245 (August 2, 1995), as amended; Executive Order 13526, 75 FR 707 (January 5, 2010); Executive Order 10865, 25 FR 1583 (February 24, 1960), as amended; Executive Order 10450, 18 FR 2489 (April 27, 1954), as amended; and the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information approved by the President (the ''Adjudicative Guidelines''; see Appendix A of this part).

**§710.2 Scope.**

The procedures outlined in this rule require the application of the Adjudicative Guidelines (see §710.7) in determining eligibility for access authorization for:

(a) Employees (including consultants) of, and applicants for employment with, contractors and agents of the DOE;

(b) Access permittees of the DOE and their employees (including consultants) and applicants for employment;

(c) Employees (including consultants) of, and applicants for employment with, the DOE; and

(d) Other persons designated by the Secretary of Energy.

**§710.3 Reference.**

The Adjudicative Guidelines are set forth in Appendix A to this part.

**§710.4 Policy.**

(a) It is the policy of DOE to provide for the security of its programs in a manner consistent with traditional American concepts of justice and fairness. To this end, the Secretary has established procedures that will afford those individuals described in §710.2 the opportunity for administrative review of questions concerning their eligibility for access authorization.

(b) It is also the policy of DOE that none of the procedures established for determining eligibility for access authorization shall be used for an improper purpose, including any attempt to coerce, restrain, threaten, intimidate, or retaliate against individuals for exercising their rights under any statute, regulation or DOE directive. Any DOE officer or employee violating, or causing the violation of this policy, shall be subject to appropriate disciplinary action.

**§710.5 Definitions.**

(a) As used in this part:

*Access authorization* means an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.

*Administrative Judge* means a DOE attorney appointed by the Director, Office of Hearings and Appeals, pursuant to §710.25 of this part. An Administrative Judge shall be a U.S. citizen and shall hold a Q access authorization.

*Classified matter* means the material of thought or expression that is classified pursuant to statute or Executive Order.

*Director* means the Director, DOE Office of Departmental Personnel Security.

*DOE Counsel* means a DOE attorney assigned to represent DOE in proceedings under this part. DOE Counsel shall be a U.S. citizen and shall hold a Q access authorization.

*Local Director of Security* means the individual with primary responsibility for safeguards and security at the Chicago, Idaho, Oak Ridge, Richland, and Savannah River Operations Offices; for Naval Reactors, the individual(s) designated under the authority of the Director of the Naval Nuclear Propulsion Program; for the National Nuclear Security Administration (NNSA), the individual designated in writing by the Chief, Defense Nuclear Security; and for DOE Headquarters cases the Director, Office of Headquarters Personnel Security Operations.

*Manager* means the senior Federal official at the Chicago, Idaho, Oak Ridge, Richland, or Savannah River Operations Offices; for Naval Reactors, the individual designated under the authority of the Director of the Naval Nuclear Propulsion Program; for the NNSA, the individual designated in writing by the NNSA Administrator or Deputy Administrator; and for DOE Headquarters cases, the Director, Office of Headquarters Security Operations.

*Secretary* means the Secretary of Energy, as provided by section 201 of the Department of Energy Organization Act.

*Special nuclear material* means plutonium, uranium enriched in the isotope 233, or in the isotope 235, and any other material which, pursuant to the provisions of section 51 of the Atomic Energy Act of 1954, has been determined to be special nuclear material, but does not include source material; or any material artificially enriched by any of the foregoing, not including source material.

(b) [Reserved]

## Subpart B—Eligibility for Access to Classified Matter or Special Nuclear Material

### § 710.6 Cooperation by the individual.

(a)(1) It is the responsibility of the individual to provide full, frank, and truthful answers to DOE's relevant and material questions, and when requested, to furnish or authorize others to furnish information that the DOE deems pertinent to the individual's eligibility for access authorization. This obligation to cooperate applies when completing security forms, during the course of a personnel security background investigation or reinvestigation, and at any stage of DOE's processing of the individual's access authorization request, including but not limited to, personnel security interviews, DOE-sponsored mental health evaluations, and other authorized DOE investigative activities under this part. The individual may elect not to cooperate; however, such refusal may prevent DOE from reaching an affirmative finding required for granting or continuing access authorization. In this event, any access authorization then in effect may be administratively withdrawn or, for applicants, further processing may be administratively terminated.

(2) It is the responsibility of an individual subject to 10 CFR 709.3(d) to consent to and take a polygraph examination required by part 709. A refusal to consent to or take such an examination may prevent DOE from reaching an affirmative finding required for continuing access authorization. In this event, any access authorization then in effect may be administratively withdrawn.

(b) If the individual believes that the provisions of paragraph (a) of this section have been inappropriately applied, the individual may file a written appeal of the action with the Director within 30 calendar days of the date the individual was notified of the action.

(c) Upon receipt of the written appeal, the Director shall conduct an inquiry as to the circumstances involved in the action and shall, within 30 calendar days of receipt of the written appeal, notify the individual, in writing, of his/her decision. If the Director determines that the action was inappropriate, the Director shall notify the Manager that access authorization must be reinstated or, for applicants, that the individual must continue to be processed for access authorization. If the Director determines the action was appropriate, the Director shall notify the individual of this fact in writing. The Director's decision is final and not subject to further review or appeal.

### § 710.7 Application of the adjudicative guidelines.

(a) The decision on an access authorization request is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security.

(b) All such determinations shall be based upon application of the Adjudicative Guidelines, or any successor national standard issued under the authority of the President.

(c) Each Adjudicative Guideline sets forth a series of concerns that may create a doubt regarding an individual's eligibility for access authorization. In resolving these concerns, all DOE officials involved in the decision-making process shall consider: The nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors.

(d) If the reports of investigation of an individual or other reliable information tend to establish the validity and significance of one or more areas of

concern as set forth in the Adjudicative Guidelines, such information shall be regarded as derogatory and create a question as to the individual's access authorization eligibility. Absent any derogatory information, a favorable determination will be made as to access authorization eligibility.

### § 710.8 Action on derogatory information.

(a) If a question arises as to the individual's access authorization eligibility, the Local Director of Security shall authorize the conduct of an interview with the individual, or other appropriate actions and, on the basis of the results of such interview or actions, may authorize the granting of the individual's access authorization. If, in the opinion of the Local Director of Security, the question as to the individual's access authorization eligibility has not been favorably resolved, the Local Director of Security shall submit the matter to the Manager with a recommendation that authority be obtained to process the individual's case under administrative review procedures set forth in this part.

(b) If the Manager agrees that unresolved derogatory information is present and that appropriate attempts to resolve such derogatory information have been unsuccessful, the Manager shall notify the Director of the proposal to conduct an administrative review proceeding, accompanied by an explanation of the security concerns and a duplicate Personnel Security File. If the Manager believes that the derogatory information has been favorably resolved, the Manager shall direct that access authorization be granted for the individual. The Manager may also direct the Local Director of Security to obtain additional information prior to deciding whether to grant the individual access authorization or to submit a request for authority to conduct an administrative review proceeding. A decision in the matter shall be rendered by the Manager within 10 calendar days of its receipt.

(c) Upon receipt of the Manager's notification, the Director shall review the matter and confer with the Manager on:

(1) The institution of administrative review proceedings set forth in §§ 710.20 through 710.30;

(2) The granting of access authorization; or

(3) Other actions as the Director deems appropriate.

(d) The Director shall act pursuant to one of these options within 30 calendar days of receipt of the Manager's notification unless an extension is granted by the Deputy Associate Under Secretary for Environment, Health, Safety and Security.

### § 710.9 Suspension of access authorization.

(a) If derogatory information is received, the Local Director of Security shall authorize action(s), to be taken on an expedited basis, to resolve the question pursuant to § 710.8(a). If the question as to the individual's continued access authorization eligibility is not resolved in favor of the individual, the Local Director of Security shall submit the matter to the Manager with the recommendation that the individual's access authorization be suspended pending the final determination resulting from the procedures set forth in this part.

(b) If the information received is determined to represent an immediate threat to national security or to the safety or security of a DOE facility or employee, or is determined to be so serious in nature that action(s) to resolve the matter as set forth in § 710.8(b) are not practical or advisable, the Local Director of Security shall immediately submit the matter to the Manager with a recommendation that the individual's access authorization be suspended pending the final determination resulting from the procedures set forth in this part. The Manager shall either authorize the immediate suspension of access authorization, or shall direct the Local Director of Security to take action(s) as set forth in § 710.8(b), in an expedited manner, to resolve the matter.

(c) The Manager shall, within two working days of receipt of the recommendation from the Local Director of Security to suspend the individual's DOE access authorization:

(1) Approve the suspension of access authorization; or

(2) Direct the continuation of access authorization, or

(3) Take or direct other such action(s) as the Manager deems appropriate.

(d) Upon suspension of an individual's access authorization pursuant to paragraph (c)(1) of this section, the individual, the individual's employer, any other DOE office or program having an access authorization interest in the individual, and, if known, any other government agency where the individual holds an access authorization, security clearance, or access approval, or to which the DOE has certified the individual's DOE access authorization, shall be notified immediately in writing. The appropriate DOE database for tracking access authorizations and related actions shall also be updated. Notification to the individual shall reflect, in general terms, the reason(s) why the suspension has been affected. Pending final determination of the individual's eligibility for access authorization from the operation of the procedures set forth in this part, the individual shall not be afforded access to classified matter, special nuclear material, or unescorted access to security areas that require the individual to possess a DOE access authorization.

(e) Written notification to the individual shall include, if the individual is a Federal employee, notification that if the individual believes that the action to suspend his/her access authorization was taken as retaliation against the individual for having made a protected disclosure, as defined in Presidential Policy Directive 19, *Protecting Whistleblowers with Access to Classified Information*, or any successor directive issued under the authority of the President, the individual may submit a request for review of this matter directly to the DOE Office of the Inspector General. Such a request shall have no impact upon the continued processing of the individual's access authorization eligibility under this part.

(f) Following the decision to suspend an individual's DOE access authorization pursuant to paragraph (c)(1) of this section, the Manager shall immediately notify the Director in writing of the action and the reason(s) therefor. In addition, the Manager, within 10 calendar days of the date of suspension (unless an extension of time is approved by the Director), shall notify the Director in writing of his/her proposal to conduct an administrative review proceeding, accompanied by an explanation of its basis and a duplicate Personnel Security File.

(g) Upon receipt of the Manager's notification, the Director shall review the matter and confer with the Manager on:

(1) The institution of administrative review procedures set forth in §§ 710.20 through 710.30; or

(2) The reinstatement of access authorization; or

(3) Other actions as the Director deems appropriate.

(h) The Director shall act pursuant to one of these options within 30 calendar days of the receipt of the Manager's notification unless an extension is granted by the Deputy Associate Under Secretary for Environment, Health, Safety and Security.

## Subpart C—Administrative Review

### § 710.20 Purpose of administrative review.

These procedures govern the conduct of the administrative review of questions concerning an individual's eligibility for access authorization when it is determined that such questions cannot be favorably resolved by interview or other action.

### § 710.21 Notice to the individual.

(a) Unless an extension is authorized in writing by the Director, within 30 calendar days of receipt of authority to institute administrative review procedures, the Manager shall prepare and deliver to the individual a notification letter approved by the local Office of Chief Counsel, or the Office of the General Counsel for Headquarters cases. Where practicable, the letter shall be delivered to the individual in person.

(b) The letter shall state:

(1) That reliable information in the possession of DOE has created a substantial doubt concerning the individual's eligibility for access authorization.

(2) The information which creates a substantial doubt regarding the individual's access authorization eligibility (which shall be as comprehensive and detailed as the national security permits) and why that information creates such doubt.

(3) That the individual has the option to have the substantial doubt regarding eligibility for access authorization resolved in one of two ways:

(i) By the Manager, without a hearing, on the basis of the existing information in the case; or

(ii) By personal appearance before an Administrative Judge (a ''hearing'').

(4) That, if the individual desires a hearing, the individual must, within 20 calendar days of the date of receipt of the notification letter, make a written request for a hearing to the Manager from whom the letter was received.

(5) That the individual may also file with the Manager the individual's written answer to the reported information which raises the question of the individual's eligibility for access authorization, and that, if the individual requests a hearing without filing a written answer, the request shall be deemed a general denial of all of the reported information.

(6) That, if the individual so requests, a hearing shall be scheduled before an Administrative Judge, with due regard for the convenience and necessity of the parties or their representatives, for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization. The Administrative Judge shall decide whether the hearing will be conducted via video teleconferencing.

(7) That, if a hearing is requested, the individual will have the right to appear personally before an Administrative Judge or, at the discretion of the Administrative Judge, via video teleconferencing; to present evidence in his/her own behalf, through witnesses, or by documents, or both; and, subject to the limitations set forth in § 710.26(g), to be present during the entire hearing and be accompanied, represented, and advised by counsel or other representative of the individual's choosing and at the individual's own expense at every stage of the proceedings. Such representative or counsel, if applicable, shall be identified in writing to the Administrative Judge and DOE Counsel and authorized by the individual to receive all correspondence, transcripts and other documents pertaining to the proceedings under this part.

(8) That the individual's failure to file a timely written request for a hearing before an Administrative Judge in accordance with paragraph (b)(4) of this section, unless time deadlines are extended for good cause, shall be considered as a relinquishment by the individual of the right to a hearing provided in this part, and that in such event a final decision to deny or revoke the individual's access authorization shall be made by the Manager.

(9) That in any proceedings under this subpart DOE Counsel will participate on behalf of and representing DOE and that any statements made by the individual to DOE Counsel may be used in subsequent proceedings;

(10) The individual's access authorization status until further notice;

(11) The name and telephone number of the designated DOE official to contact for any further information desired concerning the proceedings, including an explanation of the individual's rights under the Freedom of Information Act and Privacy Act;

(12) If applicable, that if the individual is currently the subject of criminal charges for a felony offense or an offense punishable by imprisonment of one year or more, the individual must elect either to continue with the Administrative Review process and have the substantial doubt regarding eligibility for access authorization resolved by the Manager or by a hearing, or to withdraw from the Administrative Review process.

(i) If the individual elects to continue with the Administrative Review process a determination as to the individual's access authorization shall be made by the Manager or by an Administrative Judge via a hearing. The individual will be expected to participate

fully in the process. Any refusal to cooperate, answer all questions, or provide requested information may prevent DOE from reaching an affirmative finding required for granting or continuing access authorization.

(ii) If the individual elects to withdraw from the Administrative Review process, the individual's access authorization shall be administratively withdrawn. Such action shall be taken in accordance with applicable procedures set forth in pertinent Departmental directives. Any future requests for access authorization for the individual must be accompanied by documentary evidence of resolution of the criminal charges.

(iii) The individual must, within 20 calendar days of receipt of the notification letter, indicate in writing his/her decision to continue or to withdraw from the Administrative Review process. Such notification must be made to the Manager from whom the notification letter was received.

(c) The notification letter referenced in paragraph (b) of this section shall also:

(1) Include a copy of this part, and

(2) For Federal employees only, indicate that if the individual believes that the action to process the individual under this part was taken as retaliation against the individual for having made a protected disclosure, as defined in Presidential Policy Directive 19, *Protecting Whistleblowers with Access to Classified Information,* or any successor directive issued under the authority of the President, the individual may submit a request for review of this matter directly to the DOE Office of the Inspector General. Such a request shall have no impact upon the continued processing of the individual's access authorization eligibility under this part.

### § 710.22 Initial decision process.

(a) The Manager shall make an initial decision as to the individual's access authorization eligibility based on the existing information in the case if:

(1) The individual fails to respond to the notification letter by filing a timely written request for a hearing before an Administrative Judge or fails to respond to the notification letter after requesting an extension of time to do so;

(2) The individual's response to the notification letter does not request a hearing before an Administrative Judge; or

(3) The Administrative Judge refers the individual's case to the Manager in accordance with § 710.25(e) or § 710.26(b).

(b) Unless an extension of time is granted by the Director, the Manager's initial decision as to the individual's access authorization eligibility shall be made within 15 calendar days of the date of receipt of the information in paragraph (a) of this section. The Manager shall either grant or deny, or reinstate or revoke, the individual's access authorization.

(c) A letter reflecting the Manager's initial decision shall be signed by the Manager and delivered to the individual within 15 calendar days of the date of the Manager's decision unless an extension of time is granted by the Director. If the Manager's initial decision is unfavorable to the individual, the individual shall be advised:

(1) Of the Manager's unfavorable decision and the reason(s) therefor;

(2) That within 30 calendar days from the date of receipt of the letter, the individual may file a written request for a review of the Manager's initial decision, through the Director, to the DOE Headquarters Appeal Panel (Appeal Panel);

(3) That the Director may, for good cause shown, at the written request of the individual, extend the time for filing a written request for a review of the case by the Appeal Panel; and

(4) That if the written request for a review of the Manager's initial decision by the Appeal Panel is not filed within 30 calendar days of the individual's receipt of the Manager's letter, the Manager's initial decision in the case shall be final and not subject to further review or appeal.

### § 710.23 Extensions of time by the manager.

The Manager may, for good cause shown, at the written request of the individual, extend the time for filing a written request for a hearing, and/or the time for filing a written answer to

the matters contained in the notification letter. The Manager shall notify the Director, in writing, when such extensions have been approved.

### § 710.24 Appointment of DOE Counsel.

(a) Upon receipt from the individual of a written request for a hearing, a DOE attorney shall forthwith be assigned by the Manager to act as DOE Counsel.

(b) DOE Counsel is authorized to consult directly with the individual if he/she is not represented by counsel, or with the individual's counsel or other representative if so represented, to clarify issues and reach stipulations with respect to testimony and contents of documents and physical evidence. Such stipulations shall be binding upon the individual and the DOE Counsel for the purposes of this part.

### § 710.25 Appointment of Administrative Judge; prehearing conference; commencement of hearings.

(a) Upon receipt of a request for a hearing, the Manager shall in a timely manner transmit that request to the Office of Hearings and Appeals, and identify the DOE Counsel. The Manager shall at the same time transmit a copy of the notification letter and the individual's response to the Office of Hearings and Appeals.

(b) Upon receipt of the hearing request from the Manager, the Director, Office of Hearings and Appeals, shall appoint, as soon as practicable, an Administrative Judge.

(c) Immediately upon appointment, the Administrative Judge shall notify the individual and DOE Counsel of his/her identity and the address to which all further correspondence should be sent.

(d) The Administrative Judge shall have all powers necessary to regulate the conduct of proceedings under this part, including, but not limited to, establishing a list of persons to receive service of papers, issuing subpoenas for witnesses to attend the hearing or for the production of specific documents or physical evidence, administering oaths and affirmations, ruling upon motions, receiving evidence, regulating the course of the hearing, disposing of procedural requests or similar matters, and taking other actions consistent with the regulations in this part. Requests for subpoenas shall be liberally granted except where the Administrative Judge finds that the issuance of subpoenas would result in evidence or testimony that is repetitious, incompetent, irrelevant, or immaterial to the issues in the case. The Administrative Judge may take sworn testimony, sequester witnesses, and control the dissemination or reproduction of any record or testimony taken pursuant to this part, including correspondence, or other relevant records or physical evidence including, but not limited to, information retained in computerized or other automated systems in possession of the subpoenaed person.

(e) The Administrative Judge shall determine the day, time, and place for the hearing and shall decide whether the hearing will be conducted via video teleconferencing. Hearings will normally be held at or near the relevant DOE facility, unless the Administrative Judge determines that another location would be more appropriate. Normally the location for the hearing will be selected for the convenience of all participants. In the event the individual fails to appear at the time and place specified, without good cause shown, the record in the case shall be closed and returned to the Manager, who shall then make an initial determination regarding the eligibility of the individual for DOE access authorization in accordance with § 710.22(a)(3).

(f) At least 7 calendar days prior to the date scheduled for the hearing, the Administrative Judge shall convene a prehearing conference for the purpose of discussing stipulations and exhibits, identifying witnesses, and disposing of other appropriate matters. The conference will usually be conducted by telephone.

(g) Hearings shall commence within 60 calendar days from the date the individual's request for a hearing is received by the Office of Hearings and Appeals. Any extension of the hearing date past 60 calendar days from the date the request for a hearing is received by the Office of Hearings and Appeals shall be decided by the Director, Office of Hearings and Appeals.

**§ 710.26 Conduct of hearings.**

(a) In all hearings conducted under this part, the individual shall have the right to be represented by a person of his/her own choosing, at the individual's own expense. The individual is responsible for producing witnesses in his/her own behalf, including requesting the issuance of subpoenas, if necessary, or presenting testimonial, documentary, or physical evidence before the Administrative Judge to support the individual's defense to the derogatory information contained in the notification letter. With the exception of procedural or scheduling matters, the Administrative Judge is prohibited from initiating or otherwise engaging in *ex parte* discussions about the case during the pendency of proceedings under this part.

(b) Unless the Administrative Judge finds good cause for deferring issuance of a decision, in the event that the individual unduly delays the hearing, such as by failure to meet deadlines set by the Administrative Judge, the record shall be closed, and an initial decision shall be made by the Manager on the basis of the record in the case per § 710.22(a)(3).

(c) Hearings shall be open only to DOE Counsel, duly authorized representatives of DOE, the individual and the individual's counsel or other representatives, and such other persons as may be authorized by the Administrative Judge. Unless otherwise ordered by the Administrative Judge, witnesses shall testify in the presence of the individual but not in the presence of other witnesses.

(d) DOE Counsel shall assist the Administrative Judge in establishing a complete administrative hearing record in the proceeding and bringing out a full and true disclosure of all facts, both favorable and unfavorable, having a bearing on the issues before the Administrative Judge. The individual shall be afforded the opportunity of presenting testimonial, documentary, and physical evidence, including testimony by the individual in the individual's own behalf. The proponent of a witness shall conduct the direct examination of that witness. All witnesses shall be subject to cross-examination, if possible. Whenever reasonably possible, testimony shall be given in person.

(e) The Administrative Judge may ask the witnesses any questions which the Administrative Judge deems appropriate to assure the fullest possible disclosure of relevant and material facts.

(f) During the course of the hearing, the Administrative Judge shall rule on all objections raised.

(g) In the event it appears during the course of the hearing that classified matter may be disclosed, it shall be the duty of the Administrative Judge to assure that disclosure is not made to persons who are not authorized to receive it, and take other appropriate measures.

(h) Formal rules of evidence shall not apply, but the Federal Rules of Evidence may be used as a guide for procedures and principles designed to assure production of the most probative evidence available. The Administrative Judge shall admit into evidence any matters, either oral or written, which are material, relevant, and competent in determining issues involved, including the testimony of responsible persons concerning the integrity of the individual. In making such determinations, the utmost latitude shall be permitted with respect to relevancy, materiality, and competency. The Administrative Judge may also exclude evidence which is incompetent, immaterial, irrelevant, or unduly repetitious. Every reasonable effort shall be made to obtain the best evidence available. Subject to §§ 710.26(l), 710.26(m), 710.26(n) and 710.26(o), hearsay evidence may, at the discretion of the Administrative Judge and for good cause show, be admitted without strict adherence to technical rules of admissibility and shall be accorded such weight as the Administrative Judge deems appropriate.

(i) Testimony of the individual and witnesses shall be given under oath or affirmation. Attention of the individual and each witness shall be directed to 18 U.S.C. 1001 and 18 U.S.C. 1621.

(j) The Administrative Judge shall endeavor to obtain all the facts that are reasonably available in order to arrive at a decision. If, prior to or during the proceedings, in the opinion of the

Administrative Judge, the derogatory information in the notification letter is not sufficient to address all matters into which inquiry should be directed, the Administrative Judge may recommend to the Manager concerned that, in order to give more adequate notice to the individual, the notification letter should be amended. Any amendment shall be made with the concurrence of the local Office of Chief Counsel or the Office of the General Counsel in Headquarters cases. If, in the opinion of the Administrative Judge, the circumstances of such amendment may involve undue hardship to the individual because of limited time to respond to the new derogatory information in the notification letter, an appropriate adjournment shall be granted upon the request of the individual.

(k) A written or oral statement of a person relating to the characterization in the notification letter of any organization or person other than the individual may be received and considered by the Administrative Judge without affording the individual an opportunity to cross-examine the person making the statement on matters relating to the characterization of such organization or person, provided the individual is given notice that such a statement has been received and may be considered by the Administrative Judge, and is informed of the contents of the statement, provided such notice is not prohibited by paragraph (g) of this section.

(l) Any oral or written statement adverse to the individual relating to a controverted issue may be received and considered by the Administrative Judge without affording an opportunity for cross-examination in either of the following circumstances:

(1) The head of the agency supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of the informant's identity would be substantially harmful to the national interest;

(2) The Secretary or the Secretary's special designee for that particular purpose has preliminarily determined, after considering information furnished by the investigative agency as to the reliability of the person and the accuracy of the statement concerned, that:

(i) The statement concerned appears to be reliable and material; and

(ii) Failure of the Administrative Judge to receive and consider such statement would, in view of the access sought to classified matter or special nuclear material, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify:

(A) Due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the individual, or

(B) Due to some other specified cause determined by the Secretary to be good and sufficient.

(m) Whenever procedures under paragraph (l) of this section are used:

(1) The individual shall be given a summary or description of the information which shall be as comprehensive and detailed as the national interest permits, and

(2) Appropriate consideration shall be accorded to the fact that the individual did not have an opportunity to cross-examine such person(s).

(n) Records compiled in the regular course of business, or other evidence other than investigative reports obtained by DOE, may be received and considered by the Administrative Judge subject to rebuttal without authenticating witnesses, provided that such information has been furnished to DOE by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary to safeguard classified matter or special nuclear material.

(o) Records compiled in the regular course of business, or other evidence other than investigative reports, relating to a controverted issue which, because they are classified, may not be inspected by the individual, may be received and considered by the Administrative Judge, provided that:

(1) The Secretary or the Secretary's special designee for that particular

purpose has made a preliminary determination that such evidence appears to be material;

(2) The Secretary or the Secretary's special designee for that particular purpose has made a determination that failure to receive and consider such evidence would, in view of the access sought to classified matter or special nuclear material, be substantially harmful to the national security; and

(3) To the extent that national security permits, a summary or description of such evidence is made available to the individual. In every such case, information as to the authenticity and accuracy of such evidence furnished by the investigative agency shall be considered.

(p) The Administrative Judge may request the Local Director of Security to arrange for additional investigation on any points which are material to the deliberations of the Administrative Judge and which the Administrative Judge believes need further investigation or clarification. In this event, the Administrative Judge shall set forth in writing those issues upon which more evidence is requested, identifying where possible persons or sources from which the evidence should be sought. The Local Director of Security shall make every effort through appropriate sources to obtain additional information upon the matters indicated by the Administrative Judge.

(q) A written transcript of the entire hearing shall be made and, except for portions containing classified matter, a copy of such transcript shall be furnished to the individual without cost.

(r) Whenever information is made a part of the record under the exceptions authorized by paragraphs (l) or (o) of this section, the record shall contain certificates evidencing that the determinations required therein have been made.

### § 710.27 Administrative Judge's decision.

(a) The Administrative Judge shall carefully consider the entire record of the proceeding and shall render a decision, within 30 calendar days of the receipt of the hearing transcript, as to whether granting or restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. In resolving a question concerning the eligibility of an individual for access authorization under these procedures, the Administrative Judge shall consider the factors stated in § 710.7(c) to determine whether the findings will be favorable or unfavorable.

(b) In reaching the findings, the Administrative Judge shall consider the demeanor of the witnesses who have testified at the hearing, the probability or likelihood of the truth of their testimony, their credibility, and the authenticity and accuracy of documentary evidence, or lack of evidence on any material points in issue. If the individual is, or may be, handicapped by the non-disclosure to the individual of undisclosed information or by lack of opportunity to cross-examine confidential informants, the Administrative Judge shall take that fact into consideration. The possible adverse impact of the loss of the individual's access authorization upon the DOE program in which the individual works shall not be considered by the Administrative Judge.

(c) The Administrative Judge shall make specific findings based upon the record as to the validity of each instance of derogatory information contained in the notification letter and the significance which the Administrative Judge attaches to it. These findings shall be supported fully by a statement of reasons which constitute the basis for such findings.

(d) The Administrative Judge's decision shall be based on the Administrative Judge's findings of fact. If, after considering all of the factors set forth in § 710.7(c) in light of the Adjudicative Guidelines, the Administrative Judge is of the opinion that it will not endanger the common defense and security and will be clearly consistent with the national interest to grant or reinstate access authorization for the individual, the Administrative Judge shall render a favorable decision; otherwise, the Administrative Judge shall render an unfavorable decision. Within 15 calendar days of the Administrative Judge's written decision, the Administrative

Judge shall provide copies of the decision and the administrative record to the Manager and the Director.

**§ 710.28 Action on the Administrative Judge's decision.**

(a) Within 10 calendar days of receipt of the decision and the administrative record, unless an extension of time is granted by the Director, the Manager shall:

(1) Notify the individual in writing of the Administrative Judge's decision;

(2) Advise the individual in writing of the appeal procedures available to the individual in paragraph (b) of this section if the decision is unfavorable to the individual;

(3) Advise the individual in writing of the appeal procedures available to the Manager and the Director in paragraph (c) of this section if the decision is favorable to the individual; and

(4) Provide the individual and/or his/her counsel or other representative a copy of the Administrative Judge's decision and the administrative record.

(b) If the Administrative Judge's decision is unfavorable to the individual:

(1) The individual may file with the Director a written request for further review of the decision by the Appeal Panel along with a statement required by paragraph (e) of this section within 30 calendar days of the individual's receipt of the Manager's notice;

(2) The Director may, for good cause shown, extend the time for filing a request for further review of the decision by the Appeal Panel at the written request of the individual, provided the request for an extension of time is filed by the individual within 30 calendar days of receipt of the Manager's notice;

(3) The Administrative Judge's decision shall be final and not subject to review or appeal if the individual does not:

(i) File a written request for a review of the decision by the Appeal Panel or for an extension of time to file a written request for review of the decision by the Appeal Panel in accordance with paragraphs (b)(1) or (b)(2) of this section, or

(ii) File a written request for review of the decision by the Appeal Panel after having been granted an extension of time to do so.

(c) If the Administrative Judge's decision is favorable to the individual:

(1) The Manager, with the concurrence of the Director, shall grant or reinstate the individual's access authorization within 30 calendar days of the Administrative Judge's decision becoming final, or

(2) The Manager or the Director may file a written request with the Deputy Associate Under Secretary for Environment, Health, Safety and Security for review of the decision by the Appeal Panel, along with statement required by paragraph (e) of this section, within 30 calendar days of the individual's receipt of the Manager's notice.

(3) The Deputy Associate Under Secretary for Environment, Health, Safety and Security may, for good cause shown, extend the time for filing a request for review of the decision by the Appeal Panel at the request of the Manager or Director, provided the request for an extension of time is filed by the Manager or Director within 30 calendar days of the receipt of the Manager's notice;

(4) The Administrative Judge's decision shall constitute final action, and not be subject to review or appeal, if the Manager or Director does not:

(i) File a written request for review of the decision by the Appeal Panel or for an extension of time to file a written request for review of the decision by the Appeal Panel in accordance with paragraphs (c)(2) or (c)(3) of this section, or

(ii) File a written request for a review of the decision by the Appeal Panel after having been granted an extension of time to do so.

(d) A copy of any request for review of the individual's case by the Appeal Panel filed by the Manager or the Director shall be provided to the individual by the Manager.

(e) The party filing a request for review by the Appeal Panel shall include with the request a statement identifying the issues upon which the appeal is based. A copy of the request and statement shall be served on the other party, who may file a response with the Appeal Panel within 20 calendar days of receipt of the statement.

**§ 710.29 Final appeal process.**

(a) The Appeal Panel shall be convened by the Deputy Associate Under Secretary for Environment, Health, Safety and Security to review and render a final decision in access authorization eligibility cases referred by the individual, the Manager, or the Director in accordance with §§ 710.22 or 710.28.

(b) The Appeal Panel shall consist of three members, each of whom shall be a DOE Headquarters employee, a United States citizen, and hold a DOE Q access authorization. The Deputy Associate Under Secretary for Environment, Health, Safety and Security shall serve as a permanent member of the Appeal Panel and as the Appeal Panel Chair. The second member of the Appeal Panel shall be a DOE attorney designated by the General Counsel. The head of the DOE Headquarters element which has cognizance over the individual whose access authorization eligibility is being considered may designate an employee to act as the third member on the Appeal Panel; otherwise, the third member shall be designated by the Chair. Only one member of the Appeal Panel shall be from the security field.

(c) In filing a written request for a review by the Appeal Panel in accordance with §§ 710.22 and 710.28, the individual, or his/her counsel or other representative, shall identify the issues upon which the appeal is based. The written request, and any response, shall be made a part of the administrative record. The Director shall provide staff support to the Appeal Panel as requested by the Chair.

(d) Within 15 calendar days of the receipt of the request for review of a case by the Appeal Panel, the Chair shall arrange for the Appeal Panel members to convene and review the administrative record or provide a copy of the administrative record to the Appeal Panel members for their independent review.

(e) The Appeal Panel shall consider only that evidence and information in the administrative record at the time of the Manager's or the Administrative Judge's initial decision.

(f) Within 45 calendar days of receipt of the administrative record, the Appeal Panel shall render a final decision in the case. If a majority of the Appeal Panel members determine that it will not endanger the common defense and security and will be clearly consistent with the national interest, the Chair shall grant or reinstate the individual's access authorization; otherwise, the Chair shall deny or revoke the individual's access authorization. The Appeal Panel's written decision shall be made a part of the administrative record and is not subject to further review or appeal.

(g) The Chair, through the Director, shall inform the individual in writing, as well as the individual's counsel or other representative, of the Appeal Panel's final decision. A copy of the correspondence shall also be provided to the other panel members and the Manager.

**§ 710.30 Action by the Secretary.**

(a) Whenever an individual has not been afforded an opportunity to cross-examine witnesses who have furnished information adverse to the individual under the provisions of §§ 710.26(l) or (o), the Secretary may issue a final decision to deny or revoke access authorization for the individual after personally reviewing the administrative record and any additional material provided by the Chair. The Secretary's authority may, in accordance with applicable provisions of Executive Order 12968, be delegated to the Deputy Secretary where the effected individual is a Federal employee. The Secretary's authority, in accordance with applicable provisions of Executive Order 10865, may not be delegated where the effected individual is a contractor employee. This authority may be exercised only when the Secretary determines that the circumstances described in § 710.26(l) or (o) are present, and such determination shall be final and not subject to review or appeal.

(b) Whenever the Secretary issues a final decision as to an individual's access authorization eligibility, the individual and other concerned parties shall be notified in writing by the Chair of that decision and of the Secretary's findings with respect to each instance of derogatory information contained in the notification letter and

each substantial issue identified in the statement in support of the request for review to the extent allowed by the national security.

(c) Nothing contained in these procedures shall be deemed to limit or affect the responsibility and powers of the Secretary to issue subpoenas or to deny or revoke access to classified matter or special nuclear material.

### § 710.31 Reconsideration of access eligibility.

(a) If, pursuant to the procedures set forth in §§ 710.20 through 710.30, the Manager, Administrative Judge, Appeal Panel, or the Secretary has made a decision granting or reinstating an individual's access authorization, eligibility shall be reconsidered as a new administrative review under the procedures set forth in this part when previously unconsidered derogatory information is identified, or the individual violates a commitment upon which the DOE previously relied to favorably resolve an issue of access authorization eligibility.

(b) If, pursuant to the procedures set forth in §§ 710.20 through 710.31, the Manager, Administrative Judge, Appeal Panel, or the Secretary has made a decision denying or revoking the individual's access authorization, eligibility may be reconsidered only when the individual so requests in writing, when there is a bona fide offer of employment requiring access authorization, and when there is either material and relevant new evidence which the individual and the individual's representatives were without fault in failing to present earlier, or convincing evidence of rehabilitation or reformation.

(1) A request for reconsideration shall be accepted when a minimum of one year has elapsed since the date of the Manager's, Administrative Judge's, Appeal Panel's or Secretary's final decision, or of a previous denial of reconsideration. Requests must be submitted in writing to the Deputy Associate Under Secretary for Environment, Health, Safety and Security, and must include an affidavit setting forth in detail the new evidence or evidence of rehabilitation or reformation.

(2) If the Deputy Associate Under Secretary for Environment, Health, Safety and Security approves the request for reconsideration of an individual's access authorization eligibility, he/she shall so notify the individual, and shall direct the Manager to take appropriate actions to determine whether the individual is eligible for access authorization.

(3) If the Deputy Associate Under Secretary for Environment, Health, Safety and Security denies the request for reconsideration of an individual's access authorization eligibility, he/she shall so notify the individual in writing. Such a denial is final and not subject to review or appeal.

(4) If, pursuant to the provisions of § 710.31(2), the Manager determines the individual is eligible for access authorization, the Manager shall grant access authorization.

(5) If, pursuant to the provisions of § 710.31(2), the Manager determines the individual remains ineligible for access authorization, the Manager shall so notify the Director in writing. If the Director concurs, the Director shall notify the individual in writing. This decision is final and not subject to review or appeal. If the Director does not concur, the Director shall confer with the Manager on further actions.

(6) Determinations as to eligibility for access authorization pursuant to paragraphs (f) or (g) of this section may be based solely upon the mitigation of derogatory information which was relied upon in a final decision to deny or to revoke access authorization. If, pursuant to the procedures set forth in paragraph (d) of this section, previously unconsidered derogatory information is identified, a determination as to eligibility for access authorization must be subject to a new Administrative Review proceeding.

## Subpart D—Miscellaneous

### § 710.32 Terminations.

(a) If the individual is no longer an applicant for access authorization or no longer requires access authorization, the procedures of this part shall be terminated without a final decision as to the individual's access authorization eligibility, unless a final decision

has been rendered prior to the DOE being notified of the change in the individual's pending access authorization status. Where the procedures of this part have been terminated pursuant to this paragraph after an unfavorable initial agency decision as to the individual's access authorization eligibility has been rendered, any subsequent request for access authorization for the individual will be processed as a request for a review of the initial agency decision by the Appeal Panel and a final agency decision will be rendered pursuant to § 710.29, unless a minimum of one year has elapsed since the date of the initial agency decision.

(b) With regard to applicants (individuals for whom DOE has not yet approved access authorization), DOE may administratively terminate processing an application for access authorization under the following circumstances:

(1) If the applicant is currently the subject of criminal proceedings for a felony offense or an offense that is punishable by a term of imprisonment of one year or longer, or is awaiting or serving a form of probation, suspended or deferred sentencing, or parole. Once all judicial proceedings on the criminal charges have been finally resolved, and the term (if any) of imprisonment, probation, or parole has been completed, DOE processing of a request for access authorization shall resume upon receipt by DOE of a written request therefor, provided that the individual has a bona fide offer of employment requiring access authorization.

(2) If sufficient information about the individual's background cannot be obtained to meet the investigative scope and extent requirements for the access authorization requested.

(c) If an individual believes that the provisions of paragraph (b) of this section have been inappropriately applied, a written appeal may be filed with the Director within 30 calendar days of the date the individual was notified of the action. The Director shall act on the written appeal as described in § 710.6(c).

### § 710.33 Time frames.

Statements of time established for processing aspects of a case under this part are the agency's desired time frames in implementing the procedures set forth in this part. However, failure to meet the time frames shall have no impact upon the final disposition of an access authorization by a Manager, Administrative Judge, the Appeal Panel, or the Secretary, and shall confer no procedural or substantive rights upon an individual whose access authorization eligibility is being considered.

### § 710.34 Acting officials.

Except for the Secretary, the responsibilities and authorities conferred in this part may be exercised by persons who have been designated in writing as acting for, or in the temporary capacity of, the following DOE positions: The Local Director of Security; the Manager; the Director, or the General Counsel. The responsibilities and authorities of the Deputy Associate Under Secretary for Environment, Health, Safety and Security may be exercised by persons in senior security-related positions within the Office of Environment, Health, Safety and Security who have been designated in writing as acting for, or in the temporary capacity of, the Deputy Associate Under Secretary for Environment, Health, Safety and Security, with the approval of the Associate Under Secretary for Environment, Health, Safety and Security.

## APPENDIX A—ADJUDICATIVE GUIDELINES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED INFORMATION (DECEMBER 30, 2005)

1. *Introduction.* The following adjudicative guidelines are established for all U.S. government civilian and military personnel, consultants, contractors, employees of contractors, licensees, certificate holders or grantees and their employees and other individuals who require access to classified information. They apply to persons being considered for initial or continued eligibility for access to classified information, to include sensitive compartmented information and special access programs, and are to be used by government departments and agencies in all final clearance determinations. Government departments and agencies may also choose to apply these guidelines to analogous situations regarding persons being considered for access to other types of protected information.

Decisions regarding eligibility for access to classified information take into account factors that could cause a conflict of interest

and place a person in the position of having to choose between his or her commitment to the United States, including the commitment to protect classified information, and any other compelling loyalty. Access decisions also take into account a person's reliability, trustworthiness and ability to protect classified information. No coercive policing could replace the self-discipline and integrity of the person entrusted with the nation's secrets as the most effective means of protecting them. When a person's life history shows evidence of unreliability or untrustworthiness, questions arise whether the person can be relied on and trusted to exercise the responsibility necessary for working in a secure environment where protecting classified information is paramount.

2. *The Adjudicative Process.*

(a) The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudication process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:

(1) The nature, extent, and seriousness of the conduct;

(2) The circumstances surrounding the conduct, to include knowledgeable participation;

(3) The frequency and recency of the conduct;

(4) The individual's age and maturity at the time of the conduct;

(5) The extent to which participation is voluntary;

(6) The presence or absence of rehabilitation and other permanent behavioral changes;

(7) The motivation for the conduct;

(8) The potential for pressure, coercion, exploitation, or duress; and

(9) The likelihood of continuation or recurrence.

(b) Each case must be judged on its own merits, and final determination remains the responsibility of the specific department or agency. Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.

(c) The ability to develop specific thresholds for action under these guidelines is limited by the nature and complexity of human behavior. The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person.

(1) Guideline A: Allegiance to the United States;

(2) Guideline B: Foreign Influence;

(3) Guideline C: Foreign Preference;

(4) Guideline D: Sexual Behavior;

(5) Guideline E: Personal Conduct;

(6) Guideline F: Financial Considerations;

(7) Guideline G: Alcohol Consumption;

(8) Guideline H: Drug Involvement;

(9) Guideline I: Psychological Conditions;

(10) Guideline J: Criminal Conduct;

(11) Guideline K: Handling Protected Information;

(12) Guideline L: Outside Activities;

(13) Guideline M: Use of Information Technology Systems.

(d) Although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior. Notwithstanding the whole-person concept, pursuit of further investigation may be terminated by an appropriate adjudicative agency in the face of reliable, significant, disqualifying, adverse information.

(e) When information of security concern becomes known about an individual who is currently eligible for access to classified information, the adjudicator should consider whether the person:

(1) Voluntarily reported the information;

(2) Was truthful and complete in responding to questions;

(3) Sought assistance and followed professional guidance, where appropriate;

(4) Resolved or appears likely to favorably resolve the security concern:

(5) Has demonstrated positive changes in behavior and employment;

(6) Should have his or her access temporarily suspended pending final adjudication of the information.

(f) If after evaluating information of security concern, the adjudicator decides that the information is not serious enough to warrant a recommendation of disapproval or revocation of the security clearance, it may be appropriate to recommend approval with a warning that future incidents of a similar nature may result in revocation of access.

GUIDELINE A: ALLEGIANCE TO THE UNITED STATES

3. *The Concern.* An individual must be of unquestioned allegiance to the United States. The willingness to safeguard classified information is in doubt if there is any reason to suspect an individual's allegiance to the United States.

4. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Involvement in, support of, training to commit, or advocacy of any act of sabotage, espionage, treason, terrorism, or sedition against the United States of America;

(b) Association or sympathy with persons who are attempting to commit, or who are committing, any of the above acts;

(c) Association or sympathy with persons or organizations that advocate, threaten, or use force or violence, or use any other illegal or unconstitutional means, in an effort to:

(1) Overthrow or influence the government of the United States or any state or local government;

(2) Prevent Federal, state, or local government personnel from performing their official duties;

(3) Gain retribution for perceived wrongs caused by the Federal, state, or local government;

(4) Prevent others from exercising their rights under the Constitution or laws of the United States or of any state.

5. *Conditions that could mitigate security concerns include:*

(a) The individual was unaware of the unlawful aims of the individual or organization and severed ties upon learning of these;

(b) The individual's involvement was only with the lawful or humanitarian aspects of such an organization;

(c) Involvement in the above activities occurred for only a short period of time and was attributable to curiosity or academic interest;

(d) The involvement or association with such activities occurred under such unusual circumstances, or so much times has elapsed, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or loyalty.

GUIDELINE B: FOREIGN INFLUENCE

6. *The Concern.* Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercioon by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

7. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

(b) Connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information;

(c) Counterintelligence information, that may be classified, indicates that the individual's access to protected information may involve unacceptable risk to national security;

(d) Sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion;

(e) A substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation;

(f) Failure to report, when required, association with a foreign national;

(g) Unauthorized association with a suspected or known agent, associate, or employee of a foreign intelligence service;

(h) Indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, inducement, manipulation, pressure, or coercion;

(i) Conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country.

8. *Conditions that could mitigate security concerns include:*

(a) The nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) There is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

(c) Contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

(d) The foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) The individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country;

(f) The value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

GUIDELINE C: FOREIGN PREFERENCE

9. *The Concern*. When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

10. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

(1) Possession of a current foreign passport;

(2) Military service or a willingness to bear arms for a foreign country;

(3) Accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;

(4) Residence in a foreign country to meet citizenship requirements;

(5) Using foreign citizenship to protect financial or business interests in another country;

(6) Seeking or holding political office in a foreign country;

(7) Voting in a foreign election;

(b) Action to acquire or obtain recognition of a foreign citizenship by an American citizen;

(c) Performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest;

(d) Any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

11. *Conditions that could mitigate security concerns include:*

(a) Dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(b) The individual has expressed a willingness to renounce dual citizenship;

(c) Exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;

(d) Use of a foreign passport is approved by the cognizant security authority;

(e) The passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated;

(f) The vote in a foreign election was encouraged by the United States Government.

GUIDELINE D: SEXUAL BEHAVIOR

12. *The Concern*. Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in the Guideline may be raised solely on the basis of the sexual orientation of the individual.

13. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(b) A pattern of compulsive, self-destructive, or high-risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;

(c) Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;

(d) Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

14. *Conditions that could mitigate security concerns include:*

(a) The behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;

(b) The sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(c) The behavior no longer serves as a basis for coercion, exploitation, or duress;

(d) The sexual behavior is strictly private, consensual, and discreet.

GUIDELINE E: PERSONAL CONDUCT

15. *The Concern*. Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. The following will normally result in an

unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) Refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation;

(b) Refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

16. *Conditions that could raise a security concern and may be disqualifying also include:*

(a) Deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) Deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(c) Credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(d) Credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) Untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) Disruptive, violent, or other inappropriate behavior in the workplace;

(3) A pattern of dishonesty or rule violations;

(4) Evidence of significant misuse of Government or other employer's time or resources;

(e) Personal conduct or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as:

(1) Engaging in activities which, if known, may affect the person's personal, professional, or community standing, or

(2) While in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

(f) Violation of a written or recorded commitment made by the individual to the employer as a condition of employment;

(g) Association with persons involved in criminal activity.

17. *Conditions that could mitigate security concerns include:*

(a) The individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) The refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) The offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) The individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) The individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) Association with persons involved in criminal activities has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

GUIDELINE F: FINANCIAL CONSIDERATIONS

18. *The Concern.* Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability

to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

19. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Inability or unwillingness to satisfy debts;

(b) Indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt.

(c) A history of not meeting financial obligations;

(d) Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust;

(e) Consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis;

(f) Financial problems that are linked to drug abuse, alcoholism, gambling problems, or other issues of security concern.

(g) Failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same;

(h) Unexplained affluence, as shown by a lifestyle or standard of living, increase in net worth, or money transfers that cannot be explained by subject's known legal sources of income;

(i) Compulsive or addictive gambling as indicated by an unsuccessful attempt to stop gambling, ''chasing losses'' (*i.e.*, increasing the bets or returning another day in an effort to get even), concealment of gambling losses, borrowing money to fund gambling or pay gambling debts, family conflict or other problems caused by gambling.

20. *Conditions that could mitigate security concerns include:*

(a) The behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) The conditions that resulted in the financial problem were largely beyond the person's control (*e.g.* loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) The person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;

(e) The individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue;

(f) The affluence resulted from a legal source of income.

GUIDELINE G: ALCOHOL CONSUMPTION

21. *The Concern*. Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

22. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

(b) Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

(c) Habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

(d) Diagnosis by a duly qualified medical professional (*e.g.*, physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;

(e) Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;

(f) Relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program;

(g) Failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

23. *Conditions that could mitigate security concerns include:*

(a) So much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) The individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern

of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);

(c) The individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress;

(d) The individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

GUIDELINE H: DRUG INVOLVEMENT

24. *The Concern*. Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (*e.g.*, marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) Inhalants and other similar substances

(b) Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

25. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Any drug abuse (see above definition);

(b) Testing positive for illegal drug use;

(c) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

(d) Diagnosis by a duly qualified medical professional (*e.g.*, physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;

(e) Evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program;

(f) Failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;

(g) Any illegal drug use after being granted a security clearance;

(h) Expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

26. *Conditions that could mitigate security concerns include:*

(a) The behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) A demonstrated intent not to abuse any drugs in the future, such as:

(1) Dissociation from drug-using associates and contacts;

(2) Changing or avoiding the environment where drugs were used;

(3) An appropriate period of abstinence;

(4) A signed statement of intent with automatic revocation of clearance for any violation;

(c) Abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended;

(d) Satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

GUIDELINE I: PSYCHOLOGICAL CONDITIONS

27. *The Concern*. Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified mental health professional (*e.g.*, clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this guideline. No negative inference concerning the standards in this Guideline may be raised solely on the basis of seeking mental health counseling.

28. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Behavior that casts doubt on an individual's judgment, reliability, or trustworthiness that is not covered under any other guideline, including but not limited to emotionally unstable, irresponsible, dysfunctional, violent, paranoid, or bizarre behavior;

(b) An opinion by a duly qualified mental health professional that the individual has a condition not covered under any other guideline that may impair judgment, reliability, or trustworthiness;

(c) The individual has failed to follow treatment advice related to a diagnosed emotional, mental, or personality condition, *e.g.* failure to take prescribed medication.

29. *Conditions that could mitigate security concerns include:*

(a) The identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;

(b) The individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional;

(c) Recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation;

(d) The past emotional instability was a temporary condition (*e.g.*, one caused by a death, illness, or marital breakup), the situation has been resolved, and the individual no longer shows indications of emotional instability;

(e) There is no indication of a current problem.

GUIDELINE J: CRIMINAL CONDUCT

30. *The Concern*. Criminal activity creates doubt about a person's judgment, reliability and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

31. *Conditions that could raise a security concern and may be disqualifying include:*

(a) A single serious crime or multiple lesser offenses;

(b) Discharge or dismissal from the Armed Forces under dishonorable conditions;

(c) Allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;

(d) Individual is currently on parole or probation;

(e) Violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

32. *Conditions that could mitigate security concerns include:*

(a) So much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) The person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) Evidence that the person did not commit the offense;

(d) There is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

GUIDELINE K: HANDLING PROTECTED INFORMATION

33. *The Concern*. Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

34. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Deliberate or negligent disclosure of classified or other protected information to unauthorized persons, including but not limited to personal or business contacts, to the media, or to persons present at seminars, meetings, or conferences;

(b) Collecting or storing classified or other protected information in any unauthorized location;

(c) Loading, drafting, editing, modifying, storing, transmitting, or otherwise handling classified reports, data, or other information on any unapproved equipment including but not limited to any typewriter, word processor, or computer hardware, software, drive, system, gameboard, handheld, ''palm'' or pocket device or other adjunct equipment;

(d) Inappropriate efforts to obtain or view classified or other protected information outside one's need to know;

(e) Copying classified or other protected information in a manner designed to conceal or remove classification or other document control markings;

(f) Viewing or downloading information from a secure system when the information is beyond the individual's need to know;

(g) Any failure to comply with rules for the protection of classified or other sensitive information;

(h) Negligence or lax security habits that persist despite counseling by management;

(i) Failure to comply with rules or regulations that results in damage to the National Security, regardless of whether it was deliberate or negligent.

35. *Conditions that could mitigate security concerns include:*

(a) So much time has elapsed since the behavior, or it happened so infrequently or under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) The individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities;

(c) The security violations were due to improper or inadequate training.

GUIDELINE L: OUTSIDE ACTIVITIES

36. *The Concern*. Involvement in certain types of outside employment or activities is

of security concern if it poses a conflict of interest with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information.

37. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Any employment or service, whether compensated or volunteer, with:

(1) The government of a foreign country;

(2) Any foreign national, organization, or other entity;

(3) A representative of any foreign interest;

(4) Any foreign, domestic, or international organization or person engaged in analysis, discussion, or publication of material on intelligence, defense, foreign affairs, or protected technology;

(b) Failure to report or fully disclose an outside activity when this is required.

38. *Conditions that could mitigate security concerns include:*

(a) Evaluation of the outside employment or activity by the appropriate security or counterintelligence office indicates that it does not pose a conflict with an individual's security responsibilities or with the national security interests of the United States;

(b) The individual terminates the employment or discontinued the activity upon being notified that it was in conflict with his or her security responsibilities.

GUIDELINE M: USE OF INFORMATION TECHNOLOGY SYSTEMS

39. *The Concern.* Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.

40. *Conditions that could raise a security concern and may be disqualifying include:*

(a) Illegal or unauthorized entry into any information technology system or component thereof;

(b) Illegal or unauthorized modification, destruction, manipulation or denial of access to information, software, firmware, or hardware in an information technology system;

(c) Use of any information technology system to gain unauthorized access to another system or to a compartmented area within the same system;

(d) Downloading, storing, or transmitting classified information on or to any unauthorized software, hardware, or information technology system;

(e) Unauthorized use of a government or other information technology system;

(f) Introduction, removal, or duplication of hardware, firmware, software, or media to or from any information technology system without authorization, when prohibited by rules, procedures, guidelines or regulations.

(g) Negligence or lax security habits in handling information technology that persist despite counseling by management;

(h) Any misuse of information technology, whether deliberate or negligent, that results in damage to the national security.

41. *Conditions that could mitigate security concerns include:*

(a) So much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) The misuse was minor and done only in the interest of organizational efficiency and effectiveness, such as letting another person use one's password or computer when no other timely alternative was readily available;

(c) The conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification of supervisor.

# PART 712—HUMAN RELIABILITY PROGRAM

## Subpart A—Establishment of and Procedures for the Human Reliability Program

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SOURCE: 69 FR 3223, Jan. 23, 2004, unless otherwise noted.

## Subpart A—Establishment of and Procedures for the Human Reliability Program

GENERAL PROVISIONS

### § 712.1 Purpose.

This part establishes the policies and procedures for a Human Reliability Program (HRP) in the Department of Energy (DOE), including the National Nuclear Security Administration (NNSA). The HRP is a security and safety reliability program designed to ensure that individuals who occupy positions affording access to certain materials, nuclear explosive devices, facilities, and programs meet the highest standards of reliability and physical and mental suitability. This objective is accomplished under this part through a system of continuous evaluation that identifies individuals whose judgment and reliability may be impaired by physical or mental/personality disorders, alcohol abuse, use of illegal drugs or the abuse of legal drugs or other substances, or any other condition or circumstance that may be of a security or safety concern.

### § 712.2 Applicability.

The HRP applies to all applicants for, or current employees of DOE or a DOE contractor or subcontractor in a position defined or designated under § 712.10 of this subpart as an HRP position. Individuals currently in a Personnel Assurance Program or Personnel Security Assurance Program position will be grandfathered into the HRP.

### § 712.3 Definitions.

The following definitions are used in this part:

*Access* means:

(1) A situation that may provide an individual proximity to or control over Category I special nuclear material (SNM); or

(2) The proximity to a nuclear explosive and/or Category I SNM that allows the opportunity to divert, steal, tamper with, and/or damage the nuclear explosive or material in spite of any controls that have been established to prevent such unauthorized actions.

*Alcohol* means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohol.

*Alcohol abuse* means consumption of any beverage, mixture, or preparation, including any medication containing alcohol that results in impaired social or occupational functioning.

*Alcohol concentration* means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test.

*Alcohol use disorder* means a maladaptive pattern in which a person's intake of alcohol is great enough to damage or adversely affect physical or mental health or personal, social, or occupational function; or when alcohol has become a prerequisite to normal function.

*Certification* means the formal action the HRP certifying official takes that permits an individual to perform HRP duties after it is determined that the individual meets the requirements for certification under this part.

*Contractor* means subcontractors at all tiers and any industrial, educational, commercial, or other entity, grantee, or licensee, including an employee that has executed an agreement with the Federal government for the purpose of performing under a contract, license, or other arrangement.

*Designated Physician* means a licensed doctor of medicine or osteopathy who has been nominated by the Site Occupational Medical Director (SOMD) and approved by the Manager or designee, with the concurrence of the Director, Office of Health and Safety, to provide professional expertise in occupational medicine for the HRP.

*Designated Psychologist* means a licensed Ph.D., or Psy.D., in clinical psychology who has been nominated by the SOMD and approved by the Manager or designee, with the concurrence of the Director, Office of Health and Safety, to provide professional expertise in the area of psychological assessment for the HRP.

*Diagnostic and Statistical Manual of Mental Disorders* means the current version of the American Psychiatric Association's manual containing definitions of psychiatric terms and diagnostic criteria of mental disorders.

*Director, Office of Health and Safety* means the DOE individual with responsibility for policy and quality assurance for DOE occupational medical programs.

*Drug abuse* means use of an illegal drug or misuse of legal drugs.

*Evidential-grade breath alcohol device* means a device that conforms to the model standards for an evidential breath-testing device as listed on the Conforming Products List of Evidential Breath Measurement Devices published by the National Highway Traffic Safety Administration (NHTSA).

*Flashback* means an involuntary, spontaneous recurrence of some aspect of a hallucinatory experience or perceptual distortion that occurs long after taking the hallucinogen that produced the original effect; also referred to as hallucinogen persisting perception disorder.

*Hallucinogen* means a drug or substance that produces hallucinations, distortions in perception of sights and sounds, and disturbances in emotion, judgment, and memory.

*HRP candidate* means an individual being considered for assignment to an HRP position.

*HRP-certified individual* means an individual who has successfully completed the HRP requirements.

*HRP certifying official* means the Manager or the Manager's designee who certifies, recertifies, temporarily removes, reviews the circumstances of an individual's removal from an HRP position, and directs reinstatement.

*HRP management official* means an individual designated by the DOE or a DOE contractor, as appropriate, who has programmatic responsibility for HRP positions.

*Illegal drug* means a controlled substance, as specified in Schedules I through V of the Controlled Substances Act, 21 U.S.C. 811 and 812; the term does not apply to the use of a controlled substance in accordance with the terms of a valid prescription, or other uses authorized by Federal law.

*Impaired or impairment* means a decrease in functional capacity of a person that is caused by a physical, mental, emotional, substance abuse, or behavioral disorder.

*Incident* means an unplanned, undesired event that interrupts the completion of an activity and that may include property damage or injury.

*Job task analysis* means the formal process of defining the requirements of a position and identifying the knowledge, skills, and abilities necessary to effectively perform the duties of the position.

*Manager* means the senior Federal line manager at a departmental site or Federal office with HRP-designated positions.

*Material access area* means a type of Security Area that is authorized to contain a Category I quantity of special nuclear material and that has specifically defined physical barriers, is located within a Protected Area, and is subject to specific access controls.

*Medical assessment* means an evaluation of an HRP candidate and HRP-certified individual's present health status and health risk factors by means of:

(1) Medical history review;

(2) Job task analysis;

(3) Physical examination;

(4) Appropriate laboratory tests and measurements; and

(5) Appropriate psychological and psychiatric evaluations.

*Nuclear explosive* means an assembly of fissionable and/or fusionable materials and main charge high explosive parts or propellants that is capable of producing a nuclear detonation.

*Nuclear explosive duties* means work assignments that allow custody of a nuclear explosive or access to a nuclear explosive device or area.

*Occurrence* means any event or incident that is a deviation from the planned or expected behavior or course

of events in connection with any DOE or DOE-controlled operation if the deviation has environmental, public health and safety, or national security protection significance, including (but not limited to) incidents involving:

(1) Injury or fatality to any person involving actions of a DOE employee or contractor employee;

(2) An explosion, fire, spread of radioactive material, personal injury or death, or damage to property that involves nuclear explosives under DOE jurisdiction;

(3) Accidental release of pollutants that results from, or could result in, a significant effect on the public or environment; or

(4) Accidental release of radioactive material above regulatory limits.

*Psychological assessment or test* means a scientifically validated instrument designed to detect psychiatric, personality, and behavioral tendencies that would indicate problems with reliability and judgment.

*Random alcohol testing* means the unscheduled, unannounced alcohol testing of randomly selected employees by a process designed to ensure that selections are made in a nondiscriminatory manner.

*Random drug testing* means the unscheduled, unannounced drug testing of randomly selected employees by a process designed to ensure that selections are made in a nondiscriminatory manner.

*Reasonable suspicion* means a suspicion based on an articulable belief that an individual uses illegal drugs or is under the influence of alcohol, drawn from reasonable inferences from particular facts, as detailed further in part 707 of this title.

*Recertification* means the formal action the HRP certifying official takes annually, not to exceed 12 months, that permits an employee to remain in the HRP and perform HRP duties.

*Reinstatement* means the action the HRP certifying official takes after it has been determined that an employee who has been temporarily removed from the HRP meets the certification requirements of this part and can be returned to HRP duties.

*Reliability* means an individual's ability to adhere to security and safety rules and regulations.

*Safety concern* means any condition, practice, or violation that causes a substantial probability of physical harm, property loss, and/or environmental impact.

*Security concern* means the presence of information regarding an individual applying for or holding an HRP position that may be considered derogatory under the criteria listed in 10 CFR part 710, subpart A.

*Semi-structured interview* means an interview by a Designated Psychologist, or a psychologist under his or her supervision, who has the latitude to vary the focus and content of the questions depending on the interviewee's responses.

*Site Occupational Medical Director (SOMD)* means the physician responsible for the overall direction and operation of the occupational medical program at a particular site.

*Supervisor* means the individual who has oversight and organizational responsibility for a person holding an HRP position, and whose duties include evaluating the behavior and performance of the HRP-certified individual.

*Transfer* means an HRP-certified individual moving from one site to another site.

*Unacceptable damage* means an incident that could result in a nuclear detonation; high-explosive detonation or deflagration from a nuclear explosive; the diversion, misuse, or removal of Category I special nuclear material; or an interruption of nuclear explosive operations with a significant impact on national security.

*Unsafe practice* means either a human action departing from prescribed hazard controls or job procedures or practices, or an action causing a person unnecessary exposure to a hazard.

[69 FR 3223, Jan. 23, 2004, as amended at 71 FR 68731, Nov. 28, 2006; 78 FR 56135, Sept. 12, 2013]

PROCEDURES

### § 712.10 Designation of HRP positions.

(a) HRP certification is required for each individual assigned to, or applying for, a position that:

(1) Affords access to Category I SNM or has responsibility for transportation or protection of Category I quantities of SNM;

(2) Involves nuclear explosive duties or has responsibility for working with, protecting, or transporting nuclear explosives, nuclear devices, or selected components;

(3) Affords access to information concerning vulnerabilities in protective systems when transporting nuclear explosives, nuclear devices, selected components, or Category I quantities of SNM; or

(4) Is not included in paragraphs (a)(1) through (3) of this section but affords the potential to significantly impact national security or cause unacceptable damage and is approved pursuant to paragraph (b) of this section.

(b) The Manager or the HRP management official may nominate positions for the HRP that are not specified in paragraphs (a)(1) through (3) of this section or that have not previously been designated HRP positions. All such nominations must be submitted to and approved by either the NNSA Administrator, his or her designee, the Chief Health, Safety and Security Officer, or the appropriate Lead Program Secretarial Officer, or his or her designee.

(c) Before nominating a position for designation as an HRP position, the Manager or the HRP management official must analyze the risks the position poses for the particular operational program. If the analysis shows that more restrictive physical, administrative, or other controls could be implemented that would prevent the position from being designated an HRP position, those controls will be implemented, if practicable.

(d) Nothing in this part prohibits contractors from establishing stricter employment standards for individuals who are nominated to DOE for certification or recertification in the HRP.

[69 FR 3223, Jan. 23, 2004, as amended at 71 FR 68731, Nov. 28, 2006]

### § 712.11 General requirements for HRP certification.

(a) The following certification requirements apply to each individual applying for or in an HRP position:

(1) A DOE ''Q'' access authorization based on a background investigation;

(2) An annual review of the personnel security file;

(3) Signed releases, acknowledgments, and waivers to participate in the HRP on forms provided by DOE;

(4) Completion of initial and annual HRP instruction as provided in § 712.17;

(5) Successful completion of an initial and annual supervisory review, medical assessment, management evaluation, and a DOE personnel security review for certification and recertification in accordance with this part. With respect to the DOE personnel security review:

(i) If the DOE personnel security review is not completed within the 12-month time period and the individual's access authorization is not suspended, the HRP certification form shall be forwarded to the HRP certifying official for recertification or temporary removal, contingent upon a favorable security review;

(ii) If a final determination has been made by DOE personnel security that is favorable, this information shall be forwarded to the HRP certifying official and so noted on the certification form; or

(iii) If the final determination has been made by DOE personnel security that the access authorization has been suspended, the individual shall be immediately removed from the HRP position, the HRP certifying official notified, the information noted on the certification form, and the procedures outlined in 10 CFR part 710, subpart A, shall be followed.

(6) No use of any hallucinogen in the preceding five years and no experience of flashback resulting from the use of any hallucinogen more than five years before applying for certification or recertification;

(7) A psychological evaluation consisting of a generally accepted psychological assessment (test) and a semi-structured interview;

(8) An initial drug test and random drug tests for the use of illegal drugs at least once each 12 months in accordance with DOE policies implementing Executive Order 12564 or the relevant provisions of 10 CFR part 707 for DOE contractors, and DOE Order 3792.3,

''Drug-Free Federal Workplace Testing Implementation Program,'' for DOE employees;

(9) An initial alcohol test and random alcohol tests at least once each 12 months using an evidential-grade breath alcohol device, as listed without asterisks on the Conforming Products List of Evidential Breath Measurement Devices published by the NHTSA (49 CFR part 40); and

(10) Successful completion of a counterintelligence evaluation, which includes a counterintelligence-scope polygraph examination in accordance with DOE's Polygraph Examination Regulation, 10 CFR part 709, and any subsequent revisions to that regulation.

(b) Each HRP candidate must be certified in the HRP before being assigned to HRP duties and must be recertified annually, not to exceed 12 months between recertifications. For certification:

(1) Individuals in newly identified HRP positions must immediately sign the releases, acknowledgments, and waivers to participate in the HRP and complete initial instruction on the importance of security, safety, reliability, and suitability. If these requirements are not met, the individual must be removed from the HRP position.

(2) All remaining HRP requirements listed in paragraph (a) of this section must be completed in an expedited manner.

(c) Alcohol consumption is prohibited within an eight-hour period preceding scheduled work for individuals performing nuclear explosive duties and for individuals in specific positions designated by either the Manager, the NNSA Administrator, his or her designee, or the appropriate Lead Program Secretarial Officer, or his or her designee.

(d) Individuals reporting for unscheduled nuclear explosive duties and those specific positions designated by either the Manager, the NNSA Administrator or his or her designee, or the appropriate Lead Program Secretarial Officer, or his or her designee, will be asked prior to performing any type of work if they have consumed alcohol within the preceding eight-hour period. If they answer ''no,'' they may perform their assigned duties but still may be tested.

(e) HRP-certified individuals may be tested for alcohol and/or drugs in accordance with § 712.15(b), (c), (d) and (e) if they are involved in an incident, unsafe practice, or an occurrence, or if there is reasonable suspicion that they may be impaired.

[69 FR 3223, Jan. 23, 2004, as amended at 78 FR 56135, Sept. 12, 2013]

### § 712.12 HRP implementation.

(a) The implementation of the HRP is the responsibility of the appropriate Manager or his or her designee. The Manager or designee must fully implement the HRP by April 22, 2004.

(b) The HRP Management Official must:

(1) Prepare an initial HRP implementation plan and submit it by March 23, 2004, to the applicable Manager for review and site approval. The implementation plan must:

(i) Be reviewed and updated every two years;

(ii) Include the four annual components of the HRP process: supervisory review, medical assessment, management evaluation (which includes random drug and alcohol testing), and a DOE personnel security determination; and

(iii) Include the HRP instruction and education component described in § 712.17 of this part.

(2) Approve the temporary removal and the reinstatement after temporary removal of an HRP-certified individual if the removal was based on a nonsecurity concern and the HRP-certified individual continues to meet the certification requirements and notify the HRP certifying official of these actions.

(c) The Deputy Administrator for Defense Programs, NNSA must:

(1) Provide advice and assistance to the Chief Health, Safety and Security Officer, regarding policies, standards, and guidance for all nuclear explosive duty requirements; and

(2) Be responsible for implementation of all nuclear explosive duty safety requirements.

(d) The DOE Under Secretary with cognizance over the program which makes the HRP certification at issue

(hereinafter 'cognizant Under Secretary'), in consultation with the DOE General Counsel, based on a recommendation of the Chief Health, Safety and Security Officer, makes the final decision for any appeal of denial or revocation of certification or recertification from HRP.

(e) The Director, Office of Security, or designee, is responsible for HRP policy and must:

(1) Ensure consistency of the HRP throughout the DOE and NNSA;

(2) Review and comment on all HRP implementation plans to ensure consistency with policy; and

(3) Provide policies and guidance, including instructional materials, to NNSA and non-NNSA field elements concerning the HRP, as appropriate.

(f) The Manager must:

(1) Review and approve the HRP implementation plan for sites/facilities under their cognizance and forward the plan to the Director, Office of Security, or designee; and

(2) Ensure that the HRP is implemented at the sites/facilities under their cognizance.

(g) The HRP certifying official must:

(1) Approve placement, certification, reinstatement, and recertification of individuals into HRP positions; for unresolved temporary removals, follow the process in § 712.19(c)(5);

(2) Ensure that instructional requirements are implemented;

(3) Immediately notify (for the purpose of limiting access) the appropriate HRP management official of a personnel security action that results in the suspension of access authorization; and

(4) Ensure that the supervisory review, medical assessment, and management evaluation, including drug and alcohol testing, are conducted on an annual basis (not to exceed 12 months).

(h) Individuals assigned to HRP duties must:

(1) Execute HRP releases, acknowledgments, and waivers to facilitate the collection and dissemination of information, the performance of drug and alcohol testing, and medical examinations;

(2) Notify the Designated Physician, the Designated Psychologist, or the SOMD immediately of a physical or mental condition requiring medication or treatment;

(3) Provide full, frank, and truthful answers to relevant and material questions, and when requested, furnish, or authorize others to furnish, information that DOE deems pertinent to reach a decision regarding HRP certification or recertification;

(4) Report any observed or reported behavior or condition of another HRP-certified individual that could indicate a reliability concern, including those behaviors and conditions listed in § 712.13(c), to a supervisor, the Designated Physician, the Designated Psychologist, the SOMD, or the HRP management official; and

(5) Report to a supervisor, the Designated Physician, the Designated Psychologist, the SOMD, or the HRP management official, any behavior or condition, including those listed in § 712.13(c), that may affect his or her ability to perform HRP duties.

[69 FR 3223, Jan. 23, 2004, as amended at 71 FR 68731, Nov. 28, 2006; 76 FR 12273, Mar. 7, 2011; 78 FR 56135, Sept. 12, 2013]

### § 712.13 Supervisory review.

(a) The supervisor must ensure that each HRP candidate and each individual occupying an HRP position but not yet HRP certified, executes the appropriate HRP releases, acknowledgments, and waivers. If these documents are not executed:

(1) The request for HRP certification may not be further processed until these requirements are completed; and

(2) The individual is immediately removed from the position.

(b) Each supervisor of HRP-certified personnel must conduct an annual review of each HRP-certified individual during which the supervisor must evaluate information (including security concerns) relevant to the individual's suitability to perform HRP tasks in a reliable and safe manner.

(c) The supervisor must report any concerns resulting from his or her review to the appropriate HRP management official. Types of behavior and conditions that would indicate a concern include, but are not limited to:

(1) Psychological or physical disorders that impair performance of assigned duties;

(2) Conduct that warrants referral for a criminal investigation or results in arrest or conviction;

(3) Indications of deceitful or delinquent behavior;

(4) Attempted or threatened destruction of property or life;

(5) Suicidal tendencies or attempted suicide;

(6) Use of illegal drugs or the abuse of legal drugs or other substances;

(7) Alcohol use disorders;

(8) Recurring financial irresponsibility;

(9) Irresponsibility in performing assigned duties;

(10) Inability to deal with stress, or the appearance of being under unusual stress;

(11) Failure to comply with work directives, hostility or aggression toward fellow workers or authority, uncontrolled anger, violation of safety or security procedures, or repeated absenteeism; and

(12) Significant behavioral changes, moodiness, depression, or other evidence of loss of emotional control.

(d) The supervisor must immediately remove an HRP-certified individual from HRP duties, pursuant to § 712.19, and temporarily reassign the individual to a non-HRP position if the supervisor believes the individual has demonstrated a security or safety concern that warrants such removal. If temporary removal is based on a security concern, the HRP management official must immediately notify the applicable DOE personnel security office and the HRP certifying official.

(1) Based on the DOE personnel security office recommendation, the HRP certifying official will make the final decision about whether to reinstate an individual into an HRP position.

(2) If temporary removal is based on a medical concern, the Designated Physician, the Designated Psychologist, or the SOMD must immediately recommend the medical removal or medical restriction in writing to the appropriate HRP management official, who will make the final determination in temporary removal actions and immediately notify the appropriate HRP certifying official.

(e) The supervisor must immediately remove from HRP duties any Federal employee who does not obtain HRP recertification. The supervisor may reassign the individual or realign the individual's current duties. If these actions are not feasible, the supervisor must contact the appropriate personnel office for guidance.

(f) The supervisor who has been informed by the breath alcohol technician that an HRP-certified individual's confirmatory breath alcohol test result is at or above an alcohol concentration of 0.02 percent shall send the individual home and not allow that individual to perform HRP duties for 24 hours, and inform the HRP management official of this action.

### § 712.14 Medical assessment.

(a) *Purpose.* The HRP medical assessment is performed to evaluate whether an HRP candidate or an HRP-certified individual:

(1) Represents a security concern; or

(2) Has a condition that may prevent the individual from performing HRP duties in a reliable and safe manner.

(b) *When performed.* (1) The medical assessment is performed initially on HRP candidates and individuals occupying HRP positions who have not yet received HRP certification. The medical assessment is performed annually for HRP-certified individuals, or more often as required by the SOMD.

(2) The Designated Physician and other examiners working under the direction of the Designated Physician also will conduct an evaluation:

(i) If an HRP-certified individual requests an evaluation (*i.e.*, self-referral); or

(ii) If an HRP-certified individual is referred by management for an evaluation.

(c) *Process.* The Designated Physician, under the supervision of the SOMD, is responsible for the medical assessment of HRP candidates and HRP-certified individuals. In performing this responsibility, the Designated Physician or the SOMD must integrate the medical evaluations, available testing results, psychological evaluations, any psychiatric evaluations, a review of current legal drug use, and any other relevant information. This information is used to determine if a reliability, safety, or security

concern exists and if the individual is medically qualified for his or her assigned duties. If a security concern is identified, the Designated Physician or SOMD must immediately notify the HRP management official, who notifies the applicable DOE personnel security office and appropriate HRP certifying official.

(d) *Evaluation*. The Designated Physician, with the assistance of the Designated Psychologist, must determine the existence or nature of any of the following:

(1) Physical or medical disabilities, such as a lack of visual acuity, defective color vision, impaired hearing, musculoskeletal deformities, and neuromuscular impairment;

(2) Mental/personality disorders or behavioral problems, including alcohol and other substance use disorders, as described in the *Diagnostic and Statistical Manual of Mental Disorders;*

(3) Use of illegal drugs or the abuse of legal drugs or other substances, as identified by self-reporting or by medical or psychological evaluation or testing;

(4) Threat of suicide, homicide, or physical harm; or

(5) Medical conditions such as cardiovascular disease, endocrine disease, cerebrovascular or other neurologic disease, or the use of drugs for the treatment of conditions that may adversely affect the judgment or ability of an individual to perform assigned duties in a reliable and safe manner.

(e) *Job task analysis*. Before the initial or annual medical assessment and psychological evaluation, employers must provide, to both the Designated Physician and Designated Psychologist, a job task analysis for each HRP candidate or HRP-certified individual. Medical assessments and psychological evaluations may not be performed if a job task analysis has not been provided.

(f) *Psychological evaluations*. Psychological evaluations must be conducted:

(1) For initial HRP certification. This psychological evaluation consists of a psychological assessment (test), approved by the Director, Office of Health and Safety or his or her designee, and a semi-structured interview.

(2) For recertification. This psychological evaluation consists of a semi-structured interview. A psychological assessment (test) may also be conducted as warranted.

(3) Every third year. The medical assessment for recertification must include a psychological assessment (test) approved by the Director, Office of Health and Safety or his or her designee. This requirement can be implemented over a three-year period for individuals who are currently in an HRP position.

(4) When additional psychological or psychiatric evaluations are required by the SOMD to resolve any concerns.

(g) *Return to work after sick leave*. HRP-certified individuals who have been on sick leave for five or more consecutive days, or an equivalent time period for those individuals on an alternative work schedule, must report in person to the Designated Physician, the Designated Psychologist, or the SOMD before being allowed to return to normal duties. The Designated Physician, the Designated Psychologist, or the SOMD must provide a written recommendation to the appropriate HRP supervisor regarding the individual's return to work. An HRP-certified individual also may be required to report to the Designated Physician, the Designated Psychologist, or the SOMD for written recommendation to return to normal duties after any period of sick leave.

(h) *Temporary removal or restrictions*. The Designated Physician, the Designated Psychologist, or the SOMD may recommend temporary removal of an individual from an HRP position or restrictions on an individual's work in an HRP position if a medical condition or circumstance develops that affects the individual's ability to perform assigned job duties. The Designated Physician, the Designated Psychologist, or the SOMD must immediately recommend medical removal or medical restrictions in writing to the appropriate HRP management official. If the HRP management official concurs, he or she will then notify the appropriate HRP certifying official. To reinstate or remove such restrictions, the Designated Physician, the Designated Psychologist, or the SOMD must make

written recommendation to the HRP management official for concurrence. The HRP management official will then notify the appropriate HRP certifying official.

(i) *Medical evaluation after rehabilitation.* (1) Individuals who request reinstatement in the HRP following rehabilitative treatment for alcohol use disorder, use of illegal drugs, or the abuse of legal drugs or other substances, must undergo an evaluation, as prescribed by the SOMD, to ensure continued rehabilitation and adequate capability to perform their job duties.

(2) The HRP certifying official may reinstate HRP certification of an individual who successfully completes an SOMD-approved drug or alcohol rehabilitation program. Recertification is based on the SOMD's follow-up evaluation and recommendation. The individual is also subject to unannounced follow-up tests for illegal drugs or alcohol and relevant counseling for three years.

(j) *Medication and treatment.* HRP-certified individuals are required to immediately report to the Designated Physician, the Designated Psychologist, or the SOMD any physical or mental condition requiring medication or treatment. The Designated Physician, the Designated Psychologist, or the SOMD determines if temporary removal of the individual from HRP duties is required and follows the procedures pursuant to § 712.14(h).

[69 FR 3223, Jan. 23, 2004, as amended at 71 FR 68731, Nov. 28, 2006]

### § 712.15 Management evaluation.

(a) *Evaluation components.* An evaluation by the HRP management official is required before an individual can be considered for initial certification or recertification in the HRP. This evaluation must be based on a careful review of the results of the supervisory review, medical assessment, and drug and alcohol testing. If a safety concern is identified, the HRP management official must require the supervisor to temporarily reassign the individual to non-HRP duties and forward this information to the HRP certifying official. If the management evaluation reveals a security concern, the HRP management official must notify the applicable DOE personnel security office.

(b) *Drug testing.* All HRP candidates and HRP-certified individuals are subject to testing for the use of illegal drugs, as required by this part. Testing must be conducted in accordance with 10 CFR part 707, the workplace substance abuse program for DOE contractor employees, and DOE Order 3792.3, ''Drug-Free Federal Workplace Testing Implementation Program,'' for DOE employees. The program must include an initial drug test, random drug tests at least once every 12 months from the previous test, and tests of HRP-certified individuals if they are involved in an incident, unsafe practice, occurrence, or based on reasonable suspicion. Failure to appear for unannounced testing within two hours of notification constitutes a refusal to submit to a test. Sites may establish a shorter time period between notification and testing but may not exceed the two-hour requirement. An HRP-certified individual who, based on a drug test, has been determined to use illegal drugs must immediately be removed from HRP duties, and DOE personnel security must be notified immediately.

(c) *Alcohol testing.* All HRP candidates and HRP-certified individuals are subject to testing for the use of alcohol, as required by this part. The alcohol testing program must include, as a minimum, an initial alcohol test prior to performing HRP duties and random alcohol tests at least once every 12 months from the previous test, and tests of HRP-certified individuals if they are involved in an incident, unsafe practice, occurrence, or based on reasonable suspicion. An HRP-certified individual who has been determined to have an alcohol concentration of 0.02 percent or greater shall be sent home and not allowed to perform HRP duties for 24 hours.

(1) Breath alcohol testing must be conducted by a certified breath alcohol technician and conform to the DOT procedures (49 CFR part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs, subparts J through N) for use of an evidential-grade breath analysis device approved for 0.02/0.04 cutoff levels, which

conforms to the DOT model specifications and the most recent ''Conforming Products List'' issued by NHTSA.

(2) An individual required to undergo DOT alcohol testing is subject to the regulations of the DOT. If such an individual's blood alcohol level exceeds DOT standards, the individual's employer may take appropriate disciplinary action.

(3) The following constitutes a refusal to submit to a test and shall be considered as a positive alcohol concentration test of 0.02 percent, which requires the individual be sent home and not allowed to perform HRP duties for 24 hours:

(i) Failure to appear for unannounced testing within two hours of notification (or established shorter time for the specific site);

(ii) Failure to provide an adequate volume of breath in two attempts without a valid medical excuse; and

(iii) Engaging in conduct that clearly obstructs the testing process, including failure to cooperate with reasonable instructions provided by the testing technician.

(d) *Occurrence testing*. (1) When an HRP-certified individual is involved in, or associated with, an occurrence requiring immediate reporting to the DOE, the following procedures must be implemented:

(i) Testing for the use of illegal drugs in accordance with the provisions of the DOE policies implementing Executive Order 12564, and 10 CFR part 707 or DOE Order 3792.3, which establish workplace substance abuse programs for contractor and DOE employees, respectively.

(ii) Testing for use of alcohol in accordance with this section.

(2) Testing must be performed as soon as possible after an occurrence that requires immediate notification or reporting.

(3) The supervisor must remove an HRP-certified individual from HRP duties if the individual refuses to undergo the testing required by this section.

(e) *Testing for reasonable suspicion*. (1) If the behavior of an individual in an HRP position creates the basis for reasonable suspicion of the use of an illegal drug or alcohol, that individual must be tested if two or more supervisory or management officials, at least one of whom is in the direct chain of supervision of the individual or is the Designated Physician, the Designated Psychologist, or the SOMD, agree that such testing is appropriate.

(2) Reasonable suspicion must be based on an articulable belief, drawn from facts and reasonable inferences from those particular facts, that an HRP-certified individual is in possession of, or under the influence of, an illegal drug or alcohol. Such a belief may be based on, among other things:

(i) Observable phenomena, such as direct observation of the use or possession of illegal drugs or alcohol, or the physical symptoms of being under the influence of drugs or alcohol;

(ii) A pattern of abnormal conduct or erratic behavior;

(iii) Information provided by a reliable and credible source that is independently corroborated; or

(iv) Detection of alcohol odor on the breath.

(f) Counterintelligence Evaluation. HRP candidates and, when selected, HRP-certified individuals, must submit to and successfully complete a counterintelligence evaluation, which includes a polygraph examination in accordance with 10 CFR part 709, Polygraph Examination Regulations and any subsequent revisions to that regulation.

### § 712.16 DOE security review.

(a) A personnel security specialist will perform a personnel security file review of an HRP candidate and HRP-certified individual upon receiving the supervisory review, medical assessment, and management evaluation and recommendation.

(b) If the personnel security file review is favorable, this information must be forwarded to the HRP certifying official. If the review reveals a security concern, or if a security concern is identified during another component of the HRP process, the HRP certifying official must be notified and the security concern evaluated in accordance with the criteria in 10 CFR part 710, subpart A. All security concerns must be resolved according to procedures outlined in 10 CFR part 710, subpart A, rather than through the procedures in this part.

(c) Any mental/personality disorder or behavioral issues found in a personnel security file, which could impact an HRP candidate or HRP-certified individual's ability to perform HRP duties, may be provided in writing to the SOMD, Designated Physician, and Designated Psychologist previously identified for receipt of this information. Medical personnel may not share any information obtained from the personnel security file with anyone who is not an HRP certifying official.

**§ 712.17 Instructional requirements.**

(a) HRP management officials at each DOE site or facility with HRP positions must establish an initial and annual HRP instruction and education program. The program must provide:

(1) HRP candidates, HRP-certified individuals, supervisors, and managers, and supervisors and managers responsible for HRP positions with the knowledge described in paragraph (b)(1) of this section; and

(2) For all HRP medical personnel, a detailed explanation of HRP duties and responsibilities.

(b) The following program elements must be included in initial and annual instruction. The elements may be tailored to accommodate group differences and refresher training needs:

(1) The objectives of the HRP and the role and responsibilities of each individual in the HRP to include recognizing and responding to behavioral change and aberrant or unusual behavior that may result in a risk to national security or nuclear explosive safety; recognizing and reporting security concerns and prescription drug use; and an explanation of return-to-work requirements and continuous evaluation of HRP participants; and

(2) For those who have nuclear explosive responsibilities, a detailed explanation of duties and safety requirements.

**§ 712.18 Transferring HRP certification.**

(a) For HRP certification to be transferred, the individual must currently be certified in the HRP.

(b) Transferring the HRP certification from one site to another requires the following before the individual is allowed to perform HRP duties at the new site:

(1) Verify that the individual is currently certified in the HRP and is transferring into a designated HRP position;

(2) Incorporate the individual into the new site's alcohol and drug-testing program;

(3) Ensure that the 12-month time period for HRP requirements that was established at the prior site is not exceeded; and

(4) Provide site-specific instruction.

(c) Temporary assignment to HRP positions at other sites requires verification that the individual is currently enrolled in the HRP and has completed all site-specific instruction. The individual is required to return to the site that maintains his or her HRP certification for recertification.

**§ 712.19 Removal from HRP.**

(a) *Immediate removal.* A supervisor who has a reasonable belief that an HRP-certified individual is not reliable, based on either a safety or security concern, must immediately remove that individual from HRP duties pending a determination of the individual's reliability. A supervisor also must immediately remove an individual from HRP duties when requested to do so by the HRP certifying official. The supervisor must, at a minimum:

(1) Require the individual to stop performing HRP duties;

(2) Take action to ensure the individual is denied both escorted and unescorted access to the material access areas; and

(3) Provide, within 24 hours, to the individual and the HRP management official, a written reason for these actions.

(b) The temporary removal of an HRP-certified individual from HRP duties pending a determination of the individual's reliability is an interim, precautionary action and does not constitute a determination that the individual is not fit to perform his or her required duties. Removal is not, in itself, cause for loss of pay, benefits, or other changes in employment status.

(c) *Temporary removal.* (1) If an HRP management official receives a supervisor's written notice of the immediate

removal of an HRP-certified individual, that official must direct the temporary removal of the individual pending an evaluation and determination of the individual's reliability.

(2) If removal is based on a security concern, the HRP management official must notify the HRP certifying official and the applicable DOE personnel security office. The security concern will be resolved under the criteria and procedures in 10 CFR part 710, subpart A.

(3) If removal is based on a concern that is not security related, the HRP management official must conduct an evaluation of the circumstances or information that led the supervisor to remove the individual from HRP duties. The HRP management official must prepare a written report of the evaluation that includes a determination of the individual's reliability for continuing HRP certification.

(4) If the HRP management official determines that an individual who has been temporarily removed continues to meet the requirements for certification, the HRP management official must:

(i) Notify the individual's supervisor of the determination and direct that the individual be allowed to return to HRP duties;

(ii) Notify the individual; and

(iii) Notify the HRP certifying official.

(5) If the HRP management official determines that an individual who has been temporarily removed does not meet the HRP requirements for certification, the HRP management official must forward the written report to the HRP certifying official. If the HRP certifying official is not the Manager, the HRP certifying official must review the written report and take one of the following actions:

(i) Direct that the individual be reinstated and provide written explanation of the reasons and factual bases for the action;

(ii) Direct continuation of the temporary removal pending completion of specified actions (*e.g.*, medical assessment, treatment) to resolve the concerns about the individual's reliability; or

(iii) Recommend to the Manager the revocation of the individual's certification and provide written explanation of the reasons and factual bases for the decision.

(d) The Manager, on receiving the HRP management official's written report and the HRP certifying official's recommendation (if any), must take one of the following actions:

(1) Direct reinstatement of the individual and provide written explanation of the reasons and factual bases for the action;

(2) Direct revocation of the individual's HRP certification; or

(3) Direct continuation of the temporary removal pending completion of specified actions (*e.g.*, medical assessment, treatment) to resolve the concerns about the individual's reliability.

(e) If the action is revocation, the Manager must provide the individual a copy of the HRP management official's report. The Manager may withhold such a report, or portions thereof, to the extent that he or she determines that the report, or portions thereof, may be exempt from access by the employee under the Privacy Act or the Freedom of Information Act.

(f) If an individual is directed by the Manager to take specified actions to resolve HRP concerns, he or she must be reevaluated by the HRP management official and HRP certifying official after those actions have been completed. After considering the HRP management and HRP certifying officials' report and recommendation, the Manager must direct either:

(1) Reinstatement of the individual; or

(2) Revocation of the individual's HRP certification.

(g) *Notification of Manager's initial decision*. The Manager must send by certified mail (return receipt requested) a written decision, including rationale, to the HRP-certified individual whose certification is revoked. The Manager's decision must be accompanied by notification to the individual, in writing, of the procedures pertaining to reconsideration or a hearing on the Manager's decision.

### § 712.20 Request for reconsideration or certification review hearing.

(a) An HRP-certified individual who receives notification of the Manager's

decision to revoke his or her HRP certification may choose one of the following options:

(1) Take no action;

(2) Submit a written request to the Manager for reconsideration of the decision to revoke certification. The request must include the individual's response to the information that gave rise to the concern. The request must be sent by certified mail to the Manager within 20 working days after the individual received notice of the Manager's decision; or

(3) Submit a written request to the Manager for a certification review hearing. The request for a hearing must be sent by certified mail to the Manager within 20 working days after the individual receives notice of the Manager's decision.

(b) If an individual requests reconsideration by the Manager but not a certification review hearing, the Manager must, within 20 working days after receipt of the individual's request, send by certified mail (return receipt requested) a final decision to the individual. This final decision about certification is based on the individual's response and other relevant information available to the Manager.

(c) If an individual requests a certification review hearing, the Manager must forward the request to the Office of Hearings and Appeals.

### § 712.21 Office of Hearings and Appeals.

(a) The certification review hearing is conducted by the Office of Hearings and Appeals.

(b) The hearing officer must have a DOE ''Q'' access authorization when hearing cases involving HRP duties.

(c) An individual who requests a certification review hearing has the right to appear personally before the hearing officer; to present evidence in his or her own behalf, through witnesses or by documents, or by both; and to be accompanied and represented at the hearing by counsel or any other person of the individual's choosing and at the individual's own expense.

(d) In conducting the proceedings, the hearing officer must:

(1) Receive all relevant and material information relating to the individual's fitness for HRP duties through witnesses or documentation;

(2) Ensure that the individual is permitted to offer information in his or her behalf; to call, examine, and cross-examine witnesses and other persons who have made written or oral statements, and to present and examine documentary evidence;

(3) Require the testimony of the individual and all witnesses be given under oath or affirmation; and

(4) Ensure that a transcript of the certification review proceedings is made.

### § 712.22 Hearing officer's report and recommendation.

Within 30 calendar days of the receipt of the hearing transcript by the hearing officer or the closing of the record, whichever is later, the hearing officer must forward written findings, a supporting statement of reasons, and recommendation regarding the individual's eligibility for recertification in the HRP position to the Chief Health, Safety and Security Officer. The hearing officer's report and recommendation must be accompanied by a copy of the record of the proceedings. The Chief Health, Safety and Security Officer shall forward to the DOE cognizant Under Secretary a recommendation to either recertify or revoke the certification of an individual in the HRP.

[69 FR 3223, Jan. 23, 2004, as amended at 71 FR 68731, Nov. 28, 2006; 76 FR 12273, Mar. 7, 2011]

### § 712.23 Final decision by DOE Under Secretary.

Within 20 working days of the receipt of the Chief Health, Safety and Security Officer's recommendation, the cognizant Under Secretary, in consultation with the DOE General Counsel should issue a final written decision. A copy of this decision must be sent by certified mail (return receipt requested) to the Manager and to the individual accompanied by a copy of the hearing officer's report and the transcript of the certification review proceedings.

[69 FR 3223, Jan. 23, 2004, as amended at 71 FR 68731, Nov. 28, 2006; 76 FR 12273, Mar. 7, 2011]

## Subpart B—Medical Standards

### § 712.30 Applicability.

This subpart establishes standards and procedures for conducting medical assessments of DOE and DOE contractor individuals in HRP positions.

### § 712.31 Purpose.

The standards and procedures set forth in this subpart are necessary for DOE to:

(a) Identify the presence of any mental/personality disorders, physical, or behavioral characteristics or conditions that present or are likely to present an unacceptable impairment in reliability;

(b) Facilitate the early diagnosis and treatment of disease or impairment and foster accommodation and rehabilitation;

(c) Determine what functions an HRP-certified individual may be able to perform and to facilitate the proper placement of individuals; and

(d) Provide for continuing monitoring of the health status of individuals to facilitate early detection and correction of adverse health effects, trends, or patterns.

### § 712.32 Designated Physician.

(a) The Designated Physician must be qualified to provide professional expertise in the area of occupational medicine as it relates to the HRP.

(b) The Designated Physician must:

(1) Be a graduate of an accredited school of medicine or osteopathy;

(2) Have a valid, unrestricted state license to practice medicine in the state where HRP medical assessments occur;

(3) Have met the applicable HRP instruction requirements; and

(4) Be eligible for the appropriate DOE access authorization.

(c) The Designated Physician is responsible for the medical assessments of HRP candidates and HRP-certified individuals, including determining which components of the medical assessments may be performed by other qualified personnel. Although a portion of the assessment may be performed by another physician, physician's assistant, or nurse practitioner, the Designated Physician remains responsible for:

(1) Supervising the evaluation process;

(2) Interpreting the results of evaluations;

(3) Documenting medical conditions or issues that may disqualify an individual from the HRP;

(4) Providing medical assessment information to the Designated Psychologist to assist in determining psychological fitness;

(5) Determining, in conjunction with DOE if appropriate, the location and date of the next required medical assessment; and

(6) Signing a recommendation about the medical fitness of an individual for certification or recertification.

(d) The Designated Physician must immediately report to the SOMD any of the following about himself or herself:

(1) Initiation of an adverse action by any state medical licensing board or any other professional licensing board;

(2) Initiation of an adverse action by any Federal regulatory board since the last designation;

(3) The withdrawal of the privilege to practice by any institution;

(4) Being named a defendant in any criminal proceedings (felony or misdemeanor) since the last designation;

(5) Being evaluated or treated for alcohol use disorder or drug dependency or abuse since the last designation; or

(6) Occurrence, since the last designation, of a physical, mental/personality disorder, or health condition that might affect his or her ability to perform professional duties.

### § 712.33 Designated Psychologist.

(a) The Designated Psychologist reports to the SOMD and determines the psychological fitness of an individual to participate in the HRP. The results of this evaluation may be provided only to the Designated Physician or the SOMD.

(b) The Designated Psychologist must:

(1) Hold a doctoral degree from a clinical psychology program that includes a one-year clinical internship approved by the American Psychological Association or an equivalent program;

(2) Have accumulated a minimum of three years postdoctoral clinical experience with a major emphasis in psychological assessment and testing;

(3) Have a valid, unrestricted state license to practice clinical psychology in the state where HRP medical assessments occur;

(4) Have met the applicable HRP instruction requirements; and

(5) Be eligible for the appropriate DOE access authorization.

(c) The Designated Psychologist is responsible for all psychological evaluations of HRP candidates, HRP-certified individuals, and others as directed by the SOMD. Although a portion of the psychological evaluation may be performed by another psychologist, the Designated Psychologist must:

(1) Supervise the psychological evaluation process and designate which components may be performed by other qualified personnel;

(2) Upon request of management, assess the psychological fitness of HRP candidates and HRP-certified individuals for HRP duties, including specific work settings, and recommend referrals as indicated; and

(3) Make referrals for psychiatric, psychological, substance abuse, or personal or family problems, and monitor the progress of individuals so referred.

(d) The Designated Psychologist must immediately report to the SOMD any of the following about himself or herself:

(1) Initiation of an adverse action by any state medical licensing board or any other professional licensing board;

(2) Initiation of an adverse action by any Federal regulatory board since the last designation;

(3) The withdrawal of the privilege to practice by any institution;

(4) Being named a defendant in any criminal proceeding (felony or misdemeanor) since the last designation;

(5) Being evaluated or treated for alcohol use disorder or drug dependency or abuse since the last designation; or

(6) Occurrence since the last designation of a physical, mental/personality disorder, or health condition that might affect his or her ability to perform professional duties.

### § 712.34 Site Occupational Medical Director.

(a) The SOMD must nominate a physician to serve as the Designated Physician and a clinical psychologist to serve as the Designated Psychologist. The nominations must be sent through the Manager to the Director, Office of Health and Safety or his or her designee. Each nomination must describe the nominee's relevant training, experience, and licensure, and include a curriculum vitae and a copy of the nominee's current state or district license.

(b) The SOMD must submit a renomination report biennially through the Manager to the Director, Office of Health and Safety or his or her designee. This report must be submitted at least 60 days before the second anniversary of the initial designation or of the last redesignation, whichever applies. The report must include:

(1) A statement evaluating the performance of the Designated Physician and Designated Psychologist during the previous designation period; and

(2) A copy of the valid, unrestricted state or district license of the Designated Physician and Designated Psychologist.

(c) The SOMD must submit, annually, to the Director, Office of Health and Safety or his or her designee through the Manager, a written report summarizing HRP medical activity during the previous year. The SOMD must comply with any DOE directives specifying the form or contents of the annual report.

(d) The SOMD must investigate any reports of performance issues regarding a Designated Physician or Designated Psychologist, and the SOMD may suspend either official from HRP-related duties. If the SOMD suspends either official, the SOMD must notify the Director, Office of Health and Safety or his or her designee and provide supporting documentation and reasons for the action.

[69 FR 3223, Jan. 23, 2004, as amended at 71 FR 68731, Nov. 28, 2006]

### § 712.35 Director, Office of Health and Safety.

The Director, Office of Health and Safety or his or her designee must:

(a) Develop policies, standards, and guidance for the medical aspects of the HRP, including the psychological testing inventory to be used;

(b) Review the qualifications of Designated Physicians and Designated Psychologists, and concur or nonconcur with their designations by sending a statement to the Manager and an informational copy to the SOMD; and

(c) Provide technical assistance on medical aspects of the HRP to all DOE elements and DOE contractors.

[69 FR 3223, Jan. 23, 2004, as amended at 71 FR 68732, Nov. 28, 2006]

### § 712.36 Medical assessment process.

(a) The Designated Physician, under the supervision of the SOMD, is responsible for the medical assessment of HRP candidates and HRP-certified individuals. In carrying out this responsibility, the Designated Physician or the SOMD must integrate the medical evaluations, psychological evaluations, psychiatric evaluations, and any other relevant information to determine an individual's overall medical qualification for assigned duties.

(b) Employers must provide a job task analysis for those individuals involved in HRP duties to both the Designated Physician and the Designated Psychologist before each medical assessment and psychological evaluation. HRP medical assessments and psychological evaluations may not be performed if a job task analysis has not been provided.

(c) The medical process by the Designated Physician includes:

(1) Medical assessments for initial certification, annual recertification, and evaluations for reinstatement following temporary removal from the HRP;

(2) Evaluations resulting from self-referrals and referrals by management;

(3) Routine medical contacts and occupational and nonoccupational health counseling sessions; and

(4) Review of current legal drug use.

(d) Psychological evaluations must be conducted:

(1) For initial certification. This psychological evaluation consists of a generally accepted psychological assessment (test) approved by the Director, Office of Health and Safety or his or her designee and a semi-structured interview.

(2) For recertification. This psychological evaluation consists of a semi-structured interview, which is conducted annually at the time of the medical examination.

(3) Every third year. The medical assessment for recertification must include a generally accepted psychological assessment (test) approved by the Director, Office of Health and Safety or his or her designee.

(4) When the SOMD determines that additional psychological or psychiatric evaluations are required to resolve HRP concerns as listed in § 712.13(c).

(e) Following absences requiring return-to-work evaluations under applicable DOE directives, the Designated Physician, the Designated Psychologist, or the SOMD must determine whether a psychological evaluation is necessary.

(f) Except as provided in paragraph (g) of this section, the Designated Physician must forward the completed medical assessment of an HRP candidate and HRP-certified individual to the SOMD, who must make a recommendation, based on the assessment, to the individual's HRP management official. If the Designated Physician determines that a currently certified individual no longer meets the HRP requirements, the Designated Physician must immediately, orally, inform the HRP management official. A written explanation must follow within 24 hours.

(g) The Designated Physician, the Designated Psychologist, or the SOMD may make a medical recommendation for return to work and work accommodations for HRP-certified individuals.

(h) The following documentation is required after treatment of an individual for any disqualifying condition:

(1) A summary of the diagnosis, treatment, current status, and prognosis to be furnished by the treatment provider to the Designated Physician;

(2) The medical opinion of the Designated Physician advising the individual's supervisor whether the individual is able to return to work in either an HRP or non-HRP capacity; and

(3) Any periodic monitoring plan, approved by the Designated Physician or the Designated Psychologist and the SOMD, used to evaluate the reliability of the individual.

(i) If the disqualifying condition was of a security concern, the appropriate procedure described in 10 CFR part 710, subpart A, applies.

[69 FR 3223, Jan. 23, 2004, as amended at 71 FR 68731, Nov. 28, 2006]

### § 712.37 Evaluation for hallucinogen use.

If DOE determines that an HRP candidate or HRP-certified individual has used any hallucinogen, the individual is not eligible for certification or recertification unless:

(a) Five years have passed since the last use of the hallucinogen;

(b) There is no evidence of any flashback within the last five years from the previous hallucinogen use; and

(c) The individual has a record of acceptable job performance and observed behavior.

### § 712.38 Maintenance of medical records.

(a) The medical records of HRP candidates and HRP-certified individuals must be maintained in accordance with the Privacy Act, 5 U.S.C. 552a, and DOE implementing regulations in 10 CFR part 1008; the Department of Labor's regulations on access to individual exposure and medical records, 29 CFR 1910.1020; and applicable DOE directives. DOE contractors also may be subject to section 503 of the Rehabilitation Act, 29 U.S.C. 793, and its implementing rules, including confidentiality provisions in 41 CFR 60–741.23 (d).

(b) The psychological record of HRP candidates and HRP-certified individuals is a component of the medical record. The psychological record must:

(1) Contain any clinical reports, test protocols and data, notes of individual contacts and correspondence, and other information pertaining to an individual's contact with a psychologist;

(2) Be stored in a secure location in the custody of the Designated Psychologist; and

(3) Be kept separate from other medical record documents, with access limited to the SOMD and the Designated Physician.

## PART 715—DEFINITION OF NONRECOURSE PROJECT-FINANCED

Sec.
715.1 Purpose and scope.
715.2 Definitions.
715.3 Definition of ''Nonrecourse Project-Financed.''

AUTHORITY: 42 U.S.C. 7651o(a)(2)(B); 42 U.S.C. 7254.

SOURCE: 56 FR 55064, Oct. 24, 1991, unless otherwise noted.

### § 715.1 Purpose and scope.

This part sets forth the definition of ''nonrecourse project-financed'' as that term is used to define ''new independent power production facility,'' in section 416(a)(2)(B) of the Clean Air Act Amendments of 1990, 42 U.S.C. 7651o(a)(2)(B). This definition is for purposes of section 416(a)(2)(B) only. It is not intended to alter or impact the tax treatment of any facility or facility owner under the Internal Revenue Code and regulations.

### § 715.2 Definitions.

As used in this subpart—

*Act* means the Clean Air Act Amendments of 1990, 104 Stat. 2399.

*Facility* means a ''new independent power production facility'' as that term is used in the Act, 42 U.S.C. 7651o(a)(2).

### § 715.3 Definition of "Nonrecourse Project-Financed".

*Nonrecourse project-financed* means when being financed by any debt, such debt is secured by the assets financed and the revenues received by the facility being financed including, but not limited to, part or all of the revenues received under one or more agreements for the sale of the electric output from the facility, and which neither an electric utility with a retail service territory, nor a public utility as defined by section 201(e) of the Federal Power Act, as amended, 16 U.S.C. 824(e), if any of its facilities are financed with general credit, is obligated to repay in whole or in part. A commitment to contribute equity or the contribution of equity to a facility by an electric utility shall

not be considered an obligation of such utility to repay the debt of a facility. The existence of limited guarantees, commitments to pay for cost overruns, indemnity provisions, or other similar undertakings or assurances by the facility's owners or other project participants will not disqualify a facility from being ''nonrecourse project-financed'' as long as, at the time of the financing for the facility, the borrower is obligated to make repayment of the term debt from the revenues generated by the facility, rather than from other sources of funds. Projects that are 100 percent equity financed are also considered ''nonrecourse project-financed'' for purposes of section 416(a)(2)(B).

# PART 719—CONTRACTOR LEGAL MANAGEMENT REQUIREMENTS

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APPENDIX A TO PART 719—GUIDANCE FOR LEGAL RESOURCE MANAGEMENT

AUTHORITY: 42 U.S.C. 2201, 5814, 5815 and 7101, *et seq.;* 50 U.S.C. 2401, *et seq.*

SOURCE: 78 FR 25809, May 3, 2013, unless otherwise noted.

## Subpart A—General Provisions

### § 719.1 What is the purpose of this part?

This part facilitates management of retained legal counsel and contractor legal costs, including litigation and legal matter costs. It requires the contractor to develop a Legal Management Plan, to document the analysis used to decide when to utilize outside counsel, and to document what law firm or individual attorney will be engaged as outside counsel. This part also requires the contractor to document the terms of the engagement with retained legal counsel. Payment of Department-retained law firm invoices and reimbursement of contractor legal costs under covered contracts are subject to compliance with this part.

### § 719.2 What are the definitions of terms used in this part?

For purposes of this part:

*Alternative dispute resolution* includes, but is not limited to, processes such as mediation, neutral evaluation, mini-trials and arbitration.

*Contractor* means any person or entity with whom the Department contracts for the acquisition of goods or services.

*Covered contracts* means those contracts described in § 719.3 of this part.

*Days* means calendar days.

*Department* means the Department of Energy (DOE), including the National Nuclear Security Administration (NNSA).

*Department Counsel* means the attorney in the DOE or NNSA field office, or Headquarters office, designated as the contracting officer's representative and point of contact for a contractor or for Department retained legal counsel, for purposes of this part.

*General Counsel* means the DOE General Counsel for DOE legal matters and the NNSA General Counsel for NNSA legal matters.

*Legal costs* means, but is not limited to, administrative expenses associated with the provision of legal services by retained legal counsel; the costs of legal services provided by retained legal counsel; the costs of the services, if the services are procured in connection with a legal matter, of accountants, consultants, experts or others retained by the contractor or by retained legal counsel; and any similar costs incurred by retained legal counsel or in connection with the services of retained legal counsel.

*Legal Management Plan* means a document required by subpart B of this part describing the contractor's practices for managing legal costs and legal matters for which it procures the services of retained legal counsel.

*Litigation* means a proceeding arising under or related to a contract between the contractor and the Department to which the contractor is a party in a State, tribal, territorial, foreign, or federal court or before an administrative body or an arbitrator.

*Retained legal counsel* means a licensed attorney working in the private sector who is retained by a contractor or the Department to provide legal services.

*Retrospective insurance* means any insurance policy under which the premium is not fixed but is subject to adjustments to reimburse the insurance carrier for actual losses incurred or paid (e.g. claims, settlements, damages, and legal costs). Retrospective insurance includes service-type insurance policies as described in 48 CFR 928.370.

*Settlement agreement* means a written agreement between a contractor and one or more parties pursuant to which one or more parties waives the right to pursue a legal claim in exchange for something of value.

*Significant matters* means legal matters involving significant issues as determined by Department Counsel and identified to a contractor in writing, and any legal matters where the amount of any legal costs, over the life of the matter, is expected to exceed $100,000.

*Staffing and Resource Plan* means a statement prepared in accordance with subpart B of this part by retained legal counsel that describes the method for managing a Significant Matter in litigation.

### § 719.3 What contracts are covered by this part?

(a) Unless excluded under § 719.5, this part covers the following three categories of contracts:

(1) All management and operating contracts;

(2) Non-management and operating cost reimbursement contracts exceeding $100,000,000; and

(3) Non-management and operating contracts exceeding $100,000,000 that include cost reimbursable elements exceeding $10,000,000 (e.g., contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed $10,000,000 or time and materials contracts where the materials portions exceed $10,000,000).

(b) This part also covers contracts otherwise not covered by paragraph (a) of this section but which contain a clause requiring compliance with this part.

(c) This part also covers any contract the Department awards directly to retained legal counsel exceeding $100,000.

### § 719.4 Are law firms that are retained by contract by the Department covered by this part?

Legal counsel retained under fixed rate or other type of contract or other agreement by the Department to provide legal services must comply with the following if the legal costs over the life of the matter for which counsel has been retained are expected by the Department to exceed $100,000 and retained legal counsel are so notified by the Department:

(a) Requirements related to Staffing and Resource Plans in subpart B of this part;

(b) Cost guidelines in subpart E of this part; and

(c) Engagement letter requirements in subpart C of this part if the retained legal counsel subcontracts legal work valued at $25,000 or more (e.g., a law firm retained by the Department subcontracts with another law firm to provide $26,000 in discovery-related legal work).

### § 719.5 What contracts are not covered by this part?

This part does not cover any contract under which the Department is not responsible for directly reimbursing the contractor for legal costs, such as fixed price contracts.

### § 719.6 Are there any types of legal matters not included in the coverage of this part?

Legal matters not covered by this part include:

(a) Matters handled by counsel retained by an insurance carrier, except under retrospective insurance in accordance with § 719.45;

(b) Routine intellectual property law support services; and

(c) Routine workers and unemployment compensation matters.

### § 719.7 Is there a procedure for exceptions or deviations from this part?

(a) Requests for exceptions or deviations from this part must be made in writing to Department Counsel and approved by the General Counsel. If an alternate procedure is proposed for compliance with an individual requirement in this part, that procedure must be included in the written request by the contractor. The General Counsel or his/her delegee shall provide a written response to such requests; however the response shall not require a justification of the Department's exercise of its discretion.

(b) The General Counsel may authorize exceptions or deviations requested under paragraph (a) of this section. The General Counsel may also establish exceptions to this part based on current field office and contractor practices that satisfy the purpose of these requirements.

(c) Exceptions to this part that are also a deviation from the Department of Energy Acquisition Regulation (DEAR) cost principles (see subpart D of this part) must be approved in accordance with applicable DOE procurement policy. See, e.g., DOE Acquisition Guide chapter 1.1, requiring approval by the Senior Procurement Executive of DOE or NNSA as applicable. In any event, the written request from a contractor for a deviation from a cost principle relating to this part must be submitted to the contracting officer, with a copy provided to Department Counsel.

### § 719.8 Does the provision of protected documents from the contractor to the Department constitute a waiver of privilege?

Contractors are required to provide detailed information about third-party claims and litigation to the Department. The Department and its contractors typically share common legal and strategic interests relating to pending or threatened litigation. The common interest between the parties is primarily rooted in the fact that the Department reimburses contractors for allowable costs incurred when litigation is threatened or initiated against contractors. However, other sources of the common interest between the Department and its contractors may include, but are not limited to, an interest in completion of the agency's important mission work and an interest in safe and efficient operation of the Department's facilities. To the extent documents associated with compliance with this part (e.g., Staffing and Resource Plans, invoices, engagement letters, settlement authority requests, and draft pleadings) are protected from disclosure to third parties because the items constitute attorney work product and/or involve attorney client communications, the contractor's provision of these items to the Department does not constitute a waiver of privilege. As long as the Department and the contractor share a common interest in the outcome of legal matters, this mutual legal interest permits the parties to share privileged material without waiving any applicable privilege.

## Subpart B—Legal Management Plan, Staffing and Resource Plan and Annual Legal Budget

### § 719.10 Who must submit a Legal Management Plan?

Contractors who are parties to contracts identified under § 719.3(a) and (b) must submit a Legal Management Plan.

### § 719.11 When must a Legal Management Plan be submitted or revised?

(a) Contractors must submit a Legal Management Plan to Department Counsel within 60 days following award of the contract. The deadline for submitting the Legal Management Plan may be extended by Department Counsel.

(b) Contractors must submit a revised Legal Management Plan upon request of Department Counsel within 60 days of receipt of the Department Counsel's request. The request for a revised Legal Management Plan shall include an explanation of the request. The deadline for submitting the Legal Management Plan may be extended by the Department Counsel.

### § 719.12 What information must be included in the Legal Management Plan?

The Legal Management Plan must include the following items:

(a) A description of the contractor's in-house counsel resources at the time the Legal Management Plan is submitted, including areas of expertise and an explanation of the types of matters expected to be handled in-house.

(b) A description of the legal matters that may necessitate engagement of retained legal counsel.

(c) A description of the factors the contractor will consider in determining whether to handle a particular matter utilizing retained legal counsel.

(d) An outline of the factors the contractor must consider in selecting retained legal counsel, including:

(1) Cost;

(2) Past performance of previously retained counsel;

(3) Particular expertise in a specific area of the law;

(4) Familiarity with the Department's activity at the particular site and the prevalent issues associated with facility history and current operations;

(5) Location of retained legal counsel relative to:

(i) The site involved in the matter,

(ii) Any forum in which the matter will be processed, and

(iii) The location where a significant portion of the work will be performed;

(6) Experience as an advocate in alternative dispute resolution procedures such as mediation;

(7) Actual or potential conflicts of interest; and

(8) The means and rate of compensation (e.g., hourly billing, fixed fee, blended fees).

(e) A description of the system that the contractor will use to review each matter in litigation to determine whether and when alternative dispute resolution is appropriate.

(f) A description of the role of in-house counsel in cost management.

(g) A description of the contractor's process for review and approval of invoices for legal costs.

(h) A description of the contractor's strategy for interaction with, and supervision of, retained legal counsel.

(i) A description of the procedures the contractor will employ in order to seek timely approval from Department Counsel to settle any legal matters as required by § 719.34 of this part;

(j) A description of the contractor's strategy for keeping Department Counsel apprised of all legal matters covered by this part (e.g., regularly scheduled meetings and written communications).

### § 719.13 Who at the Department receives and reviews the Legal Management Plan?

Contractors must submit a Legal Management Plan to Department Counsel. If the contractor has not been notified of the assignment of Department Counsel, the contractor must submit the Legal Management Plan to the contracting officer and the DOE Deputy General Counsel for Litigation and Enforcement or the NNSA Deputy General Counsel as appropriate.

### § 719.14 Will the Department notify the contractor concerning the adequacy or inadequacy of the submitted Legal Management Plan?

The Contracting Officer or Department Counsel will notify the contractor of any non-compliance or inadequate information relating to requirements in § 719.12 within 30 days of the contractor's submission of the plan. The contractor must either correct matters identified within 30 days of notification or file a letter with the General Counsel disputing the determination of a deficiency.

### § 719.15 What are the requirements for a Staffing and Resource Plan?

(a) For significant matters in litigation, the contractor must require retained legal counsel to prepare a Staffing and Resource Plan. The contractor must then forward the Staffing and Resource Plan to Department Counsel.

(b) Retained legal counsel retained directly by the Department subject to this part must prepare a Staffing and Resource Plan and forward it to Department Counsel.

(c) A Staffing and Resource Plan must describe the following:

(1) Major phases likely to be involved in the handling of the matter;

(2) Timing and sequence of such phases;

(3) Projected cost for each phase of the representation; and

(4) Detailed description of resources that the retained legal counsel intends to devote to the representation.

(d) A Staffing and Resource Plan must include a budget, broken down by phases, including at a minimum the following phases:

(1) Matter assessment, development and administration;

(2) Pretrial pleadings and motions;

(3) Discovery;

(4) Trial preparation and trial; and

(5) Appeal.

(e) The contractor must notify Department Counsel before incurring retained legal counsel costs in excess of costs listed in the budget developed pursuant to paragraph (d) of this section.

### § 719.16 When must the Staffing and Resource Plan be submitted?

(a) The contractor or retained legal counsel must submit the Staffing and Resource Plan to Department Counsel within 30 days after the filing of an answer or a dispositive motion in lieu of an answer, 30 days after a determination that the cost is expected to exceed $100,000, or 30 days after notification from Department Counsel that a matter is considered significant, whichever is sooner. The deadline for submitting the Staffing and Resource Plan may be extended by Department Counsel.

(b) Department Counsel may state objections to the Staffing and Resource Plan within 30 days of receipt of a

Staffing and Resource Plan. When an objection is stated, the contractor or retained legal counsel must either revise the Staffing and Resource Plan to satisfy the objection within 30 days or file a letter with the General Counsel disputing the objection.

(c) Contractors must require retained legal counsel to update Staffing and Resource Plans annually or more frequently if there are significant changes in the matter. The contractor must submit the Staffing and Resource Plan updates to Department Counsel. Similarly, Department retained legal counsel must submit to Department Counsel annual Staffing and Resource Plan updates or more frequent updates if there are significant changes in the matter.

### § 719.17 Are there any budgetary requirements?

(a) Contractors required to submit a Legal Management Plan must also submit an annual legal budget to Department Counsel.

(b) The annual legal budget must include cost projections for significant matters at a level of detail reflective of the types of billable activities and the stage of each such matter.

(c) For informational purposes for both the contractor and Department Counsel, the contractor must submit a report to Department Counsel comparing its budgeted and actual legal costs within 30 days of the conclusion of the period covered by each annual legal budget. The Department recognizes, however, that there may be departures from the annual budget beyond the control of the contractor.

## Subpart C—Engagement Letter

### § 719.20 When must an engagement letter be submitted to Department Counsel?

Contractors must submit a copy of an executed engagement letter between it and retained legal counsel to Department Counsel when the retained counsel is expected to provide $25,000 or more in legal services for a particular matter. A copy of the executed engagement letter must be submitted to Department Counsel upon execution.

### § 719.21 What are the required elements of an engagement letter?

(a) The engagement letter must require retained legal counsel to assist the contractor in complying with this part and any supplemental guidance distributed under this part.

(b) At a minimum, the engagement letter must include the following:

(1) A process for review and documented approval of all billing by a contractor representative including the timing and scope of billing reviews.

(2) A statement that provision of records to the Government is not intended to constitute a waiver of any applicable legal privilege, protection, or immunity with respect to disclosure of these records to third parties. An exemption for specific records may be obtained where contractors can demonstrate that a particular situation may provide grounds for a waiver.

(3) A requirement that the contractor, the Department, and the Government Accountability Office have the right, upon request, and at reasonable times and locations to inspect, copy, and audit all records documenting billable fees and costs.

(4) A statement that all records must be retained for a period of six (6) years and three (3) months after the final payment or after final case disposition, whichever is later.

(5) Identification of all attorneys and staff who are assigned to the matter and the rate and basis of their compensation (i.e., hourly rates, fixed fees, contingency arrangement) and a process for obtaining approval of temporary adjustments in staffing levels or identified attorneys.

(6) An initial assessment of the matter by retained legal counsel, along with a commitment to provide updates as necessary.

(7) A description of billing procedures, including frequency of billing and billing statement format.

(8) A statement setting forth an agreement that the retained legal counsel will prepare a Staffing and Resource Plan in accordance with the requirements of § 719.15.

(9) A statement setting forth an agreement to consider alternative dispute resolution at the earliest possible

stage and thereafter as appropriate where litigation is involved.

(10) A statement setting forth an agreement that retained legal counsel must comply with the cost guidelines in subpart E of this part.

(11) A statement setting forth an agreement that retained legal counsel will provide a certification concerning the costs submitted for reimbursement. The certification that must be included in bills or invoices submitted by retained legal counsel must appear as follows: ''Under penalty of law, [the representative] acknowledges the expectation that the bill will be paid by the contractor and that the contractor will be reimbursed by the Federal Government through the U.S. Department of Energy, and, based on personal knowledge and a good faith belief, certifies that the bill is truthful and accurate, and that the services and charges set forth herein comply with the terms of engagement and the policies set forth in the Department of Energy's regulation and guidance on contractor legal management requirements, and that the costs and charges set forth herein are appropriate and related to the representation of the client.'' The certification must be signed and dated by a representative of the retained legal counsel. Invoices must contain all elements (e.g., date of service, description of service, name of attorney, etc.) set forth in the model bill format in Appendix A to this part.

(12) A statement setting forth agreement to identify and address promptly any professional conflicts of interest.

(c) There may be additional requirements for an engagement letter based on the needs of the contractor or the Departmental element requiring the services of the Department retained legal counsel.

## Subpart D—Requests From Contractor Counsel To Initiate, Defend, and Settle Legal Matters

### § 719.30 In what circumstances may the contractor initiate litigation, including appeals from adverse decisions?

(a) The contractor must provide written notice to Department Counsel prior to initiating litigation or appealing from adverse decisions.

(b) The contractor may not initiate litigation for which it seeks reimbursement without prior written authorization of Department Counsel.

(c) The following information must be provided to Department Counsel by the contractor prior to initiating litigation or appealing an adverse decision:

(1) Identification of the proposed parties;

(2) The nature of the proposed action;

(3) Relief sought;

(4) Venue;

(5) Proposed representation and reason for selection;

(6) An analysis of the issues and the likelihood of success, and any time limitation associated with the requested approval;

(7) The estimated costs associated with the proposed action, including whether outside counsel has agreed to a contingent fee arrangement;

(8) Whether, for any reason, the contractor will assume any part of the costs of the action;

(9) A description of any attempts to resolve the issues that would be the subject of the litigation, such as through mediation or other means of alternative dispute resolution; and

(10) A discussion regarding why initiating litigation would prove beneficial to the contractor and to the Department.

### § 719.31 When must the contractor initiate litigation against third parties?

The contractor must initiate litigation, upon the request of the contracting officer, against third parties including proceedings before administrative agencies, in connection with the contract. The contractor shall proceed with such litigation in good faith and as directed from time to time by Department Counsel.

### § 719.32 What must the contractor do when it receives notice that it is a party to litigation?

(a) The contractor shall give the contracting officer and Department Counsel immediate notice in writing of any

legal proceeding, including any proceeding before an administrative agency and any claim which will be handled by a retrospective insurance carrier if costs (including Legal costs, settlements, claims paid, damages, etc.) are likely to be $100,000 or more, filed against the contractor arising out of the performance of the contract and shall provide a copy of all relevant filings and any other documents that may be requested by the contracting officer and/or Department Counsel. The Department Counsel will direct the contractor as to:

(1) Whether the contractor must authorize the Government to defend the action;

(2) Whether the Government will take charge of the action; or

(3) Whether the Government must receive an assignment of the contractor's rights.

(b) The contractor shall proceed with such litigation in good faith and as directed from time to time by the Department Counsel.

(c) If the costs and expenses associated with the legal proceeding against the contractor are potentially allowable under the contract, the contractor shall:

(1) Authorize Department representatives to collaborate with contractor in-house counsel or Department Counsel-approved outside counsel in settling or defending the legal proceeding; or counsel for any associated insurance carrier in settling or defending the claim if retrospective insurance applies or the amount of liability claimed exceeds the amount of insurance coverage; and

(2) Authorize Department representatives to settle the legal proceeding or to defend or represent the contractor in and/or to take charge of any litigation, if required by the Department, except where the liability is covered by bond or is insured by an insurance policy other than retrospective insurance.

### § 719.33 In what circumstances must the contractor seek permission from the Department to enter a settlement agreement?

The contractor must obtain permission from Department Counsel to enter a settlement agreement if the settlement agreement requires contractor payment of $25,000 or more. Obtaining this approval does not represent a determination that the settlement amount and/or the legal costs incurred in connection with the underlying legal matter will be determined to be allowable.

### § 719.34 What documentation must the contractor provide to Department Counsel when it seeks permission to enter a settlement agreement?

The contractor must provide a written statement to the Department Counsel that includes the following information, as applicable:

(a) The amount of any proposed monetary settlement payment.

(b) Titles and docket numbers associated with the case(s) for which the contractor is seeking approval to settle;

(c) The procedural history of the case(s) or issue(s);

(d) A narrative description of the legal claims or allegations at issue in the matter and any background information that explains events that precipitated the initiation of the matter;

(e) A description of the history of the settlement discussions;

(f) A description of the terms of the proposed settlement agreement or requested settlement authority and the rationale for the contractor entering into the proposed agreement;

(g) If the proposed total monetary settlement amount would be allocated among multiple plaintiffs, a list of the plaintiffs and the amount of money each would receive pursuant to the proposed settlement agreement as well as an explanation as to why the settlement amount is different for any particular plaintiff, if appropriate;

(h) A description as to why settlement of the matter is in the best interest of the Department; and

(i) Any additional supporting documents requested by Department Counsel.

### § 719.35 When must the contractor provide a copy of an executed settlement agreement?

A contractor must provide a copy of an executed settlement agreement within seven (7) days of execution.

## Subpart E—Reimbursement of Costs Subject to This Part

### § 719.40 What effect do the regulations of this part have on cost allowability?

Contractor and retained legal counsel compliance with this part is a prerequisite for allowability of legal costs. However, compliance with this part does not guarantee that legal costs will be determined to be allowable. Only the contracting officer has the authority to determine allowability of costs in accordance with 48 CFR (FAR) part 31 and (DEAR) part 931 and all other applicable contract terms and conditions.

### § 719.41 How does the Department determine whether fees are reasonable?

In determining whether fees or rates charged by retained legal counsel are reasonable, the Department may consider among other things:

(a) Whether the lowest reasonably achievable fees or rates (including any currently available or negotiable discounts) were obtained from retained legal counsel;

(b) Whether lower rates from other firms providing comparable services, at appropriate competency and experience levels, were available;

(c) Whether alternative rate structures such as flat, contingent, and other innovative proposals, were considered; and

(d) The complexity of the legal matter and the expertise of the law firm in this area.

### § 719.42 What categories of costs are unallowable?

(a) Specific categories of unallowable costs are contained in the cost principles at 48 CFR (FAR) part 31 and 48 CFR (DEAR) part 931 and 48 CFR 970.31. See also 41 U.S.C. 4304.

(b) Costs that are customarily or already included in billed hourly rates are not separately reimbursable.

(c) Interest charges that a contractor incurs on any outstanding (unpaid) bills from retained legal counsel are not reimbursable.

### § 719.43 What is the treatment of travel costs?

(a) Travel and related expenses must at a minimum comply with the restrictions set forth in 48 CFR 31.205–46, or 48 CFR (DEAR) 970.3102–05–46, as appropriate, to be reimbursable.

(b) Travel time may be allowed at a full hourly rate for the portion of time during which retained legal counsel performs legal work for which it was retained; any remaining travel time shall be reimbursed at 50 percent of the full hourly rate, except that in no event will travel time spent working for other clients be allowable. Also, for long distance travel that could be completed by various methods of transportation, e.g., car, train, or plane, costs charged by retained legal counsel or any agent of retained legal counsel will be considered reasonable only if the individuals charge no more travel time than it would take to utilize the fastest mode of transportation that is cost-effective. For example, if retained legal counsel travels for 10 hours by train when a cost-effective flight that would take two hours to get to the same destination is available, the attorney may charge a maximum of two hours for the time spent traveling.

### § 719.44 What categories of costs require advance approval?

(a) To be considered for reimbursement, costs incurred by retained legal counsel for the following require advance written approval from Department Counsel or the submission of subsequent specific justification to Department Counsel when circumstances out of the contractor's control make advance approval unobtainable:

(1) Computers or general application software, or non-routine computerized databases, if they are specifically created for a particular matter. For costs associated with the creation and use of computerized databases, contractors and retained legal counsel must ensure that the creation and use of computerized databases is necessary and cost-effective. Use of databases originally created by the Department or its contractors for other purposes, but that can be used to assist a contractor or retained legal counsel in connection with a particular matter, should be considered.

Contractors and retained legal counsel must ensure that DOE is provided the discretion to obtain unlimited access to and dominion over any computers or general application software, or non-routine computerized databases specifically created for a particular matter;

(2) Secretarial and support services, word processing, or temporary support personnel;

(3) Attendance by more than one attorney at a deposition, court hearing or interview;

(4) Expert witnesses and consultants;

(5) Trade publications, books, treatises, background materials, and other similar documents;

(6) Professional or educational seminars and conferences;

(7) Preparation of bills or time spent responding to questions about bills from either the Department or the contractor;

(8) Food and beverages when the attorney or consultant is not on travel status and away from the home office;

(9) Pro hac vice admissions; and

(10) Time charged for law students' or interns' services.

(b) Requests for fee increases by retained legal counsel, other than those under contract directly with the Department, must be sent in writing to the contractor, who will review the request for reasonableness. If the contractor determines the request is reasonable, the contractor must seek approval for the increase from Department Counsel before it authorizes any increase. Contractors should attempt to lock in rates for partners, associates and paralegals for at least a two year period.

### § 719.45 Are there any special procedures or requirements regarding subcontractor and retrospective insurance carrier legal costs?

(a) The contractor shall establish a monitoring system for significant matters in litigation which are handled by subcontractors other than retrospective insurance carriers whose contracts provide for the reimbursement of legal costs. The purpose of this monitoring system is to enable the contractor to be regularly informed of the progress of the Significant Matter, to monitor the associated costs and help ensure that they are reasonable, and to report on the progress of the Significant Matter and the associated costs to Department Counsel.

(b) The contractor shall require retrospective insurance carriers and other subcontractors whose contracts provide for the reimbursement of legal costs to request prior permission from the contractor to enter into a settlement agreement with, or make any payments to, claimants or third-parties if:

(1) In the case of a subcontractor other than a retrospective insurance carrier, the settlement or payment amount is likely to reach $25,000 or more; or

(2) In the case of a retrospective insurance carrier, the settlement or payment amount is likely to reach $100,000 or more.

(c) The contractor shall require the insurance carrier or other subcontractor to submit all documentation described in § 719.34 and to provide the contractor with a copy of the executed settlement agreement within seven days of execution, which the contractor will promptly forward to Department Counsel. The contractor shall not authorize the subcontractor to enter into a settlement agreement or make a payment to a claimant or third-party that is likely to reach or exceed the above-stated threshold amounts without first obtaining the approval of the Department Counsel.

(d) Upon request from Department Counsel, the Contracting Officer, or other authorized representative of the Department, the contractor shall provide detailed cost information regarding particular legal matters handled by retrospective insurance carriers or other subcontractors whose contracts provide for the reimbursement of legal costs.

(e) The contractor shall provide reviewed costs and status updates for all significant matters in litigation handled by subcontractors whose contracts provide for the reimbursement of legal costs in accordance with § 719.51. The contractor is not required to provide cost and status updates for matters handled by retrospective insurance carriers except upon the written request of the cognizant Contracting Officer or Department Counsel.

### § 719.46 Are costs covered by this part subject to audit?

All costs covered by this part are subject to audit by the Department, its designated representative, or the Government Accountability Office. *See* § 719.21.

### § 719.47 What happens when more than one contractor is a party to a matter?

(a) If more than one contractor is a party in a particular matter and the issues involved are similar for all the contractors, a single legal counsel designated by the General Counsel must either represent all of the contractors or serve as lead counsel, when the rights of the contractors and the Government can be effectively represented by a single legal counsel, consistent with the standards for professional conduct applicable in the particular matter. Contractors may propose to the General Counsel their preference for the individual or law firm to perform as the lead counsel for a particular matter.

(b) If a contractor, having been afforded an opportunity to present its views concerning joint or lead representation, does not acquiesce in the designation of one retained legal counsel to represent a number of contractors, or serve as lead counsel, then the legal costs of such contractor are not reimbursable by the Department, unless the contractor demonstrates that it was reasonable for the contractor to incur such expenses.

## Subpart F—Department Counsel

### § 719.50 What authority does Department Counsel have?

(a) Department Counsel will receive written delegated authority from the contracting officer to serve as the contracting officer's representative for legal matters.

(b) Actions by Department Counsel may not exceed the responsibilities and limitations as delegated by the contracting officer. Delegated contracting officer representative authority shall not be construed to include the authority to execute or modify the contract or resolve any contract dispute arising under the contract. Additional discussion of the authority and limitation of contracting officers can be found at 48 CFR 1.602–1, and contracting officer's representatives at 48 CFR (DEAR) 942.270–1. The clause, Technical Direction, 48 CFR (DEAR) 952.242–70, also discusses the responsibilities and authority of a contracting officer's representative.

### § 719.51 What information must be forwarded to the General Counsel's Office concerning contractor submissions to Department Counsel under this part?

Department Counsel must submit through the General Counsel reporting system, the reviewed costs and status updates for all matters involving retained counsel, including but not limited to contractor litigation. The reports are to be received by the 15th day of the month following the end of each quarter of the fiscal year.

### § 719.52 What types of field actions must be coordinated with the General Counsel?

(a) Requests from contractors for exceptions or deviations from this part must be submitted to the contracting officer and Department Counsel, and approved by the General Counsel or his/her delegee.

(b) Requests from contractors for approval to initiate or defend litigation, or to appeal from adverse decisions, where legal issues of first impression, sensitive issues, issues of national significance to the Department or of broad applicability to the Government that might adversely impact its operations are involved must be coordinated by Department Counsel with the General Counsel or his/her delegee.

(c) Department Counsel must inform the General Counsel of any Significant Matter, as defined in this part, and must coordinate any action involving a Significant Matter with the General Counsel, or his/her delegee, as directed by the General Counsel or his/her delegee.

## APPENDIX A TO PART 719—GUIDANCE FOR LEGAL RESOURCE MANAGEMENT

### MANAGEMENT AND ADMINISTRATION OF OUTSIDE LEGAL SERVICES

1.0 Alternative Dispute Resolution

2.0 Cost Allowability Issues
2.1 Underlying Cause for Incurrence of Costs
Attachment—Contractor Litigation and Legal Costs, Model Bill Format

MANAGEMENT AND ADMINISTRATION OF OUTSIDE LEGAL SERVICES

This guidance is intended to assist contractors, contracting officers and retained legal counsel in managing the costs of outside legal services.

*1.0 Alternative Dispute Resolution*

Contractors are expected to evaluate all matters for appropriate alternative dispute resolution (ADR) at various stages of an issue in dispute, e.g., before a case is filed, during pre-discovery, after initial discovery and during pretrial. This evaluation should be done in coordination with the Department's ADR liaison if one has been established or appointed or Department Counsel if an ADR liaison has not been appointed. Contractors, contractor counsel, and Department Counsel are also encouraged to consult with the Department's Director of the Office of Conflict Prevention and Resolution. The Department anticipates that mediation will be the principal and most common method of alternative dispute resolution. Agreement to arbitrate should generally be consistent with the Administrative Dispute Resolution Act (incorporated in part at 5 U.S.C. 571, et seq.) and Department guidance issued under that Act. When a decision to arbitrate is made, a statement fixing the maximum award amount should be agreed to in advance by the participants.

*2.0 Cost Allowability Issues*

A determination of cost reasonableness depends on a variety of considerations and circumstances. 48 CFR 31.201–3 establishes that no presumption of reasonableness is attached to the incurrence of costs by a contractor.

*2.1 Underlying Cause for Incurrence of Costs*

While 10 CFR part 719 provides procedures associated with incurring and monitoring legal costs, the evaluation of the reason for the incurrence of the legal costs, e.g., liability, fault or avoidability, is a separate issue. The reason for the contractor incurring costs may affect the allowability of the contractor's legal costs. In some cases, the final determination of allowability of legal costs cannot be made until a matter is fully resolved. In certain circumstances, contract and cost principle language may permit conditional reimbursement of costs pending the outcome of the legal matter. Whether the Department makes conditional reimbursements or withholds any payment pending the outcome, legal costs ultimately reimbursed by the Department must comply with the applicable cost principles, the terms of the contract, and part 719.

ATTACHMENT—CONTRACTOR LITIGATION AND LEGAL COSTS, MODEL BILL FORMAT

*1. Model Bill Format*

I—FOR FEES

| Date of service | Description of service | Name or initials of attorney | Approved rate | Time charged | Amount (rate × time) |
|---|---|---|---|---|---|
| (See Note 1 to this table). | | | | | |

II—FOR DISBURSEMENTS

| Date | Description of disbursement | Amount |
|---|---|---|
| (See Note 1 to this table). | | |

NOTE 1—DESCRIPTION OF SERVICE: All fees must be itemized and described in sufficient detail and specificity to reflect the purpose and nature of the work performed (e.g., subject matter researched or discussed; names of participants of calls/meetings; type of documents reviewed).

NOTE 2—DESCRIPTION OF DISBURSEMENT: Description should be in sufficient detail to determine that the disbursement expense was in accordance with all applicable Department policies on reimbursement of contractor legal costs and the terms of engagement between the contractor and the retained legal counsel. The date the expense was incurred or disbursed should be listed rather than the date the expense was processed. The following should be itemized: copy charge (i.e., number of pages times the price per page); fax charges (date, phone number and actual amount); overnight delivery (date and amount); electronic research (date and amount); extraordinary postage (e.g., bulk or certified mail); court reporters; expert witness fees; filing fees; outside copying or binding charges; temporary help (assuming prior approval).

NOTE 3—RECEIPTS: Receipts for all expenses equal to or above $75 must be attached.

# PART 725—PERMITS FOR ACCESS TO RESTRICTED DATA

GENERAL PROVISIONS

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APPENDIX A TO PART 725—CATEGORIES OF RESTRICTED DATA AVAILABLE

AUTHORITY: Sec. 161 of the Atomic Energy Act of 1954, as amended, 68 Stat. 943, 42 U.S.C. 2201.

SOURCE: 41 FR 56778, Dec. 30, 1976, unless otherwise noted.

## GENERAL PROVISIONS

### § 725.1 Purpose.

This part establishes procedures and standards for the issuance of an Access Permit to any person subject to this part who requires access to Restricted Data applicable to civil uses of atomic energy for use in his business, trade or profession; provides for the amendment, renewal, suspension, termination and revocation of an Access Permit; and specifies the terms and conditions under which the Chief Health, Safety and Security Officer will issue the Permit.

[41 FR 56778, Dec. 30, 1976, as amended at 71 FR 68732, Nov. 28, 2006]

### § 725.2 Applicability.

The regulations in this part apply to any person within or under the jurisdiction of the United States who desires access to Restricted Data for use in his business, profession or trade.

### § 725.3 Definitions.

As used in this part:

(a) *Access Permit* means a permit, issued by the Administrator authorizing access by the named permittee to Restricted Data applicable to civil uses of atomic energy in accordance with the terms and conditions stated on the permit.

(b) *Act* means the Atomic Energy Act of 1954 (68 Stat. 919), including any amendments thereto.

(c) *Category* means a category of Restricted Data designated in appendix A to the regulations in this part.

(d) *Chief Health, Safety and Security Officer* means the Chief Health, Safety and Security Officer or his duly authorized representatives.

(e) *DOE* means the Department of Energy.

(f) *Permittee* means the holder of a permit issued pursuant to the regulations in this part.

(g) *Person* means (1) 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 (2) any legal successor, representative, agent, or agency of the foregoing.

(h) *Restricted Data* means all data concerning (1) design, manufacture or utilization of atomic weapons; (2) the production of special nuclear material; or (3) 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.

(i) *Government Confidential Commercial Information* means sensitive commercial information not including Restricted Data, generated by the government, the release of which could put the government at a competitive disadvantage in providing enrichment services.

[41 FR 56778, Dec. 30, 1976, as amended at 52 FR 30139, Aug. 13, 1987; 71 FR 68732, Nov. 28, 2006]

### § 725.4 Interpretations.

Except as specifically authorized by the Chief Health, Safety and Security Officer 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.

[41 FR 56778, Dec. 30, 1976, as amended at 71 FR 68732, Nov. 28, 2006]

### § 725.5 Communications.

All communications concerning this part should be addressed to the Chief Health, Safety and Security Officer, HS–1/Forrestal Building, U.S. Department of Energy, 1000 Independence Ave, SW., Washington, DC 20585.

[71 FR 68732, Nov. 28, 2006]

### § 725.6 Categories of available information.

For administrative purposes DOE has categorized Restricted Data which will be made available to permittees in the categories as set forth in appendix A to this part. Top Secret information; information pertaining to the design, manufacture or utilization of atomic weapons; and defense information other than Restricted Data are not included in these categories and will not be made available under this part.

### § 725.7 Specific waivers.

The Chief Health, Safety and Security Officer may, upon application of any interested party, grant such waivers from the requirements of this part as he determines are authorized by law and will not constitute an undue risk to the common defense and security.

[41 FR 56778, Dec. 30, 1976, as amended at 71 FR 68732, Nov. 28, 2006]

## APPLICATIONS

### § 725.11 Applications.

(a) Any person desiring access to Restricted Data pursuant to this part should submit an application (Form 378), in triplicate, for an access permit to the Chief Health, Safety and Security Officer, HS–1/Forrestal Building, U.S. Department of Energy, 1000 Independence Ave, SW., Washington, DC 20585.

(b) Where an individual desires access to Restricted Data for use in the performance of his duties as an employee, the application for an access permit must be filed in the name of his employer.

(c) Self-employed private consultants, desiring access to Restricted Data, must file the application in their own name for an individual access permit.

(d) Each application should contain the following information:

(1) Name of applicant (unincorporated subsidiaries or divisions of a corporation must apply in the name of the corporation);

(2) Address of applicant;

(3) Description of business or occupation of applicant; and

(4)(i) If applicant is an individual, state citizenship.

(ii) If applicant is a partnership, state name, citizenship and address of each partner and the principal location where the partnership does business.

(iii) If applicant is a corporation or an unincorporated association, state:

(A) The state where it is incorporated or organized and the principal location where it does business;

(B) The names, addresses and citizenship of its directors and of its principal officers;

(C) Whether it is owned, controlled or dominated by an alien, a foreign corporation, or foreign government, and if so, give details.

(iv) If the applicant is acting as agent or representative of another person in filing the application, identify the principal and furnish information required under this subparagraph with respect to such principal;

(5) Total number of full-time employees;

(6) Classification of Restricted Data (Confidential or Secret) to which access is requested;

(7) Potential use of the Restricted Data in the applicant's business, profession or trade. If access to Secret Restricted Data is requested, list the specific categories by number and furnish detailed reasons why such access within the specified categories is needed by

the applicant. The need for Secret information should be stated by describing its proposed use in specific research, design, planning, construction, manufacturing, or operating projects; in activities under licenses issued by Nuclear Regulatory Commission; in studies or evaluations planned or under way; or in work or services to be performed for other organizations. In addition, if access to secret restricted data in category C–65, plutonium production, or restricted data in category C–24, isotope separation, is requested, the application should also include sufficient information to satisfy the requirements of § 725.15(b) (2) or (3), as the case may be.''

(8) Principal Location(s) at which Restricted Data will be used.

(e) Applications should be signed by a person authorized to sign for the applicant.

(f) Each application shall contain complete and accurate disclosure with respect to the real party or parties in interest and as to all other matters and things required to be disclosed.

[41 FR 56778, Dec. 30, 1976, as amended at 71 FR 68732, Nov. 28, 2006]

### § 725.12 Noneligibility.

The following persons are not eligible to apply for an access permit:

(a) Corporations not organized under the laws of the United States or a political subdivision thereof.

(b) Any individual who is not a citizen of the United States.

(c) Any partnership not including among the partners one or more citizens of the United States; or any other unincorporated association not including one or more citizens of the United States among its principal officers.

(d) Any organization which is owned, controlled or dominated by the Government of, a citizen of, or an organization organized under the laws of a country or area listed as a Subgroup A country or destination in § 371.3 (15 CFR 371.3) of the Comprehensive Export Schedule of the United States Department of Commerce.

(e) Persons subject to the jurisdiction of the United States who are not doing business within the United States.

### § 725.13 Additional information.

The Chief Health, Safety and Security Officer may, at any time after the filing of the original application and before the termination of the permit, require additional information in order to enable the Chief Health, Safety and Security Officer to determine whether the permit should be granted or denied or whether it should be modified or revoked.

[41 FR 56778, Dec. 30, 1976, as amended at 71 FR 68732, Nov. 28, 2006]

### § 725.14 Public inspection of applications.

Applications and documents submitted to DOE in connection with applications may be made available for public inspection in accordance with the regulations contained in part 702 of this chapter.

### § 725.15 Requirements for approval of applications.

(a) An application for an access permit authorizing access to confidential restricted data in the categories set forth in appendix A of this part (except C–91 and C–24) will be approved only if the application demonstrates that the applicant has a potential use or application for such data in his business, trade, or profession and has filed a complete application form.

(b)(1) An application for an access permit authorizing access to restricted data in category C–24 or secret restricted data in other categories will be approved only if the applicant has a need for such data in his business, trade, or profession and has filed a complete application form.

(2) An application for an access permit authorizing access to Secret Restricted Data in category C–65 Plutonium Production will be approved only if the application demonstrates also that the applicant:

(i) Is directly engaged in a substantial effort to develop, design, build or operate a chemical processing plant or other facility related to his participation in the peaceful uses of atomic energy for which such production rate and cost data are needed; or

(ii) Is furnishing to a permittee having access to C–65 under paragraph

(b)(2)(i) of this section, substantial scientific, engineering or other professional services to be used by said permittee in carrying out the activities for which said permittee received access to category C–65.

(3) An application for an access permit authorizing access to Restricted Data in category C–24, isotope separation—subcategory A or B—will be approved only if the application demonstrates also that the applicant:

(i) Possesses technical, managerial and financial qualifications demonstrating that the applicant is potentially capable of undertaking or participating significantly in the construction and/or operation of production or manufacturing facilities and offers reasonable assurance of adequacy of resources to carry on, alone or with others, uranium enrichment on a production basis or the large-scale manufacture or assembly of precision equipment systems, or is potentially capable of utilizing centrifuge machines in its business for uranium enrichment or for purposes other than uranium enrichment; and is not subject to foreign ownership, control, or influence; and

(A) For subcategory A, desires to determine its interest in participating significantly in a substantial effort to develop, design, build, and operate a uranium enrichment facility or a facility for the manufacture of uranium enrichment equipment.

(B) For subcategory B, proposes to (*1*) participate significantly in, or is directly participating significantly in, a substantial effort to evaluate alternative processes, develop, design, build, and operate a uranium enrichment facility or a facility for the manufacture of uranium enrichment equipment, or (*2*) utilize centrifuge machines and related equipment in its business for uranium enrichment or for purposes other than uranium enrichment, or

(ii) Is furnishing to a permittee having access to Category C–24 under the paragraph (b)(3)(i) of this section substantial scientific, engineering, or other professional services to be used by said permittee in carrying out the activities for which said permittee received access to Category C–24.

(4) An application for an access permit authorizing access to Confidential and Secret Restricted Data in C–91, Nuclear Reactors for Rocket Propulsion, will be approved only if the application demonstrates also that the applicant:

(i) Possesses qualifications demonstrating that he is capable of making a contribution to research and development in the field of nuclear reactors for rocket propulsion and is directly engaged in or proposes to engage in a substantial research and development program in such field of work; or

(ii) Is engaged in or proposes to engage in a substantial study program in the field of nuclear reactors for rocket propulsion preparatory to the submission of a research and development proposal to DOE; or

(iii) Is furnishing to a permittee having access under paragraph (b)(4) (i) or (ii) of this section substantial scientific, engineering or other professional services to be used by that permittee in a study or research and development program for which said permittee received access.

[41 FR 56778, Dec. 30, 1976, as amended at 52 FR 30139, Aug. 13, 1987]

PERMITS

### § 725.21 Issuance.

(a) Upon a determination that an application meets the requirements of this regulation, the Chief Health, Safety and Security Officer will issue to the applicant an access permit on Form DOE 379.

(b) An Access Permit is not an access authorization. It does not authorize any individual not having an appropriate DOE access authorization to receive Restricted Data. See § 725.24 and part 1016 of this title.

[41 FR 56778, Dec. 30, 1976, as amended at 71 FR 68732, Nov. 28, 2006]

### § 725.22 Scope of permit.

(a) All access permits will as a minimum authorize access, subject to the terms and conditions of the access permit to confidential restricted data in all of the categories set forth in appendix A to this part, except C–91 and C–24.

(b) In addition, access permits may authorize access, subject to the terms and conditions of the access permit to

such Secret Restricted Data as is included within the particular category or categories specified in the permit.

(c) In addition, access permits may authorize access, subject to the terms and conditions of the access permit, to such government confidential commercial information as is included within the particular category or categories specified in the permit.

[41 FR 56778, Dec. 30, 1976, as amended at 52 FR 30139, Aug. 13, 1987]

### § 725.23 Terms and conditions of access.

(a) Neither the United States, nor DOE, nor any person acting on behalf of DOE makes any warranty or other representation, expressed or implied, (1) with respect to the accuracy, completeness or usefulness of any information made available pursuant to an access permit, or (2) that the use of any such information may not infringe privately owned rights.

(b) The Chief Health, Safety and Security Officer, on behalf of DOE, hereby waives such rights with respect to any invention or discovery as it may have pursuant to section 152 of the Act by reason of such invention or discovery having been made or conceived in the course of, in connection with, or resulting from access to Restricted Data received under the terms of an access permit. (Note provisions of § 725.23(d).)

(c) Each permittee shall:

(1) Comply with all applicable provisions of the Atomic Energy Act of 1954, as amended, and with parts 810 and 1016 of this title and with all other applicable rules, regulations, and orders of DOE, including such rules, regulations, and orders as DOE may adopt or issue to effectuate the policies specified in the act directing DOE to strengthen free competition in private enterprise and avoid the creation or maintenance of a situation inconsistent with the antitrust laws.

(2) Be deemed to have waived all claims for damages under section 183 of title 35 U.S. Code by reason of the imposition of any secrecy order on any patent application and all claims for just compensation under section 173 of the Atomic Energy Act of 1954, with respect to any invention or discovery made or conceived in the course of, in connection with or as a result of access to Restricted Data received under the terms of the access permit;

(3) Be deemed to have waived any and all claims against the United States, DOE and all persons acting on behalf of DOE that might arise in connection with the use, by the applicant, of any and all information supplied by them pursuant to the access permit;

(4) Obtain and preserve in his files written agreements from all individuals who will have access to Restricted Data under his access permit. The agreement shall be as follows:

> In consideration for receiving access to Restricted Data under the access permit issued by the Chief Health, Safety and Security Officer, I hereby agree to:
>
> (a) Waive all claims for damages under section 183 of title 35 U.S. Code by reason of the imposition of any secrecy order on any patent application, and all claims for just compensation under section 173 of the Atomic Energy Act of 1954, with respect to any invention or discovery made or conceived in the course of, in connection with or resulting from access to Restricted Data received under the terms of the access permit issued to (insert the name of the holder of the access permit);
>
> (b) Waive any and all claims against the United States, DOE, and all persons acting on behalf of DOE that might arise in connection with the use, by me, of any and all information supplied by them pursuant to the access permit issued to (insert the name of the holder of the access permit).

In case of an access permit authorizing access to restricted data in category C–24, isotope separation, the agreement shall also provide for such requirements as the permittee considers necessary for purposes of fulfilling its obligations under paragraph (d) of this section.

(5) Pay all established charges for personnel access authorizations, DOE consulting services, publication and reproduction of documents, and such other services as DOE may furnish in connection with the access permit.

(d) The following terms and conditions are applicable to an access permit authorizing access to restricted data in category C–24, isotope separation irrespective of whether access to DOE's restricted data information is desired:

(1) The permittee agrees to grant a nonexclusive license at reasonable royalties to the United States and, at the request of DOE, to domestic and foreign persons, to use in the production or enrichment of special nuclear material any U.S. patent or any U.S. patent application (otherwise in condition for allowance except for a secrecy order thereon) on any invention or discovery made or conceived by the permittee, its employees, or others engaged by the permittee in the course of the permittee's work under the access permit, or as a result of access to data or information made available by DOE.

(2) The permittee agrees to grant to the United States, and, at the request of DOE, to domestic and foreign persons, the right at reasonable royalties to use for research, development, or manufacturing programs for the production or enrichment of special nuclear material, any technical information or data, including economic evaluations thereof, of a proprietary nature developed by the permittee, its employees, or others engaged by the permittee in the course of the permittee's work under the access permit or as a result of access to data or information made available by DOE and not covered by a U.S. patent or U.S. patent application referred to in paragraph (d)(1) of this section. If DOE disseminates any such proprietary technical information or data in its possession to any of its contractors for use in any DOE research, development, production, or manufacturing programs, it will do so under contractual provisions pursuant to which the contractor would undertake to use this information only for the work under the pertinent DOE contract. Notwithstanding the foregoing provisions of this subparagraph, the permittee waives any claim against DOE for compensation or otherwise, in connection with any use or dissemination of information or data not specifically identified and claimed by the permittee as proprietary in a written notice to DOE at the time of the furnishing of the information or data to DOE. As used in this subparagraph, the term ''technical information or data, including economic evaluations thereof, of a proprietary nature'' means information or data which:

(i) Is not the property of the Government by virtue of any agreement;

(ii) Concerns the details of trade secrets or manufacturing processes which the permittee has protected from us by others; and

(iii)(A) Is specifically identified as proprietary at the time it is made available to DOE.

(B) Technical information or data shall not be deemed proprietary in nature whenever substantially the same technical information is available to DOE which has been prepared, developed or furnished as nonproprietary information by another source independently of the proprietary information and data furnished by the permittee.

(3) If the amount of reasonable royalties provided for in paragraphs (d) (1) and (2) of this section cannot be agreed upon, the permittee agrees that such amount shall be determined by the Administrator under the provisions of section 157c of the Atomic Energy Act of 1954, as amended.

(4) In the event domestic commercial uranium enriching services are provided by persons other than an agency of the United States, the permittee agrees not to require the United States to pay the royalties provided for in paragraphs (d) (1) and (2) of this section.

(5) The acceptance, exercise, or use of the licenses or rights provided for in paragraphs (d) (1) and (2) of this section shall not prevent the Government, at any time, from contesting their validity, scope or enforceability.

(6) The permittee agrees, during the term of the access permit, to make quarterly reports to DOE in writing, in reasonable detail, respecting all technical information or data, including economic evaluations thereof, which the permittee or DOE considers may be of interest to DOE, including reports of patent applications on inventions or discoveries and of technical information and data of a proprietary nature. These reports will cover the results of the permittee's work under the access permit or as a result of data or information made available by DOE. The foregoing provisions of this subparagraph shall be subject to the provisions of paragraphs (d) (1) and (2) of this section.

(7) The permittee agrees to make available to DOE, at all reasonable times during the term of the access permit, for inspection by DOE personnel, or by mutual agreement, others on behalf of DOE, all experimental equipment and technical information or data developed by the permittee, its employees, or others engaged by the permittee, in the course of the permittee's work under the access permit or as a result of data or information made available by DOE. The foregoing provision of this subparagraph shall be subject to the provisions of paragraphs (d)(1) and (2) of this section.

(8) The permittee agrees to pay such reasonable compensation as DOE may elect to charge for the commercial use of its inventions and discoveries including related data and technology and, except for an applicant qualifying for a permit pursuant to § 725.15(b)(3)(ii), agrees to pay $25,000 for an access permit authorizing access to restricted data in subcategory B.

(9) Except as may be otherwise authorized by DOE, the permittee agrees not to disseminate to persons not granted access by DOE, restricted data or government confidential commercial information made available to the permittee by DOE or restricted data developed by the permittee, its employees, or others engaged by the permittee in the course of the permittee's work under the access permit or as a result of data or information made available by DOE.

(10) The granting of an access permit does not constitute any assurance, direct or implied, that the Nuclear Regulatory Commission will grant the permittee a license for a production facility or any other license.

(11) In the event the permittee is engaged by DOE to perform work for DOE in the field of the separation of isotopes, the permittee agrees to undertake such measures as DOE may require for the separation of its activities under the access permit from its work for DOE.

[41 FR 56778, Dec. 30, 1976, as amended at 52 FR 30139, Aug. 13, 1987; 71 FR 68732, Nov. 28, 2006]

### § 725.24 Administration.

With respect to each permit issued pursuant to the regulations in this part, the Chief Health, Safety and Security Officer will designate a DOE or National Nuclear Security Administration office which will:

(a) Process all personnel access authorizations requested in connection with the permit;

(b) Review the procedures submitted by the Applicant, in accordance with part 1016 of this title, for the safeguarding of Restricted Data; and

(c) Provide information to the permittee with respect to the sources and locations of Restricted Data available under this permit and to assist the permittee in other matters pertaining to the administration of his permit.

[41 FR 56778, Dec. 30, 1976, as amended at 71 FR 68732, Nov. 28, 2006]

### § 725.25 Term and renewal.

(a) Each access permit will be issued for a two year term, unless otherwise stated in the permit.

(b) Applications for renewal shall be filed in accordance with § 725.11. Each renewal application must be complete, without reference to previous applications. In any case in which a permittee has filed a properly completed application for renewal more than thirty (30) days prior to the expiration of his existing permit, such existing permit shall not expire until the application for a renewal has been finally acted upon by the Chief Health, Safety and Security Officer.

[41 FR 56778, Dec. 30, 1976, as amended at 71 FR 68732, Nov. 28, 2006]

### § 725.26 Assignment.

An access permit is nontransferable and nonassignable.

### § 725.27 Amendment.

An access permit may be amended from time to time upon application by the permittee. An application for amendment may be filed, in triplicate, in letter form and shall be signed by an individual authorized to sign on behalf of the applicant. The term of an access permit shall not be altered by an amendment thereto.

### § 725.28 Action on application to renew or amend.

In considering an application by a permittee to review or amend his permit, the Chief Health, Safety and Security Officer will apply the criteria set forth in § 725.15. Failure of an applicant to reply to an DOE request for additional information concerning an application for renewal or amendment within 60 days shall result in a rejection of the application without prejudice to resubmit a properly completed application at a later date.

[41 FR 56778, Dec. 30, 1976, as amended at 71 FR 68732, Nov. 28, 2006]

### § 725.29 Suspension, revocation and termination of permits.

The Chief Health, Safety and Security Officer may revoke or suspend any access permit for any material false statement in the application or in any report submitted to DOE pursuant to the regulations in this part or because of conditions or facts which would have warranted a refusal to grant the permit in the first instance, or for violation of any of the terms and conditions of the Atomic Energy Act of 1954 or rules, regulations or orders issued pursuant thereto. A permittee should request termination of his permit when he no longer requires Restricted Data for use in his business, trade or profession.

[41 FR 56778, Dec. 30, 1976, as amended at 71 FR 68732, Nov. 28, 2006]

### § 725.30 Exceptions and additional requirements.

Notwithstanding any other provision in the regulations in this part, the Chief Health, Safety and Security Officer may deny an application for an access permit or suspend or revoke any access permit, or incorporate additional conditions or requirements in any access permit, upon finding that such denial, revocation or the incorporation of such conditions and limitations is necessary or appropriate in the interest of the common defense and security or is otherwise in the public interest.

[41 FR 56778, Dec. 30, 1976, as amended at 71 FR 68732, Nov. 28, 2006]

### § 725.31 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 any provision of the Act or any regulation or order issued thereunder may be guilty of a crime and, upon conviction, may be punished by fine or imprisonment or both, as provided by law.

## APPENDIX A TO PART 725—CATEGORIES OF RESTRICTED DATA AVAILABLE

C–24 Isotope separation. This category is divided into subcategories A and B.

Subcategory A includes information in summary form concerning the status and potential of the gaseous diffusion and gas centrifuge processes for the separation of uranium isotopes.

Subcategory B includes information on the following:

a. Any aspect of separating one or more isotopes of uranium from a composition containing a mixture of isotopes of that element by the gas centrifuge or gaseous diffusion processes.

b. Design, construction, and operation of any plant, facility or device capable of separating by the gas centrifuge or gaseous diffusion processes one or more isotopes of uranium from a composition containing a mixture of isotopes of that element, including means and methods of transporting materials from one to another device.

C–44 Nuclear Technology. This category includes classified technical information concerning nuclear technology. It may contain information on the following:

a. Materials, including metals, ceramics, organic and inorganic compounds. Included are such technical areas as the technology and fabrication of fuel elements, corrosion studies, cladding techniques and radiation studies.

b. Chemistry, chemical engineering and radiochemistry of all the elements and their compounds. Included are techniques and processes of chemical separations, radioactive waste handling and feed material processing.

c. Reactor physics, engineering and technology including theory, design, criticality studies and operation of reactors, reactor systems and reactor components.

d. Reserved.

e. Lithium isotope separation technology. This subcategory includes classified technical information on the separation of lithium isotopes by using counter-current flows of lithium amalgam and aqueous lithium hydroxide solution in packed columns. Not included is information regarding plant design

and operating conditions from which total production rates or design capacity of the lithium isotope separation plant (Colex) in Oak Ridge, Tennessee, can be inferred. In addition to the other requirements of this part, access permits for Restricted Data in this subcategory will be approved, provided the permittee:

1. Demonstrates that it is not a corporation or entity owned, controlled or dominated by an alien, a foreign corporation, or a foreign government, and

2. Agrees to insertion in his access permit of the terms and conditions:

(i) Set forth in paragraphs (a) and (b) of §725.23 of this part;

(ii) Set forth in paragraph (c) of §725.23 of this part, amended by deleting the phrase ''category C–24, isotope separation,'' and inserting in lieu thereof the phrase ''subcategory C–44e, lithium isotope separation technology'';

(iii) Set forth in paragraph (d) of §725.23 of this part, amended by:

(A) Deleting the phrases ''production or enrichment of special nuclear material'' and ''separation of isotopes'' wherever they appear, and inserting in lieu thereof the phrase ''separation of isotopes of lithium'';

(B) Deleting the phrase ''domestic commercial uranium enriching services are provided by,'' and inserting in lieu thereof the phrase ''domestic lithium isotope separation capacity becomes available to.''

This category does not include information which reveals or from which can be calculated actual or planned (as distinguished from design) capacities, production rates and unit costs for the plutonium production program.

C–65 Plutonium Production. This category includes information on reactor, fuel element and separations technology which reveals or from which can be calculated actual or planned (as distinguished from design) capacities, production rates and unit costs for the Hanford and Savannah River production facilities.

Technology which does not reveal or enable calculation of production rates and unit costs of Hanford or Savannah River production facilities is categorized in C–44 Nuclear Technology.

C–90 Nuclear Reactors for Ram-Jet Propulsion. This category includes information on:

a. Programs pertaining to the development of nuclear reactors for application to ram-jet propulsion systems including theory and/or design, test philosophy procedures and/or results.

b. Fabrication technology and evaluation of performance or characteristics of materials or components for such reactors.

c. Controls, control systems and instrumentation relating to the design or technology of such reactors.

d. Data pertaining to heat transfer, propellant kinetics or corrosion and erosion of materials under conditions of high temperature, high gas flows or other environmental conditions characteristic of ram-jet propulsion systems.

This category does not include information on:

a. Design details of weapons systems or nuclear warheads.

b. Military operational techniques or characteristics.

c. General aspects of nuclear ram-jet missiles, such as payload, aerodynamic characteristics, guidance systems, physical size, gross weight, thrust and information of this kind which is associated with utilization of a nuclear ram-jet propulsion system.

C–91 Nuclear Reactors for Rocket Propulsion. This category includes information on:

a. Programs pertaining to nuclear reactors for rocket propulsion, i.e., missile propulsion, theory and/design, test philosophy procedures and/or results.

b. Design, fabrication technology and evaluation of performance or characteristics of material, components, or subsystems or nuclear rocket reactors.

c. Controls, control systems and instrumentation relating to the design or technology of rocket reactor systems.

d. Data pertaining to heat transfer, propellant kinetics or corrosion and erosion of rocket reactor system materials under conditions of high temperature, high gas flows, or other environmental conditions characteristic of rocket reactors.

This category does not include information on:

a. Design details of weapons systems or nuclear warheads.

b. Military operational techniques or characteristics.

c. General aspects of payload and aerodynamic characteristics.

d. Design details and development, information of components and subsystems of the nuclear rocket engine other than that associated with the reactor system.

C–92 Systems for Nuclear Auxiliary Power (SNAP). This category includes information on:

a. Isotopic SNAP Program, including theory, design, research and development, fabrication, test procedures and results for the device, including power conversion device and the fuels used.

b. Reactor SNAP Program, including theory, design, research and development, fabrication, test procedures and results for the reactor, including the directly associated power conversion device when developed by DOE.

This category does not include that technical and scientific data developed under the SNAP Advanced Concept Program which should be reported in C–93.

C–93 Advanced Concepts for Future Application.

C–93a Reactor Experiments. This category includes classified technical information developed in the pursuit of work on new or advanced concepts of reactors or components which DOE considers essential to future growth or for general application to future generations of reactors. Classified information developed in the pursuit of work on the lithium cooled reactor experiment is an example of the type of information to be reported in this category, i.e., information resulting from an experimental reactor project or component development which may have many future applications but which is not currently being pursued to meet the specific needs of an approved requirement for which other information categories have been provided. For example, classified technical information developed in the pursuit of work on Naval, Ram-Jet or Rocket nuclear reactors would not be reported here but under their respective specific categories. This category will include classified technical information on the following:

a. Theory, design, and performance, either estimated or actual.

b. Design details, composition and performance characteristics of major components (e.g., fuel media, reflectors, moderators, heat exchangers, pressure shells or containment devices, control rods, conversion devices, instrumentation and shielding).

c. Material (metals, ceramics and compounds) development, alloying, cladding, corrosion, erosion, radiation studies and fabrication techniques.

d. Chemistry, including chemical engineering, processes and techniques. Reactor physics, engineering and criticality studies.

C–93b Conversion Devices. This category includes classified technical information developed in the pursuit of studies, designs, research and development, fabrication and operation of any energy conversion device to be used with nuclear energy sources which is not being applied to a specific system development project.

C–94 Military Compact Reactor (MCR). This category includes classified technical information on the actual or planned Military Compact Reactor and its components developed in the pursuit of studies, designs, research and development, fabrication, and operation of the reactor system or its components.

Examples of the areas of information included are:

a. Reactor core physics.

b. Fuel elements and fuel element components.

c. Moderator and reflector details.

d. Data on primary coolant system.

e. Radiation shield.

f. Controls and instrumentation.

This category does not include information on military operational characteristics or techniques.

[41 FR 56778, Dec. 30, 1976, as amended at 44 FR 37939, June 29, 1979]

# PART 727—CONSENT FOR ACCESS TO INFORMATION ON DEPARTMENT OF ENERGY COMPUTERS

Sec.
727.1 What is the purpose and scope of this part?
727.2 What are the definitions of the terms used in this part?
727.3 To whom does this part apply?
727.4 Is there any expectation of privacy applicable to a DOE computer?
727.5 What acknowledgment and consent is required for access to information on DOE computers?
727.6 What are the obligations of a DOE contractor?

AUTHORITY: 42 U.S.C. 7101, *et seq.;* 42 U.S.C. 2011, *et. seq.;* 50 U.S.C. 2425, 2483; E.O. No. 12958, 60 FR 19825, 3 CFR, 1995 Comp., p. 333; and E.O. 12968, 60 FR 40245, 3 CFR, 1995 Comp., p. 391.

SOURCE: 71 FR 40884, July 19, 2006, unless otherwise noted.

## § 727.1 What is the purpose and scope of this part?

(a) The purpose of this part is to establish minimum requirements applicable to each individual granted access to a DOE computer or to information on a DOE computer, including a requirement for written consent to access by an authorized investigative agency to any DOE computer used in the performance of the individual's duties during the term of that individual's employment and for a period of three years thereafter.

(b) Section 727.4 of this part also applies to any person who uses a DOE computer by sending an e-mail message to such a computer.

## § 727.2 What are the definitions of the terms used in this part?

For purposes of this part:

*Authorized investigative agency* means an agency authorized by law or regulation to conduct a counterintelligence

investigation or investigations of persons who are proposed for access to classified information to ascertain whether such persons satisfy the criteria for obtaining and retaining access to such information.

*Computer* means desktop computers, portable computers, computer networks (including the DOE network and local area networks at or controlled by DOE organizations), network devices, automated information systems, or other related computer equipment owned by, leased, or operated on behalf of the DOE.

*DOE* means the Department of Energy, including the National Nuclear Security Administration.

*DOE computer* means any computer owned by, leased, or operated on behalf of the DOE.

*Individual* means an employee of DOE or a DOE contractor, or any other person who has been granted access to a DOE computer or to information on a DOE computer, and does not include a member of the public who sends an e-mail message to a DOE computer or who obtains information available to the public on DOE Web sites.

*User* means any person, including any individual or member of the public, who sends information to or receives information from a DOE computer.

### § 727.3 To whom does this part apply?

(a) This part applies to DOE employees, DOE contractors, DOE contractor and subcontractor employees, and any other individual who has been granted access to a DOE computer or to information on a DOE computer.

(b) Section 727.4 of this part also applies to any person who uses a DOE computer by sending an e-mail message to such computer.

### § 727.4 Is there any expectation of privacy applicable to a DOE computer?

Notwithstanding any other provision of law (including any provision of law enacted by the Electronic Communications Privacy Act of 1986), no user of a DOE computer shall have any expectation of privacy in the use of that DOE computer.

### § 727.5 What acknowledgment and consent is required for access to information on DOE computers?

An individual may not be granted access to information on a DOE computer unless:

(a) The individual has acknowledged in writing that the individual has no expectation of privacy in the use of a DOE computer; and

(b) The individual has consented in writing to permit access by an authorized investigative agency to any DOE computer used during the period of that individual's access to information on a DOE computer and for a period of three years thereafter.

### § 727.6 What are the obligations of a DOE contractor?

(a) A DOE contractor must ensure that neither its employees nor the employees of any of its subcontractors has access to information on a DOE computer unless the DOE contractor has obtained a written acknowledgment and consent by each contractor or subcontractor employee that complies with the requirements of § 727.5 of this part.

(b) A DOE contractor must maintain a file of original written acknowledgments and consents executed by its employees and all subcontractors employees that comply with the requirements of § 727.5 of this part.

(c) Upon demand by the cognizant DOE contracting officer, a DOE contractor must provide an opportunity for a DOE official to inspect the file compiled under this section and to copy any portion of the file.

(d) If a DOE contractor violates the requirements of this section with regard to a DOE computer with Restricted Data or other classified information, then the DOE contractor may be assessed a civil penalty or a reduction in fee pursuant to section 234B of the Atomic Energy Act of 1954 (42 U.S.C. 2282b).

## PART 733—ALLEGATIONS OF RESEARCH MISCONDUCT

Sec.
733.1 Purpose.
733.2 Scope.
733.3 Definitions.

733.4 Research misconduct requirements.
733.5 Allegations received by DOE.
733.6 Consultation with the DOE Office of the Inspector General.
733.7 Referral to the contracting officer.
733.8 Contracting officer procedures.

AUTHORITY: 42 U.S.C. 2201; 7254; 7256; 7101 *et seq.;* 50 U.S.C. 2401 *et seq.*

SOURCE: 70 FR 37014, June 28, 2005, unless otherwise noted.

### § 733.1 Purpose.

The purpose of this part is to set forth a general statement of policy on the treatment of allegations of research misconduct consistent with Federal Policy on Research Misconduct established by the White House Office of Science and Technology Policy on December 6, 2000 (65 FR 76260–76264).

### § 733.2 Scope.

This part applies to allegations of research misconduct with regard to scientific research conducted under a Department of Energy contract or an agreement.

### § 733.3 Definitions.

The following terms used in this part are defined as follows:

*Contract* is defined in 2 CFR 200.22.

*DOE* means the U.S. Department of Energy (including the National Nuclear Security Administration).

*DOE Element* means a major division of DOE, usually headed by a Presidential appointee, which has a delegation of authority to carry out activities by entering into contracts or financial assistance agreements.

*Fabrication* means making up data or results and recording or reporting them.

*Falsification* means manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

*Financial assistance agreement* means an agreement the primary purpose of which is to provide appropriated funds to stimulate an activity, including but not limited to, grants and cooperative agreements pursuant to 2 CFR part 200 as amended by 2 CFR part 910.

*Finding of research misconduct* means a determination, based on a preponderance of the evidence, that research misconduct has occurred. Such a finding requires a conclusion that there has been a significant departure from accepted practices of the relevant research community and that it be knowingly, intentionally, or recklessly committed.

*Plagiarism* means the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.

*Research* means all basic, applied, and demonstration research in all fields of science, engineering, and mathematics, such as research in economics, education, linguistics, medicine, psychology, social sciences, statistics, and research involving human subjects or animals.

*Research misconduct* means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results, but does not include honest error or differences of opinion.

*Research record* means the record of all data or results that embody the facts resulting from scientists' inquiries, including, but not limited to, research proposals, laboratory records, both physical and electronic, progress reports, abstracts, theses, oral presentations, internal reports, and journal articles

[70 FR 37014, June 28, 2005, as amended at 79 FR 76047, Dec. 19, 2014]

### § 733.4 Research misconduct requirements.

DOE intends to apply the research misconduct policy set forth in 65 FR 76260–76264 by including appropriate research misconduct requirements in contracts and financial assistance awards that make contractors and financial recipients primarily responsible for implementing the policy in dealing with allegations of research misconduct in connection with the proposal, performance or review of research for DOE .

### § 733.5 Allegations received by DOE.

If DOE receives directly a written allegation of research misconduct with regard to research under a DOE contract or financial assistance agreement, DOE will refer the allegation for

processing to the DOE Element responsible for the contract or financial assistance agreement.

### § 733.6 Consultation with the DOE Office of the Inspector General.

Upon receipt of an allegation of research misconduct, the DOE Element shall consult with the DOE Office of the Inspector General which will determine whether that office will elect to investigate the allegation.

### § 733.7 Referral to the contracting officer.

If the DOE Office of the Inspector General declines to investigate an allegation of research misconduct, the DOE Element should forward the allegation to the contracting officer responsible for administration of the contract or financial assistance agreement to which the allegation pertains.

### § 733.8 Contracting officer procedures.

Upon receipt of an allegation of research misconduct by referral under § 733.7, the contracting officer should, by notification of the contractor or financial assistance recipient:

(a) Require the contractor or the financial assistance recipient to act on the allegation consistent with the Research Misconduct requirements in the contract or financial assistance award to which the allegation pertains; or

(b) In the event the contractor or the financial assistance recipient is unable to act:

(1) Designate an appropriate DOE program to conduct an investigation to develop a complete factual record and an examination of such record leading to either a finding of research misconduct and an identification of appropriate remedies or a determination that no further action is warranted; and

(2) Make the appropriate findings consistent with the Research Misconduct requirements contained in the contract or financial assistance award, in order to act in lieu of the contractor or financial assistance recipient.

## PART 745—PROTECTION OF HUMAN SUBJECTS

Sec.

745.101 To what does this policy apply?
745.102 Definitions.
745.103 Assuring compliance with this policy—research conducted or supported by any Federal department or agency.
745.104–745.106 [Reserved]
745.107 IRB membership.
745.108 IRB functions and operations.
745.109 IRB review of research.
745.110 Expedited review procedures for certain kinds of research involving no more than minimal risk, and for minor changes in approved research.
745.111 Criteria for IRB approval of research.
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745.116 General requirements for informed consent.
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745.118 Applications and proposals lacking definite plans for involvement of human subjects.
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745.120 Evaluation and disposition of applications and proposals for research to be conducted or supported by a Federal department or agency.
745.121 [Reserved]
745.122 Use of Federal funds.
745.123 Early termination of research support: Evaluation of applications and proposals.
745.124 Conditions.

AUTHORITY: 5 U.S.C. 301; 42 U.S.C. 7254; 42 U.S.C. 300v–1(b).

SOURCE: 56 FR 28012, 28018, June 18, 1991, unless otherwise noted.

### § 745.101 To what does this policy apply?

(a) Except as provided in paragraph (b) of this section, this policy applies to all research involving human subjects conducted, supported or otherwise subject to regulation by any federal department or agency which takes appropriate administrative action to make the policy applicable to such research. This includes research conducted by federal civilian employees or military personnel, except that each department

or agency head may adopt such procedural modifications as may be appropriate from an administrative standpoint. It also includes research conducted, supported, or otherwise subject to regulation by the federal government outside the United States.

(1) Research that is conducted or supported by a federal department or agency, whether or not it is regulated as defined in § 745.102(e), must comply with all sections of this policy.

(2) Research that is neither conducted nor supported by a federal department or agency but is subject to regulation as defined in § 745.102(e) must be reviewed and approved, in compliance with § 745.101, § 745.102 and § 745.107 through § 745.101 of this policy, by an institutional review board (IRB) that operates in accordance with the pertinent requirements of this policy.

(b) Unless otherwise required by department or agency heads, research activities in which the only involvement of human subjects will be in one or more of the following categories are exempt from this policy:

(1) Research conducted in established or commonly accepted educational settings, involving normal educational practices, such as (i) research on regular and special education instructional strategies, or (ii) research on the effectiveness of or the comparison among instructional techniques, curricula, or classroom management methods.

(2) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures or observation of public behavior, unless:

(i) Information obtained is recorded in such a manner that human subjects can be identified, directly or through identifiers linked to the subjects; and (ii) any disclosure of the human subjects' responses outside the research could reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, or reputation.

(3) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures, or observation of public behavior that is not exempt under paragraph (b)(2) of this section, if:

(i) The human subjects are elected or appointed public officials or candidates for public office; or (ii) federal statute(s) require(s) without exception that the confidentiality of the personally identifiable information will be maintained throughout the research and thereafter.

(4) Research, involving the collection or study of existing data, documents, records, pathological specimens, or diagnostic specimens, if these sources are publicly available or if the information is recorded by the investigator in such a manner that subjects cannot be identified, directly or through identifiers linked to the subjects.

(5) Research and demonstration projects which are conducted by or subject to the approval of department or agency heads, and which are designed to study, evaluate, or otherwise examine:

(i) Public benefit or service programs;

(ii) Procedures for obtaining benefits or services under those programs;

(iii) Possible changes in or alternatives to those programs or procedures; or

(iv) Possible changes in methods or levels of payment for benefits or services under those programs.

(6) Taste and food quality evaluation and consumer acceptance studies, (i) if wholesome foods without additives are consumed or (ii) if a food is consumed that contains a food ingredient at or below the level and for a use found to be safe, or agricultural chemical or environmental contaminant at or below the level found to be safe, by the Food and Drug Administration or approved by the Environmental Protection Agency or the Food Safety and Inspection Service of the U.S. Department of Agriculture.

(c) Department or agency heads retain final judgment as to whether a particular activity is covered by this policy.

(d) Department or agency heads may require that specific research activities or classes of research activities conducted, supported, or otherwise subject to regulation by the department or agency but not otherwise covered by

this policy, comply with some or all of the requirements of this policy.

(e) Compliance with this policy requires compliance with pertinent federal laws or regulations which provide additional protections for human subjects.

(f) This policy does not affect any state or local laws or regulations which may otherwise be applicable and which provide additional protections for human subjects.

(g) This policy does not affect any foreign laws or regulations which may otherwise be applicable and which provide additional protections to human subjects of research.

(h) When research covered by this policy takes place in foreign countries, procedures normally followed in the foreign countries to protect human subjects may differ from those set forth in this policy. [An example is a foreign institution which complies with guidelines consistent with the World Medical Assembly Declaration (Declaration of Helsinki amended 1989) issued either by sovereign states or by an organization whose function for the protection of human research subjects is internationally recognized.] In these circumstances, if a department or agency head determines that the procedures prescribed by the institution afford protections that are at least equivalent to those provided in this policy, the department or agency head may approve the substitution of the foreign procedures in lieu of the procedural requirements provided in this policy. Except when otherwise required by statute, Executive Order, or the department or agency head, notices of these actions as they occur will be published in the FEDERAL REGISTER or will be otherwise published as provided in department or agency procedures.

(i) Unless otherwise required by law, department or agency heads may waive the applicability of some or all of the provisions of this policy to specific research activities or classes of research activities otherwise covered by this policy. Except when otherwise required by statute or Executive Order, the department or agency head shall forward advance notices of these actions to the Office for Human Research Protections, Department of Health and Human Services (HHS), or any successor office, and shall also publish them in the FEDERAL REGISTER or in such other manner as provided in department or agency procedures.[1]

[56 FR 28012, 28018, June 18, 1991; 56 FR 29756, June 28, 1991, as amended at 70 FR 36328, June 23, 2005]

### § 745.102 Definitions.

(a) *Department or agency head* means the head of any federal department or agency and any other officer or employee of any department or agency to whom authority has been delegated.

(b) *Institution* means any public or private entity or agency (including federal, state, and other agencies).

(c) *Legally authorized representative* means an individual or judicial or other body authorized under applicable law to consent on behalf of a prospective subject to the subject's participation in the procedure(s) involved in the research.

(d) *Research* means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. Activities which meet this definition constitute research for purposes of this policy, whether or not they are conducted or supported under a program which is considered research for other purposes. For example, some demonstration and service programs may include research activities.

(e) *Research subject to regulation*, and similar terms are intended to encompass those research activities for which a federal department or agency has specific responsibility for regulating as

[1] Institutions with HHS-approved assurances on file will abide by provisions of title 45 CFR part 46 subparts A-D. Some of the other Departments and Agencies have incorporated all provisions of title 45 CFR part 46 into their policies and procedures as well. However, the exemptions at 45 CFR 46.101(b) do not apply to research involving prisoners, subpart C. The exemption at 45 CFR 46.101(b)(2), for research involving survey or interview procedures or observation of public behavior, does not apply to research with children, subpart D, except for research involving observations of public behavior when the investigator(s) do not participate in the activities being observed.

a research activity, (for example, Investigational New Drug requirements administered by the Food and Drug Administration). It does not include research activities which are incidentally regulated by a federal department or agency solely as part of the department's or agency's broader responsibility to regulate certain types of activities whether research or non-research in nature (for example, Wage and Hour requirements administered by the Department of Labor).

(f) *Human subject* means a living individual about whom an investigator (whether professional or student) conducting research obtains

(1) Data through intervention or interaction with the individual, or

(2) Identifiable private information.

*Intervention* includes both physical procedures by which data are gathered (for example, venipuncture) and manipulations of the subject or the subject's environment that are performed for research purposes. Interaction includes communication or interpersonal contact between investigator and subject. ''Private information'' includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information which has been provided for specific purposes by an individual and which the individual can reasonably expect will not be made public (for example, a medical record). Private information must be individually identifiable (i.e., the identity of the subject is or may readily be ascertained by the investigator or associated with the information) in order for obtaining the information to constitute research involving human subjects.

(g) *IRB* means an institutional review board established in accord with and for the purposes expressed in this policy.

(h) *IRB approval* means the determination of the IRB that the research has been reviewed and may be conducted at an institution within the constraints set forth by the IRB and by other institutional and federal requirements.

(i) *Minimal risk* means that the probability and magnitude of harm or discomfort anticipated in the research are not greater in and of themselves than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.

(j) *Certification* means the official notification by the institution to the supporting department or agency, in accordance with the requirements of this policy, that a research project or activity involving human subjects has been reviewed and approved by an IRB in accordance with an approved assurance.

### § 745.103 Assuring compliance with this policy—research conducted or supported by any Federal department or agency.

(a) Each institution engaged in research which is covered by this policy and which is conducted or supported by a federal department or agency shall provide written assurance satisfactory to the department or agency head that it will comply with the requirements set forth in this policy. In lieu of requiring submission of an assurance, individual department or agency heads shall accept the existence of a current assurance, appropriate for the research in question, on file with the Office for Human Research Protections, HHS, or any successor office, and approved for Federal wide use by that office. When the existence of an HHS-approved assurance is accepted in lieu of requiring submission of an assurance, reports (except certification) required by this policy to be made to department and agency heads shall also be made to the Office for Human Research Protections, HHS, or any successor office.

(b) Departments and agencies will conduct or support research covered by this policy only if the institution has an assurance approved as provided in this section, and only if the institution has certified to the department or agency head that the research has been reviewed and approved by an IRB provided for in the assurance, and will be subject to continuing review by the IRB. Assurances applicable to federally supported or conducted research shall at a minimum include:

(1) A statement of principles governing the institution in the discharge of its responsibilities for protecting the rights and welfare of human subjects of

research conducted at or sponsored by the institution, regardless of whether the research is subject to federal regulation. This may include an appropriate existing code, declaration, or statement of ethical principles, or a statement formulated by the institution itself. This requirement does not preempt provisions of this policy applicable to department- or agency-supported or regulated research and need not be applicable to any research exempted or waived under § 745.101 (b) or (i).

(2) Designation of one or more IRBs established in accordance with the requirements of this policy, and for which provisions are made for meeting space and sufficient staff to support the IRB's review and recordkeeping duties.

(3) A list of IRB members identified by name; earned degrees; representative capacity; indications of experience such as board certifications, licenses, etc., sufficient to describe each member's chief anticipated contributions to IRB deliberations; and any employment or other relationship between each member and the institution; for example: full-time employee, part-time employee, member of governing panel or board, stockholder, paid or unpaid consultant. Changes in IRB membership shall be reported to the department or agency head, unless in accord with § 745.103(a) of this policy, the existence of an HHS-approved assurance is accepted. In this case, change in IRB membership shall be reported to the Office for Human Research Protections, HHS, or any successor office.

(4) Written procedures which the IRB will follow (i) for conducting its initial and continuing review of research and for reporting its findings and actions to the investigator and the institution; (ii) for determining which projects require review more often than annually and which projects need verification from sources other than the investigators that no material changes have occurred since previous IRB review; and (iii) for ensuring prompt reporting to the IRB of proposed changes in a research activity, and for ensuring that such changes in approved research, during the period for which IRB approval has already been given, may not be initiated without IRB review and approval except when necessary to eliminate apparent immediate hazards to the subject.

(5) Written procedures for ensuring prompt reporting to the IRB, appropriate institutional officials, and the department or agency head of (i) any unanticipated problems involving risks to subjects or others or any serious or continuing noncompliance with this policy or the requirements or determinations of the IRB and (ii) any suspension or termination of IRB approval.

(c) The assurance shall be executed by an individual authorized to act for the institution and to assume on behalf of the institution the obligations imposed by this policy and shall be filed in such form and manner as the department or agency head prescribes.

(d) The department or agency head will evaluate all assurances submitted in accordance with this policy through such officers and employees of the department or agency and such experts or consultants engaged for this purpose as the department or agency head determines to be appropriate. The department or agency head's evaluation will take into consideration the adequacy of the proposed IRB in light of the anticipated scope of the institution's research activities and the types of subject populations likely to be involved, the appropriateness of the proposed initial and continuing review procedures in light of the probable risks, and the size and complexity of the institution.

(e) On the basis of this evaluation, the department or agency head may approve or disapprove the assurance, or enter into negotiations to develop an approvable one. The department or agency head may limit the period during which any particular approved assurance or class of approved assurances shall remain effective or otherwise condition or restrict approval.

(f) Certification is required when the research is supported by a federal department or agency and not otherwise exempted or waived under § 745.101 (b) or (i). An institution with an approved assurance shall certify that each application or proposal for research covered by the assurance and by § 745.103 of this Policy has been reviewed and approved

by the IRB. Such certification must be submitted with the application or proposal or by such later date as may be prescribed by the department or agency to which the application or proposal is submitted. Under no condition shall research covered by § 745.103 of the Policy be supported prior to receipt of the certification that the research has been reviewed and approved by the IRB. Institutions without an approved assurance covering the research shall certify within 30 days after receipt of a request for such a certification from the department or agency, that the application or proposal has been approved by the IRB. If the certification is not submitted within these time limits, the application or proposal may be returned to the institution.

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[56 FR 28012, 28018, June 18, 1991; 56 FR 29756, June 28, 1991, as amended at 70 FR 36328, June 23, 2005]

### §§ 745.104–745.106 [Reserved]

### § 745.107 IRB membership.

(a) Each IRB shall have at least five members, with varying backgrounds to promote complete and adequate review of research activities commonly conducted by the institution. The IRB shall be sufficiently qualified through the experience and expertise of its members, and the diversity of the members, including consideration of race, gender, and cultural backgrounds and sensitivity to such issues as community attitudes, to promote respect for its advice and counsel in safeguarding the rights and welfare of human subjects. In addition to possessing the professional competence necessary to review specific research activities, the IRB shall be able to ascertain the acceptability of proposed research in terms of institutional commitments and regulations, applicable law, and standards of professional conduct and practice. The IRB shall therefore include persons knowledgeable in these areas. If an IRB regularly reviews research that involves a vulnerable category of subjects, such as children, prisoners, pregnant women, or handicapped or mentally disabled persons, consideration shall be given to the inclusion of one or more individuals who are knowledgeable about and experienced in working with these subjects.

(b) Every nondiscriminatory effort will be made to ensure that no IRB consists entirely of men or entirely of women, including the institution's consideration of qualified persons of both sexes, so long as no selection is made to the IRB on the basis of gender. No IRB may consist entirely of members of one profession.

(c) Each IRB shall include at least one member whose primary concerns are in scientific areas and at least one member whose primary concerns are in nonscientific areas.

(d) Each IRB shall include at least one member who is not otherwise affiliated with the institution and who is not part of the immediate family of a person who is affiliated with the institution.

(e) No IRB may have a member participate in the IRB's initial or continuing review of any project in which the member has a conflicting interest, except to provide information requested by the IRB.

(f) An IRB may, in its discretion, invite individuals with competence in special areas to assist in the review of issues which require expertise beyond or in addition to that available on the IRB. These individuals may not vote with the IRB.

### § 745.108 IRB functions and operations.

In order to fulfill the requirements of this policy each IRB shall:

(a) Follow written procedures in the same detail as described in § 745.103(b)(4) and, to the extent required by, § 745.103(b)(5).

(b) Except when an expedited review procedure is used (see § 745.110), review proposed research at convened meetings at which a majority of the members of the IRB are present, including at least one member whose primary concerns are in nonscientific areas. In order for the research to be approved, it shall receive the approval of a majority of those members present at the meeting.

### § 745.109 IRB review of research.

(a) An IRB shall review and have authority to approve, require modifications in (to secure approval), or disapprove all research activities covered by this policy.

(b) An IRB shall require that information given to subjects as part of informed consent is in accordance with § 745.116. The IRB may require that information, in addition to that specifically mentioned in § 745.116, be given to the subjects when in the IRB's judgment the information would meaningfully add to the protection of the rights and welfare of subjects.

(c) An IRB shall require documentation of informed consent or may waive documentation in accordance with § 745.117.

(d) An IRB shall notify investigators and the institution in writing of its decision to approve or disapprove the proposed research activity, or of modifications required to secure IRB approval of the research activity. If the IRB decides to disapprove a research activity, it shall include in its written notification a statement of the reasons for its decision and give the investigator an opportunity to respond in person or in writing.

(e) An IRB shall conduct continuing review of research covered by this policy at intervals appropriate to the degree of risk, but not less than once per year, and shall have authority to observe or have a third party observe the consent process and the research.

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[56 FR 28012, 28018, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

### § 745.110 Expedited review procedures for certain kinds of research involving no more than minimal risk, and for minor changes in approved research.

(a) The Secretary, HHS, has established, and published as a Notice in the FEDERAL REGISTER, a list of categories of research that may be reviewed by the IRB through an expedited review procedure. The list will be amended, as appropriate after consultation with other departments and agencies, through periodic republication by the Secretary, HHS, in the FEDERAL REGISTER. A copy of the list is available from the Office for Human Research Protections, HHS, or any successor office.

(b) An IRB may use the expedited review procedure to review either or both of the following:

(1) Some or all of the research appearing on the list and found by the reviewer(s) to involve no more than minimal risk,

(2) Minor changes in previously approved research during the period (of one year or less) for which approval is authorized.

Under an expedited review procedure, the review may be carried out by the IRB chairperson or by one or more experienced reviewers designated by the chairperson from among members of the IRB. In reviewing the research, the reviewers may exercise all of the authorities of the IRB except that the reviewers may not disapprove the research. A research activity may be disapproved only after review in accordance with the non-expedited procedure set forth in § 745.108(b).

(c) Each IRB which uses an expedited review procedure shall adopt a method for keeping all members advised of research proposals which have been approved under the procedure.

(d) The department or agency head may restrict, suspend, terminate, or choose not to authorize an institution's or IRB's use of the expedited review procedure.

[56 FR 28012, 28018, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

### § 745.111 Criteria for IRB approval of research.

(a) In order to approve research covered by this policy the IRB shall determine that all of the following requirements are satisfied:

(1) Risks to subjects are minimized: (i) By using procedures which are consistent with sound research design and which do not unnecessarily expose subjects to risk, and (ii) whenever appropriate, by using procedures already being performed on the subjects for diagnostic or treatment purposes.

(2) Risks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of

the knowledge that may reasonably be expected to result. In evaluating risks and benefits, the IRB should consider only those risks and benefits that may result from the research (as distinguished from risks and benefits of therapies subjects would receive even if not participating in the research). The IRB should not consider possible long-range effects of applying knowledge gained in the research (for example, the possible effects of the research on public policy) as among those research risks that fall within the purview of its responsibility.

(3) Selection of subjects is equitable. In making this assessment the IRB should take into account the purposes of the research and the setting in which the research will be conducted and should be particularly cognizant of the special problems of research involving vulnerable populations, such as children, prisoners, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons.

(4) Informed consent will be sought from each prospective subject or the subject's legally authorized representative, in accordance with, and to the extent required by § 745.116.

(5) Informed consent will be appropriately documented, in accordance with, and to the extent required by § 745.117.

(6) When appropriate, the research plan makes adequate provision for monitoring the data collected to ensure the safety of subjects.

(7) When appropriate, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data.

(b) When some or all of the subjects are likely to be vulnerable to coercion or undue influence, such as children, prisoners, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons, additional safeguards have been included in the study to protect the rights and welfare of these subjects.

### § 745.112 Review by institution.

Research covered by this policy that has been approved by an IRB may be subject to further appropriate review and approval or disapproval by officials of the institution. However, those officials may not approve the research if it has not been approved by an IRB.

### § 745.113 Suspension or termination of IRB approval of research.

An IRB shall have authority to suspend or terminate approval of research that is not being conducted in accordance with the IRB's requirements or that has been associated with unexpected serious harm to subjects. Any suspension or termination of approval shall include a statement of the reasons for the IRB's action and shall be reported promptly to the investigator, appropriate institutional officials, and the department or agency head.

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[56 FR 28012, 28018, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

### § 745.114 Cooperative research.

Cooperative research projects are those projects covered by this policy which involve more than one institution. In the conduct of cooperative research projects, each institution is responsible for safeguarding the rights and welfare of human subjects and for complying with this policy. With the approval of the department or agency head, an institution participating in a cooperative project may enter into a joint review arrangement, rely upon the review of another qualified IRB, or make similar arrangements for avoiding duplication of effort.

### § 745.115 IRB records.

(a) An institution, or when appropriate an IRB, shall prepare and maintain adequate documentation of IRB activities, including the following:

(1) Copies of all research proposals reviewed, scientific evaluations, if any, that accompany the proposals, approved sample consent documents, progress reports submitted by investigators, and reports of injuries to subjects.

(2) Minutes of IRB meetings which shall be in sufficient detail to show attendance at the meetings; actions taken by the IRB; the vote on these actions including the number of members voting for, against, and abstaining; the

basis for requiring changes in or disapproving research; and a written summary of the discussion of controverted issues and their resolution.

(3) Records of continuing review activities.

(4) Copies of all correspondence between the IRB and the investigators.

(5) A list of IRB members in the same detail as described is § 745.103(b)(3).

(6) Written procedures for the IRB in the same detail as described in § 745.103(b)(4) and § 745.103(b)(5).

(7) Statements of significant new findings provided to subjects, as required by § 745.116(b)(5).

(b) The records required by this policy shall be retained for at least 3 years, and records relating to research which is conducted shall be retained for at least 3 years after completion of the research. All records shall be accessible for inspection and copying by authorized representatives of the department or agency at reasonable times and in a reasonable manner.

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[56 FR 28012, 28018, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

### § 745.116 General requirements for informed consent.

Except as provided elsewhere in this policy, no investigator may involve a human being as a subject in research covered by this policy unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative. An investigator shall seek such consent only under circumstances that provide the prospective subject or the representative sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence. The information that is given to the subject or the representative shall be in language understandable to the subject or the representative. No informed consent, whether oral or written, may include any exculpatory language through which the subject or the representative is made to waive or appear to waive any of the subject's legal rights, or releases or appears to release the investigator, the sponsor, the institution or its agents from liability for negligence.

(a) *Basic elements of informed consent.* Except as provided in paragraph (c) or (d) of this section, in seeking informed consent the following information shall be provided to each subject:

(1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures which are experimental;

(2) A description of any reasonably foreseeable risks or discomforts to the subject;

(3) A description of any benefits to the subject or to others which may reasonably be expected from the research;

(4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;

(5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;

(6) For research involving more than minimal risk, an explanation as to whether any compensation and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of, or where further information may be obtained;

(7) An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights, and whom to contact in the event of a research-related injury to the subject; and

(8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled.

(b) Additional elements of informed consent. When appropriate, one or more of the following elements of information shall also be provided to each subject:

(1) A statement that the particular treatment or procedure may involve risks to the subject (or to the embryo

or fetus, if the subject is or may become pregnant) which are currently unforeseeable;

(2) Anticipated circumstances under which the subject's participation may be terminated by the investigator without regard to the subject's consent;

(3) Any additional costs to the subject that may result from participation in the research;

(4) The consequences of a subject's decision to withdraw from the research and procedures for orderly termination of participation by the subject;

(5) A statement that significant new findings developed during the course of the research which may relate to the subject's willingness to continue participation will be provided to the subject; and

(6) The approximate number of subjects involved in the study.

(c) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth above, or waive the requirement to obtain informed consent provided the IRB finds and documents that:

(1) The research or demonstration project is to be conducted by or subject to the approval of state or local government officials and is designed to study, evaluate, or otherwise examine: (i) Public benefit of service programs; (ii) procedures for obtaining benefits or services under those programs; (iii) possible changes in or alternatives to those programs or procedures; or (iv) possible changes in methods or levels of payment for benefits or services under those programs; and

(2) The research could not practicably be carried out without the waiver or alteration.

(d) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth in this section, or waive the requirements to obtain informed consent provided the IRB finds and documents that:

(1) The research involves no more than minimal risk to the subjects;

(2) The waiver or alteration will not adversely affect the rights and welfare of the subjects;

(3) The research could not practicably be carried out without the waiver or alteration; and

(4) Whenever appropriate, the subjects will be provided with additional pertinent information after participation.

(e) The informed consent requirements in this policy are not intended to preempt any applicable federal, state, or local laws which require additional information to be disclosed in order for informed consent to be legally effective.

(f) Nothing in this policy is intended to limit the authority of a physician to provide emergency medical care, to the extent the physician is permitted to do so under applicable federal, state, or local law.

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[56 FR 28012, 28018, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

### § 745.117 Documentation of informed consent.

(a) Except as provided in paragraph (c) of this section, informed consent shall be documented by the use of a written consent form approved by the IRB and signed by the subject or the subject's legally authorized representative. A copy shall be given to the person signing the form.

(b) Except as provided in paragraph (c) of this section, the consent form may be either of the following:

(1) A written consent document that embodies the elements of informed consent required by § 745.116. This form may be read to the subject or the subject's legally authorized representative, but in any event, the investigator shall give either the subject or the representative adequate opportunity to read it before it is signed; or

(2) A short form written consent document stating that the elements of informed consent required by § 745.116 have been presented orally to the subject or the subject's legally authorized representative. When this method is used, there shall be a witness to the oral presentation. Also, the IRB shall approve a written summary of what is to be said to the subject or the representative. Only the short form itself is to be signed by the subject or the

representative. However, the witness shall sign both the short form and a copy of the summary, and the person actually obtaining consent shall sign a copy of the summary. A copy of the summary shall be given to the subject or the representative, in addition to a copy of the short form.

(c) An IRB may waive the requirement for the investigator to obtain a signed consent form for some or all subjects if it finds either:

(1) That the only record linking the subject and the research would be the consent document and the principal risk would be potential harm resulting from a breach of confidentiality. Each subject will be asked whether the subject wants documentation linking the subject with the research, and the subject's wishes will govern; or

(2) That the research presents no more than minimal risk of harm to subjects and involves no procedures for which written consent is normally required outside of the research context.

In cases in which the documentation requirement is waived, the IRB may require the investigator to provide subjects with a written statement regarding the research.

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[56 FR 28012, 28018, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

### § 745.118 Applications and proposals lacking definite plans for involvement of human subjects.

Certain types of applications for grants, cooperative agreements, or contracts are submitted to departments or agencies with the knowledge that subjects may be involved within the period of support, but definite plans would not normally be set forth in the application or proposal. These include activities such as institutional type grants when selection of specific projects is the institution's responsibility; research training grants in which the activities involving subjects remain to be selected; and projects in which human subjects' involvement will depend upon completion of instruments, prior animal studies, or purification of compounds. These applications need not be reviewed by an IRB before an award may be made. However, except for research exempted or waived under § 745.101 (b) or (i), no human subjects may be involved in any project supported by these awards until the project has been reviewed and approved by the IRB, as provided in this policy, and certification submitted, by the institution, to the department or agency.

### § 745.119 Research undertaken without the intention of involving human subjects.

In the event research is undertaken without the intention of involving human subjects, but it is later proposed to involve human subjects in the research, the research shall first be reviewed and approved by an IRB, as provided in this policy, a certification submitted, by the institution, to the department or agency, and final approval given to the proposed change by the department or agency.

### § 745.120 Evaluation and disposition of applications and proposals for research to be conducted or supported by a Federal department or agency.

The department or agency head will evaluate all applications and proposals involving human subjects submitted to the department or agency through such officers and employees of the department or agency and such experts and consultants as the department or agency head determines to be appropriate. This evaluation will take into consideration the risks to the subjects, the adequacy of protection against these risks, the potential benefits of the research to the subjects and others, and the importance of the knowledge gained or to be gained.

(b) On the basis of this evaluation, the department or agency head may approve or disapprove the application or proposal, or enter into negotiations to develop an approvable one.

### § 745.121 [Reserved]

### § 745.122 Use of Federal funds.

Federal funds administered by a department or agency may not be expended for research involving human subjects unless the requirements of this policy have been satisfied.

**§ 745.123 Early termination of research support: Evaluation of applications and proposals.**

(a) The department or agency head may require that department or agency support for any project be terminated or suspended in the manner prescribed in applicable program requirements, when the department or agency head finds an institution has materially failed to comply with the terms of this policy.

(b) In making decisions about supporting or approving applications or proposals covered by this policy the department or agency head may take into account, in addition to all other eligibility requirements and program criteria, factors such as whether the applicant has been subject to a termination or suspension under paragraph (a) of this section and whether the applicant or the person or persons who would direct or has have directed the scientific and technical aspects of an activity has have, in the judgment of the department or agency head, materially failed to discharge responsibility for the protection of the rights and welfare of human subjects (whether or not the research was subject to Federal regulation).

**§ 745.124 Conditions.**

With respect to any research project or any class of research projects the department or agency head may impose additional conditions prior to or at the time of approval when in the judgment of the department or agency head additional conditions are necessary for the protection of human subjects.

## PART 760—DOMESTIC URANIUM PROGRAM

**§ 760.1 Uranium leases on lands controlled by DOE. (Domestic Uranium Program Circular No. 760.1, formerly (AEC) Domestic Uranium Program Circular 8, 10 CFR 60.8).**

(a) *What this section does.* This section sets forth regulations governing the issuance of leases to permit the exploration for and mining of deposits containing uranium in public lands withdrawn from entry and location under the general mining laws for use of DOE, and in certain other lands under DOE control.

(b) *Statutory authority.* The Atomic Energy Act of 1954, as amended (68 Stat. 919, 42 U.S.C. 2011 *et seq.*) is the authority for this section.

(c) *Who may hold leases.* Only parties who are (1) citizens of the United States; (2) associations of such citizens; or (3) corporations organized under the laws of the United States or territories thereof, are eligible lessees under this section. Persons under 21 years of age or employees of DOE are not eligible.

(d) *Issuance of leases through competitive bidding.* Except under special circumstances as provided in paragraph (u) of this section, each lease will be offered through competitive bidding and, except as otherwise provided in this paragraph (d), will be issued to the acceptable bidder offering the highest bid. The bid may be on a cash bonus, royalty bonus, or other basis as specified in the invitation to bid. Invitations to bid on some of the lands may be limited to small business concerns as defined by the Small Business Administration, and such invitations may limit the number of leases to be awarded to each bidder. In such cases DOE will accept those bids which, in relation to other bids received pursuant to the invitation, are most advantageous to the Government. Before any lease is awarded, DOE may require high bidders to submit a detailed statement of the facts as to such matters as their experience, organization, and financial resources. DOE reserves the right to reject any and all bids.

(e) *Solicitation of bids.* Announcements of the availability of invitations to bid for a lease will be publicly posted and published. Copies of such announcements will also be mailed to parties who submit to DOE's Grand Junction, Colorado, Office subsequent to publication in the FEDERAL REGISTER of this (DOE) Domestic Uranium Program Circular 760.1, written requests that their names be placed on a mailing list for receipt of such announcements. The invitations containing information for preparation and submission of bids will be available at the Grand Junction Office, and will be mailed only on specific written request, following announcement of their

availability. Invitations will specify the land to be leased, the basis on which bids are to be submitted, the amount of the monetary deposit which must be transmitted with the bid, the place and time the bids will be publicly opened, the term, royalty and other payments, performance requirements, and other payments, performance requirements, and other conditions which will become a part of the lease. In addition, data which have been assembled pertaining to the lands to be leased will be available for public inspection at the Grand Junction Office; copies will also be available for purchase.

(f) *Bidding requirements; deposits.* All bids must be filed at the place and prior to the time set forth in the invitation. Each bid must be sealed and accompanied by a deposit, in the form of a certified check, cashier's check, or bank draft, in an amount as specified in the invitation to bid. Deposits of unsuccessful bidders will be returned. If the bidder is an individual, he must submit with his bid a statement of his citizenship and age. If the bidder is an association (including a partnership), the bid shall be accompanied by a certified copy of the articles of association together with a statement as to the citizenship and age of its members. If the bidder is a corporation, evidence that the officer signing the bid had authority to do so and a statement as to the State of incorporation shall also be submitted.

(g) *Awarding of lease.* Following public opening of the bids, DOE, subject to the right to reject any and all bids, will determine the successful bidder. In the event the highest acceptable bids are tie bids, a public drawing will be held by DOE to determine the successful bidder. After notice of award and within the time period prescribed in the invitation, the successful bidder shall execute and return to DOE three (3) copies of the lease and shall remit payments due as prescribed in the invitation. Should the successful bidder fail to execute the lease, or make payments as required, in accordance with the terms of the invitation, or fail to otherwise comply with applicable regulations, he may be required to forfeit any payments previously made, and lose any further right or interest in the lease. In such event, DOE may offer the lease to the next highest acceptable bidder, reoffer the lease for bidding, or take such other action as appropriate. If the awarded lease is executed by the bidder through an agent, evidence of authorization must be submitted.

(h) *Dating of lease.* A lease issued under this section will ordinarily be effective as of the date it is signed on behalf of DOE.

(i) *Term of lease.* A lease shall be for the period specified in the invitation to bid. When deemed desirable by DOE, the lease will provide that the lease term may be extended at the option of the lessee for a specified period and upon stipulated conditions.

(j) *Payments to DOE under lease.* Royalty payments shall be specified in the invitation to bid; base royalty, minimum royalty, advance royalty, and rental payments, or a combination thereof may be required.

(k) *Title to unshipped ore.* DOE, unless it approves otherwise, reserves all right and title to property in and to all ores and other uranium- or vanadium-bearing material not removed from the leased premises within 60 days after expiration or other termination of the lease. Unless DOE approves otherwise, all material mined from the leased premises and not marketed by the lessee shall remain on the leased premises.

(l) *Environmental controls.* Each lease will contain such provisions as may be deemed necessary by DOE with respect to the lessee's use of the leased lands. DOE may require periodic submission of plans for exploration and mining activities including provisions for control of environmental impact. The lessee will be required to conduct operations so as to minimize adverse environmental effects, to comply with all applicable State and Federal statutes and regulations and to the extent stipulated in the lease agreement, will be held responsible for maintenance or rehabilitation of affected areas in accordance with plans submitted to and approved by DOE.

(m) *Performance requirements.* A lease shall require that exploration, development, and mining activities, as appropriate, be conducted on the leased

premises with reasonable diligence, skill, and care as required to achieve and maintain production of uranium ore at rates consistent with good and safe mining practice and with market conditions.

(n) *Health and safety requirements.* A lease (1) shall require that exploration, development, and mining activities, as appropriate, be conducted on the leased premises with due regard for the health and safety of those involved, and (2) shall include appropriate measures for the control of radiation exposure in the mines.

(o) *Lessee's records.* Leases shall provide that the lessee keep and make available to DOE such records as DOE deems necessary for the administration of the lease and its leasing program.

(p) *Rights of DOE.* DOE reserves the right to enter upon the leased property and into all parts of the mine for inspection and other purposes. DOE also reserves the right to grant to other persons easements or rights of way upon, through, or in the leased premises. DOE and the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after termination or expiration of lease, have access to and the right to examine any directly pertinent books, papers, and records of the lessee involving transactions related to the lease.

(q) *Relinquishment of leases.* A lease may be surrendered by the lessee upon filing with and approval by DOE of a written application for relinquishment. Approval of the application shall be contingent upon the delivery of the leased premises to DOE in a condition determined to be satisfactory to DOE. The lessee shall continue to be liable for the payment of all royalty and other debts due DOE.

(r) *Assignment of leases.* Any transfer of a lease or any interest therein or claim thereunder, will not be recognized unless and until approved by DOE in writing. Ordinarily, DOE will not approve any transfer of a lease which involves overriding royalties or deferred payments of any kind to the transferor.

(s) *Cancellation.* Any lease may be cancelled by DOE whenever the lessee fails to comply with the provisions of the lease. Failure of DOE to exercise its right to cancel shall not be deemed a waiver thereof.

(t) *Form of lease.* Leases will be issued on forms prescribed by DOE.

(u) *Noncompetitive leases.* Under special circumstances, where DOE believes it to be in the best interest of the Government, DOE at its discretion may award or extend leases on the basis of negotiation.

(v) *DOE decisions.* All matters connected with the issuance and administration of leases will be determined by DOE whose decisions shall be final and conclusive.

(w) *Definitions.* DOE as used in this section means the United States Department of Energy or its duly authorized representative or representatives.

(x) *Multiple use of land.* Leases issued under this section shall provide that operations under them will be conducted so as not to interfere with the lawful operations of any third party having a lease, permit, easement, or other right or interest in the premises.

(y) *Compliance with State and Federal regulations.* Every lease shall provide that the lessee is required to comply with all applicable State and Federal statutes and regulations.

(Secs. 66, 161, 68 Stat. 933, 948, as amended; 42 U.S.C. 2096, 2201)

[41 FR 56783, Dec. 30, 1976]

# PART 765—REIMBURSEMENT FOR COSTS OF REMEDIAL ACTION AT ACTIVE URANIUM AND THORIUM PROCESSING SITES

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AUTHORITY: 42 U.S.C. 2296a *et seq.*

SOURCE: 59 FR 26726, May 23, 1994, unless otherwise noted.

## Subpart A—General

### § 765.1 Purpose.

The provisions of this part establish regulatory requirements governing reimbursement for certain costs of remedial action at active uranium or thorium processing sites as specified by Subtitle A of Title X of the Energy Policy Act of 1992. These regulations are authorized by section 1002 of the Act (42 U.S.C. 2296a–1), which requires the Secretary to issue regulations governing the reimbursements.

### § 765.2 Scope and applicability.

(a) This part establishes policies, criteria, and procedures governing reimbursement of certain costs of remedial action incurred by licensees at active uranium or thorium processing sites as a result of byproduct material generated as an incident of sales to the United States.

(b) Costs of remedial action at active uranium or thorium processing sites are borne by persons licensed under section 62 or 81 of the Atomic Energy Act (42 U.S.C. 2092, 2111), either by NRC or an Agreement State pursuant to a counterpart to section 62 or 81 of the Atomic Energy Act, under State law, subject to the exceptions and limitations specified in this part.

(c) The Department shall, subject to the provisions specified in this part, reimburse a licensee, of an active uranium or thorium processing site for the portion of the costs of remedial action as are determined by the Department to be attributable to byproduct material generated as an incident of sales to the United States and either incurred by the licensee not later than December 31, 2007, or incurred by the licensee in accordance with a plan for subsequent remedial action approved by the Department.

(d) Costs of remedial action are reimbursable under Title X for decontamination, decommissioning, reclamation, and other remedial action, provided that claims for reimbursement are supported by reasonable documentation as specified in subpart C of this part.

(e) Except as authorized by § 765.32, the total amount of reimbursement paid to any licensee of an active uranium processing site shall not exceed $6.25 multiplied by the number of Federal-related dry short tons of byproduct material. This total amount shall be adjusted for inflation pursuant to section 765.12.

(f) The total amount of reimbursement paid to all active uranium processing site licensees shall not exceed $350 million. This total amount shall be adjusted for inflation by applying the CPI-U, as provided by § 765.12.

(g) The total amount of reimbursement paid to the licensee of the active thorium processing site shall not exceed $365 million, as adjusted for inflation by applying the CPI-U as provided by § 765.12.

(h) Reimbursement of licensees for costs of remedial action will only be made for costs that are supported by reasonable documentation as required by § 765.20 and claimed for reimbursement by a licensee in accordance with the procedures established by subpart C of this part.

(i) The $715 million aggregate amount authorized to be appropriated under section 1003(a) of the Act (42 U.S.C. 2296a-2(a)) shall be adjusted for inflation by applying the CPI-U as provided by § 765.12, and shall be provided from the Fund.

[59 FR 26726, May 23, 1994, as amended at 68 FR 32957, June 3, 2003]

### § 765.3 Definitions.

For the purposes of this part, the following terms are defined as follows:

*Active uranium or thorium processing site* or *active processing site* means:

(1) Any uranium or thorium processing site, including the mill, containing byproduct material for which a license, issued either by NRC or by an Agreement State, for the production at a site of any uranium or thorium derived from ore—

(i) Was in effect on January 1, 1978;

(ii) Was issued or renewed after January 1, 1978; or

(iii) For which an application for renewal or issuance was pending on, or after January 1, 1978; and

(2) Any other real property or improvement on such real property that is determined by the Secretary or by an Agreement State to be:

(i) In the vicinity of such site; and

(ii) Contaminated with residual byproduct material.

*Agreement State* means a State that is or has been a party to a discontinuance agreement with NRC under section 274 of the Atomic Energy Act (42 U.S.C. 2021) and thereafter issues licenses and establishes remedial action requirements pursuant to a counterpart to section 62 or 81 of the Atomic Energy Act under state law.

*Atomic Energy Act* means the Atomic Energy Act of 1954, as amended, (42 U.S.C. 2011 *et seq.*).

*Byproduct material* means the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

*Claim for reimbursement* means the submission of an application for reimbursement in accordance with the requirements established in subpart C of this part.

*Costs of remedial action* means costs incurred by a licensee prior to or after enactment of UMTRCA to perform decontamination, decommissioning, reclamation, and other remedial action. These costs may include but are not necessarily limited to expenditures for work necessary to comply with applicable requirements to conduct groundwater remediation, treatment or containment of contaminated soil, disposal of process wastes, removal actions, air pollution abatement measures, mill and equipment decommissioning, site monitoring, administrative activities, expenditures required to meet necessary regulatory standards, or other requirements established by NRC, or an Agreement State. Costs of remedial action must be supported by reasonable documentation in accordance with the requirements of subpart C of this part.

*Decontamination, decommissioning, reclamation, and other remedial action* means work performed which is necessary to comply with all applicable requirements of UMTRCA or, where appropriate, with applicable requirements established by an Agreement State.

*Department* means the United States Department of Energy or its authorized agents.

*Dry short tons of byproduct material* means the quantity of tailings generated from the extraction and processing of 2,000 pounds of uranium or thorium ore-bearing rock.

*Federal reimbursement ratio* means the ratio of Federal-related dry short tons of byproduct material to total dry short tons of byproduct material present at an active uranium or thorium processing site on October 24, 1992. The ratio shall be established by comparing Federal-related dry short tons of byproduct material to total dry short tons of byproduct material present at the site on October 24, 1992, or by another means of attributing costs of remedial action to byproduct material generated as an incident of sales to the United States which the Department determines is more accurate than a ratio established using dry short tons of byproduct material.

*Federal-related dry short tons of byproduct material* means dry short tons of byproduct material that was present at an active uranium or thorium processing site on October 24, 1992, and was generated as an incident of uranium or thorium sales to the United States.

*Generally accepted accounting principles* means those principles established by the Financial Accounting Standards Board which encompass the conventions, rules, and procedures necessary to define accepted accounting practice at a particular time.

*Inflation index* means the consumer price index for all urban consumers (CPI-U) as published by the Department of Commerce's Bureau of Labor Statistics.

*Licensee* means a site owner licensed under section 62 or 81 of the Atomic Energy Act (42 U.S.C. 2092, 2111) by NRC, or an Agreement State, for any activity at an active uranium or thorium processing site which results, or has resulted, in the production of byproduct material.

*Maximum reimbursement amount or maximum reimbursement ceiling* means the smaller of the following two quantities:

(1) The amount obtained by multiplying the total cost of remedial action at the site, as determined in the approved plan for subsequent remedial action, by the Federal reimbursement ratio established for the site; or

(2) $6.25, as adjusted for inflation, multiplied by the number of Federal-related dry short tons of byproduct material.

*NRC* means the United States Nuclear Regulatory Commission or its predecessor agency.

*Offsite disposal* means the disposal, and activities that contribute to the disposal, of byproduct material in a location that is not contiguous to the West Chicago Thorium Mill Site located in West Chicago, Illinois, in accordance with a plan approved by, or other written authorization from, the State of Illinois or NRC provided the activities are consistent with the ultimate removal of byproduct material from the West Chicago Thorium Mill Site.

*Plan for subsequent remedial action* means a plan approved by the Department which includes an estimated total cost and schedule for remedial action, and all applicable requirements of remedial action established by NRC or an Agreement State to be performed after December 31, 2007, at an active uranium or thorium processing site.

*Reclamation plan or site reclamation plan* means a plan, which has been approved by NRC or an Agreement State, for remedial action at an active processing site that establishes the work necessary to comply with applicable requirements of UMTRCA, or where appropriate with requirements established by an Agreement State.

*Remedial action* means decontamination, decommissioning, reclamation, and other remedial action at an active uranium or thorium processing site.

*Secretary* means the Secretary of Energy or her designees.

*Site owner* means a person that presently holds, or held in the past, any interest in land, including but not limited to a fee simple absolute, surface or subsurface ownership of mining claims, easements, and a right of access for the purposes of cleanup, or any other legal or equitable interest.

*Tailings* means the remaining portion of a metal-bearing ore after some or all of the metal, such as uranium, has been extracted.

*The Fund* means the Uranium Enrichment Decontamination and Decommissioning Fund established at the United States Department of Treasury pursuant to section 1801 of the Atomic Energy Act (42 U.S.C. 2297g).

*Title X or ''the Act''* means Subtitle A of Title X of the Energy Policy Act of 1992, Public Law 102–486, 106 Stat. 2776 (42 U.S.C. 2296a–1 *et seq.*).

*UMTRCA* means the Uranium Mill Tailings Radiation Control Act of 1978, as amended (42 U.S.C. 7901 *et seq.*).

*United States* means any executive department, commission, or agency, or other establishment in the executive branch of the Federal Government.

*Written Authorization* means a written statement from either the NRC or an Agreement State that a licensee has performed in the past, or is authorized to perform in the future, a remedial action that is necessary to comply with the requirements of UMTRCA or, where appropriate, the requirements of an Agreement State.

[59 FR 26726, May 23, 1994, as amended at 68 FR 32957, June 3, 2003]

## Subpart B—Reimbursement Criteria

### § 765.10 Eligibility for reimbursement.

(a) Any licensee of an active uranium or thorium processing site that has incurred costs of remedial action for the site that are attributable to byproduct material generated as an incident of sales to the United States shall be eligible for reimbursement of these costs, subject to the procedures and limitations specified in this part.

(b) Prior to reimbursement of costs of remedial action incurred by a licensee, the Department shall make a determination regarding the total quantity of dry short tons of byproduct material, and the quantity of Federal-related dry short tons of byproduct material present on October 24, 1992 at the licensee's active processing site. A claim for reimbursement from a site for which a determination is made will be evaluated individually. If a licensee does not concur with the Department's determination regarding the quantity of dry short tons of byproduct material present at the site, the licensee may appeal the Department's determination in accordance with § 765.22 of this part. The Department's determination shall be used to determine that portion of an approved claim for reimbursement submitted by the licensee which shall be reimbursed, unless or until the determination is overturned on appeal. If the outcome of an appeal requires a change in the Department's initial determination, the Department will adjust any payment previously made to the licensee to reflect the change.

### § 765.11 Reimbursable costs.

(a) Costs for which a licensee may be reimbursed must be for remedial action that a licensee demonstrates is attributable to byproduct material generated as an incident of sales to the United States, as determined by the Department. These costs are equal to the total costs of remedial action at a site multiplied by the Federal reimbursement ratio established for the site. These costs must be incurred in the performance of activities, prior to or after enactment of UMTRCA, and required by a plan, portion thereof, or other written authorization, approved by NRC or by an Agreement State. Costs of remedial action shall be reimbursable only if approved by the Department in accordance with the provisions of this part.

(b) In addition, costs of remedial action incurred by a licensee after December 31, 2007 must be in accordance with a plan for subsequent remedial action approved by the Department as specified in § 765.30.

(c) Total reimbursement of costs of remedial action incurred at an active processing site that are otherwise reimbursable pursuant to the provisions of this part shall be limited as follows:

(1) Reimbursement of costs of remedial action to active uranium processing site licensees shall not exceed $6.25, as adjusted for inflation, multiplied by the number of Federal-related dry short tons of byproduct material.

(2) Aggregate reimbursement of costs of remedial action incurred at all active uranium processing sites shall not exceed $350 million. This aggregate amount shall be adjusted for inflation pursuant to § 765.12; and

(3) Reimbursement of costs of remedial action at the active thorium processing site shall be limited to costs incurred for offsite disposal and shall not exceed $365 million. This amount shall be adjusted for inflation pursuant to § 765.12.

(d) Notwithstanding the Title X requirement that byproduct material must be located at an active processing site on October 24, 1992, byproduct material moved from the Edgemont Mill in Edgemont, South Dakota, to a disposal site as a result of remedial action, shall be eligible for reimbursement in accordance with all applicable requirements of this part.

[59 FR 26726, May 23, 1994, as amended at 68 FR 32957, June 3, 2003]

### § 765.12 Inflation index adjustment procedures.

(a) The amounts of $6.25 (as specified in § 765.2(e) of this rule) $350 million (as specified in § 765.2(f) of this rule), $365 million (as specified in § 765.2(g) of this rule) and $715 million (as specified in § 765.2(i) of this rule) shall be adjusted for inflation as provided by this section.

(b) To make adjustments for inflation to the amounts specified in paragraph (a) of this section, the Department shall apply the CPI-U to these amounts annually, beginning in 1994, using the CPI-U as published by the Bureau of Labor Statistics within the Department of Commerce for the preceding calendar year.

(c) The Department shall adjust annually, using the CPI-U as defined in this part, amounts paid to an active uranium processing site licensee for purposes of comparison with the $6.25

per dry short ton limit on reimbursement as adjusted for inflation.

[59 FR 26726, May 23, 1994, as amended at 68 FR 32957, June 3, 2003]

## Subpart C—Procedures for Submitting and Processing Reimbursement Claims

### § 765.20 Procedures for submitting reimbursement claims.

(a) All costs of remedial action for which reimbursement is claimed must be supported by reasonable documentation as specified in this subpart. The Department reserves the right to deny any claim for reimbursement, in whole or in part, that is not submitted in accordance with the requirements of this subpart.

(b) The licensee shall provide a copy of the approved site reclamation plan or other written authorization from NRC or an Agreement State upon which claims for reimbursement are based, with the initial claim submitted. Any revision or modification made to the plan or other written authorization, which is approved by NRC or an Agreement State, shall be included by the licensee in the next claim submitted to the Department following that revision or modification. This reclamation plan or other written authorization, as modified or revised, shall serve as the basis for the Department's evaluation of all claims for reimbursement submitted by a licensee.

(c) Each submitted claim shall provide a summary of all costs of remedial action for which reimbursement is claimed. This summary shall identify the costs of remedial action associated with each major activity or requirement established by the site's reclamation plan or other written authorization. In addition, each claim shall provide a summary of the documentation relied upon by the licensee in support of each cost category for which reimbursement is claimed.

(d) Documentation used to support a reimbursement claim must demonstrate that the costs of remedial action for which reimbursement is claimed were incurred specifically for activities specified in the site's reclamation plan, or otherwise authorized by NRC or an Agreement State. Summary documentation used in support of a claim must be cross-referenced to the relevant page and activity of the licensee's reclamation plan, or other written authorization approved by NRC or an Agreement State.

(1) Documentation prepared contemporaneous to the time the cost was incurred should be used when available. The documentation should identify the date or time period for which the cost was incurred, the activity for which the cost was incurred, and the reclamation plan provision or other written authorization to which the cost relates. Where available, each claim should be supported by receipts, invoices, pay records, or other documents that substantiate that each specific cost for which reimbursement is claimed was incurred for work that was necessary to comply with UMTRCA or applicable Agreement State requirements.

(2) Documentation not prepared contemporaneous to the time the cost was incurred, or not directly related to activities specified in the reclamation plan or other written authorization, may be used in support of a claim for reimbursement provided that the licensee determines the documentation is the only means available to document costs for which reimbursement is sought.

(e) The Department may audit, or require the licensee to audit, any documentation used to support a claim on a case-by-case basis and may approve, approve in part, or deny reimbursement of any claim in accordance with the requirements of this part. Documentation relied upon by a licensee in support of a claim for reimbursement shall be made available to the Department and retained by the licensee until 4 years after final payment of a claim is made by the Department.

(f) Each licensee should utilize generally accepted accounting principles consistently throughout the claim. These accounting principles, underlying assumptions, and any other information necessary for the Department to evaluate the claim shall be set forth in each claim.

(g) Following each annual appropriation by Congress, the Department will

issue a FEDERAL REGISTER Notice announcing:

(1) A claim submission deadline for that fiscal year;

(2) Availability of funds for reimbursement of costs of remedial action;

(3) Whether the Department anticipates that approved claims for that fiscal year may be subject to prorated payment;

(4) Any changes in the Federal reimbursement ratio or maximum reimbursement ceiling for any active uranium or thorium processing site;

(5) Any revision in the per dry short ton limit on reimbursement for all active uranium processing sites; and

(6) Any other relevant information.

(h) A licensee shall certify, with respect to any claim submitted by it for reimbursement, that the work was completed as described in an approved reclamation plan or other authorization. In addition, the licensee shall certify that all costs for which reimbursement is claimed, all documentation relied upon in support of its costs, and all statements or representations made in the claim are complete, accurate, and true. The certification shall be signed by an officer or other official of the licensee with knowledge of the contents of the claim and authority to represent the licensee in making the certification. Any knowingly false or frivolous statements or representations may subject the individual to penalties under the False Claims Act, sections 3729 through 3731 of title 31 United States Code, or any other applicable statutory authority; and criminal penalties under sections 286, 287, 1001 and 1002 of title 18, United States Code, or any other applicable statutory authority.

(i) All claims for reimbursement submitted to the Department shall be sent by registered or certified mail, return receipt requested. The Department reserves all rights under applicable law to recover any funds paid to licensees which an audit finds to not meet the requirements of this part.

### § 765.21 Procedures for processing reimbursement claims.

(a) The Department will conduct a preliminary review of each claim within 60 days after the claim submission deadline announced in the FEDERAL REGISTER Notice specified in § 765.20(g) to determine the completeness of each claim. Payments from the Fund to active uranium or thorium processing site licensees for approved costs of remedial action will be made simultaneously by the Department within 1 year of the claim submission deadline.

(b) After completing the preliminary review specified in paragraph (a) of this section, the Department may audit, or require the licensee to audit, any documentation used in support of such claim, request the licensee to provide additional information, or request the licensee to provide other clarification determined by the Department to be necessary to complete its evaluation of the claim. In addition, the Department reserves the right to conduct an inspection of the site to verify any information provided by the licensee in a claim for reimbursement, or in support thereof. Any information requested by the Department, if provided, must be submitted by the claimant within 60 days of receipt of the request unless the Department specifies in writing that additional time is provided.

(c) At any time during the review of a claim, the Department may request an informal conference with a licensee to obtain further information or clarification on any unresolved issue pertaining to the claim. While the licensee is not required to provide additional clarification requested by the Department, a failure to do so may result in the denial of that portion of the claim for which information is requested.

(d) Based upon the claim submitted and any additional information received by the Department, including any audit or site inspection if conducted, the Department shall complete a final review of all relevant information prior to making a reimbursement decision. When the Department determines it is not clear that an activity for which reimbursement is claimed was necessary to comply with UMTRCA or where appropriate, with applicable Agreement State requirements, the Department may consult with the appropriate regulatory authorities.

(e) A written decision regarding the Department's determination to approve, approve in part, or deny a claim will be provided to the licensee within 10 days of completion of the claim review. Within 45 days after the Department's issuance of a written decision to deny the claim due to inadequate documentation, the licensee may request the Department to reconsider its decision if the licensee provides reasonable documentation in accordance with § 765.20. If a licensee chooses not to submit the documentation, the licensee has the right to file a formal appeal to a claim denial in accordance with § 765.22. If a licensee chooses to submit the documentation, the Department will consider whether the documentation results in the Department's reversal of the initial decision to deny the claim and will inform the licensee of the Department's subsequent decision. The licensee may appeal that decision in accordance with § 765.22.

(f) If the Department determines that insufficient funds are available at any time to provide for complete payment of all outstanding approved claims, reimbursements of approved claims will be made on a prorated basis. A prorated payment of all outstanding approved claims for reimbursement, or any unpaid portion thereof, shall be made on the basis of the total amount of all outstanding approved claims, regardless of when the claims were submitted or approved.

(g) Notwithstanding the provisions of paragraph (f) of this section, or any other provisions of this part, any requirement for the payment or obligation of funds by the Department established by this part shall be subject to the availability of appropriated funds, and no provision herein shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act (31 U.S.C. 1341).

[59 FR 26726, May 23, 1994, as amended at 68 FR 32957, June 3, 2003]

### § 765.22 Appeals procedures.

(a) Any appeal by a licensee of any Department determination subject to the requirements of this part, shall invoke the appeals process specified in paragraph (b) of this section.

(b) A licensee shall file an appeal of any Department determination subject to the requirements of this part with the Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585. Any appeal must be filed within 45 days from the date the licensee received notice, actual or constructive (i.e., publication in the FEDERAL REGISTER), of the Department's determination. Appeals must comply with the procedures set forth in 10 CFR part 1003, subpart C. The decision of the Office of Hearings and Appeals shall be the final decision of the Department. A licensee must file an appeal in order to exhaust its administrative remedies, and the receipt of an appellate decision is a prerequisite to seeking judicial review of any determination made under this part.

[59 FR 26726, May 23, 1994, as amended at 60 FR 15017, Mar. 21, 1995]

### § 765.23 Annual report.

The Department shall prepare annually a report summarizing pertinent information concerning claims submitted in the previous calendar year, the status of the Department's review of the claims, determinations made regarding the claims, amounts paid for claims approved, and other relevant information concerning this reimbursement program. The report will be available to all interested parties upon written request to the Department's National Nuclear Security Administration Service Center, Office of Technical Services, Environmental Programs Department, P.O. Box 5400, Albuquerque, NM 87185–5400 and will also be available in the Department's Freedom of Information Reading room, 1000 Independence Avenue SW., Washington, DC.

[59 FR 26726, May 23, 1994, as amended at 68 FR 32957, June 3, 2003]

## Subpart D—Additional Reimbursement Procedures

### § 765.30 Reimbursement of costs incurred in accordance with a plan for subsequent remedial action.

(a) This section establishes procedures governing reimbursements of

costs of remedial action incurred in accordance with a plan for subsequent remedial action approved by the Department as provided in this section. Costs otherwise eligible for reimbursement in accordance with the terms of this part and incurred in accordance with the plan shall be reimbursed in accordance with the provisions of subpart D and subpart C. In the event there is an inconsistency between the requirements of subpart D and subpart C, the provisions of subpart D shall govern reimbursement of such costs of remedial action.

(b) A licensee who anticipates incurring costs of remedial action after December 31, 2007 may submit a plan for subsequent remedial action. This plan may be submitted at any time after January 1, 2005, but no later than December 31, 2006. Reimbursement of costs of remedial action incurred after December 31, 2007 shall be subject to the approval of this plan by the Department. This plan shall describe:

(1) All applicable requirements established by NRC pursuant to UMTRCA, or where appropriate, by the requirements of an Agreement State, included in a reclamation plan approved by NRC or an Agreement State which have not yet been satisfied in full by the licensee, and

(2) The total cost of remedial action required at the site, together with all necessary supporting documentation, segregated into actual costs incurred to date, costs incurred or expected to be incurred prior to December 31, 2007 but not yet approved for reimbursement, and anticipated future costs.

(c) The Department shall review the plan for subsequent remedial action to verify conformance with the NRC- or Agreement State-approved reclamation plan or other written authorization, and to determine the reasonableness of anticipated future costs, and shall approve, approve with suggested modifications, or reject the plan. During its review, the Department may request additional information from the licensee to clarify or provide support for any provision or estimate contained in the plan. The Department may also consult with NRC or an Agreement State concerning any provision or estimate contained in the plan. Upon approval, approval with modifications, or rejection of a plan, the Department shall inform and explain to the licensee its decision.

(d) If the Department rejects a plan for subsequent remedial action submitted by a licensee, the licensee may appeal the Department's rejection or prepare and submit a revised plan. The licensee may continue to submit revised plans for subsequent remedial action until the Department approves a plan, or September 30, 2007, whichever occurs first. A failure by a licensee to receive approval from the Department of a plan prior to December 31, 2007 will preclude that licensee from receiving any reimbursement for costs of remedial action incurred after that date.

(e) The Department shall determine, in approving a plan for subsequent remedial action, the maximum reimbursement amount for which the licensee may be eligible. This maximum reimbursement amount shall be the smaller of the following two quantities:

(1) The amount obtained by multiplying the total cost of remedial action at the site, as determined in the approved plan for subsequent remedial action, by the Federal reimbursement ratio established for such site; or

(2) For the uranium site licensees only, $6.25, as adjusted for inflation, multiplied by the number of Federal-related dry short tons of byproduct material. For all licensees, the Department shall subtract from the maximum reimbursement amount any reimbursement already approved to be paid to the licensee. The resulting sum shall be the potential additional reimbursement to which the licensee may be entitled. This resulting sum will be adjusted after the approval of claims for work performed through December 31, 2007, to reflect the actual approved costs of work performed through that date.

[59 FR 26726, May 23, 1994, as amended at 68 FR 32957, June 3, 2003]

### § 765.31 Designation of funds available for subsequent remedial action.

(a) The Department shall authorize reimbursement of costs of remedial action, incurred in accordance with an approved plan for subsequent remedial

action and approved by the Department as specified in subpart C to this part, to be made from the Fund. These costs are reimbursable until:

(1) This remedial action has been completed, or

(2) The licensee has been reimbursed its maximum reimbursement amount as determined by the Department pursuant to paragraph (e) of § 765.30.

(b) A licensee shall submit any claim for reimbursement of costs of remedial action incurred pursuant to an approved plan for subsequent remedial action in accordance with the requirements of subpart C of this part. The Department shall approve, approve in part, or deny any claims in accordance with the procedures specified in subpart C of this part. The Department shall authorize the disbursement of funds upon approval of a claim for reimbursement.

(c) After all remedial actions have been completed by affected Agreement State or NRC licensees, the Department will issue a FEDERAL REGISTER notice announcing a termination date beyond which claims for reimbursement will no longer be accepted.

[59 FR 26726, May 23, 1994, as amended at 68 FR 32958, June 3, 2003]

### § 765.32 Reimbursement of excess funds.

(a) No later than December 31, 2008, the Department shall determine if the aggregate amount authorized for appropriation pursuant to section 1003 of the Act (42 U.S.C. 2296a–2), as adjusted for inflation pursuant to § 765.12, exceed as of that date the combined total of all reimbursements which have been paid to licensees under this part, any amounts approved for reimbursement and owed to any licensee, and any anticipated additional reimbursements to be made in accordance with approved plans for subsequent remedial action.

(b) If the Department determines that the amount authorized pursuant to section 1003 of the Act (42 U.S.C. 2296a–2), as adjusted for inflation, exceed the combined total of all reimbursements (as indicated in paragraph (a) of this section), the Department may establish procedures for providing additional reimbursement to uranium licensees for costs of remedial action, subject to the availability of appropriated funds. If the amount of available excess funds is insufficient to provide reimbursement of all eligible costs of remedial action, then reimbursement shall be paid on a prorated basis.

(c) Each eligible uranium licensee's prorated share will be determined by dividing the total excess funds available by the total number of Federal-related dry short tons of byproduct material present at the site where costs of remedial action exceed $6.25 per dry short ton, as adjusted for inflation pursuant to § 765.12. The resulting number will be the maximum cost per dry short ton, over $6.25, that may be reimbursed. Total reimbursement for each licensee that has incurred approved costs of remedial action in excess of $6.25 per dry short ton will be the product of the excess cost per dry short ton multiplied by the number of Federal-related dry short tons of byproduct material at the site or the actual costs incurred and approved by the Department, whichever is less.

(d) Any costs of remedial action for which reimbursement is sought from excess funds determined by the Department to be available is subject to all requirements of this part except the per dry short ton limit on reimbursement established by paragraph (d) of § 765.11.

[59 FR 26726, May 23, 1994, as amended at 68 FR 32957, June 3, 2003]

## PART 766—URANIUM ENRICHMENT DECONTAMINATION AND DECOMMISSIONING FUND; PROCEDURES FOR SPECIAL ASSESSMENT OF DOMESTIC UTILITIES

### Subpart A—General

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### Subpart B—Procedures for Special Assessment

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766.107 Prepayment of future Special Assessments.

AUTHORITY: 42 U.S.C. 2201, 2297g, 2297g–1, 2297g–2, 7254.

SOURCE: 59 FR 41963, Aug. 15, 1994, unless otherwise noted.

## Subpart A—General

### § 766.1 Purpose.

The provisions of this part establish procedures for the Special Assessment of domestic utilities for the Uranium Enrichment Decontamination and Decommissioning Fund pursuant to sections 1801, 1802 and 1803 of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2011 *et seq.*).

### § 766.2 Applicability.

This part applies to all domestic utilities in the United States that purchased separative work units from the DOE between 1945 and October 23, 1992.

### § 766.3 Definitions.

For the purposes of this part, the following terms shall be defined as follows:

*CPI-U* means the Consumer Price Index for all-urban consumers published by the Department of Labor.

*Commercial electricity generation* means the production of electricity for sale to consumers.

*DOE* means the United States Department of Energy and its predecessor agencies.

*Domestic utility* means any utility in the United States that has purchased SWUs produced by DOE for the purpose of commercial electrical generation during the period beginning in 1945 to October 23, 1992.

*Fund* means an account in the U.S. Treasury referred to as the Uranium Enrichment Decontamination and Decommissioning Fund, established by section 1801 of the Atomic Energy Act of 1954, as amended.

*Oak Ridge Operations Office* means the Oak Ridge Operations Office of the Department of Energy in Oak Ridge, Tennessee.

*Special Assessment* means the Special Assessment levied on domestic utilities for payments into the Fund.

*SWU* means a separative work unit, the common measure by which uranium enrichment services are sold.

*TESS* means the Toll Enrichment Services System, which is the database that tracks uranium enrichment services transactions of the DOE Oak Ridge Operations Office for the purpose of planning, toll transaction processing, customer invoicing and historical tracking of SWU deliveries.

*Use and burnup charges* mean lease charges for the consumption of SWUs and natural uranium.

## Subpart B—Procedures for Special Assessment

### § 766.100 Scope.

This subpart sets forth the procedures for the Special Assessment of domestic utilities for funds to be deposited in the Fund.

### § 766.101 Data utilization.

DOE shall use the records from the Toll Enrichment Services System (TESS) and other records maintained by the Oak Ridge Operations Office in order to determine the total SWUs purchased from DOE for all purposes. DOE shall use records from TESS, relevant records of domestic utilities, and such other information as DOE deems to be reliable and probative in determining the number of SWUs that were purchased by each domestic utility prior to October 24, 1992. A domestic utility shall be considered to have purchased a SWU from DOE if the SWU was produced by DOE but purchased by the domestic utility from another source. DOE shall consider a purchase to have occurred upon the delivery of a SWU to the domestic utility purchasing the SWU. A domestic utility shall not be considered to have purchased a SWU from DOE if the SWU was purchased by the domestic utility but subsequently sold to another source.

### § 766.102 Calculation methodology.

(a) *Calculation of Domestic Utilities' Annual Assessment Ratio to the Fund.* Domestic utilities shall be assessed annually for their share of the Fund. The

amount of the assessment shall be determined by the ratio of SWUs produced by DOE and purchased by domestic utilities prior to October 24, 1992, to the total number of SWUs produced by DOE for all purposes (including SWUs produced for defense purposes). All calculations will be carried out to the fifth significant digit. This ratio is expressed by the following hypothetical example:

| SWUs purchased by all domestic utilities | | Total SWUs produced—all purposes | | Special assessment ratio |
|---|---|---|---|---|
| 12345 | ÷ | 45678 | = | .27026 |

(b) *Calculation of the Baseline Total Annual Special Assessment for Domestic Utilities*. The Annual Special Assessment ratio calculated in paragraph (a) of this section shall be multiplied by $480 million, yielding the total amount of the Baseline Total Annual Special Assessment as of October 1992. In the event that this amount is in excess of $150 million, the Baseline Total Annual Special Assessment shall be capped at $150 million. All calculations will be carried out to the fifth significant digit. The Baseline Total Annual Special Assessment is determined as shown in the following hypothetical example:

| Total fund | | Annual assessment ratio | | Baseline total annual special assessment |
|---|---|---|---|---|
| $480,000,000 | × | 0.27026 | = | $129,724,800 |

(c) *Calculation of Baseline Total Annual Special Assessment per Utility*. The ratio of the total number of SWUs purchased by an individual domestic utility for commercial electricity generation, to the total number of SWUs purchased by all domestic utilities for commercial electricity generation, multiplied by the Baseline Total Annual Special Assessment calculated in paragraph (b) of this section, determines an individual utility's share of the Baseline Total Annual Special Assessment. All calculations will be carried out to the fifth significant digit. A hypothetical example of such a calculation follows:

| Single utility SWUs | | All utility SWUs | | Utility ratio | | Baseline total annual special assessment | Individual utility special Assessment |
|---|---|---|---|---|---|---|---|
| 300 | ÷ | 12345 | = | .02430 | × | $129,724,800 | $3,152,312.64 |

(d) *Calculation of Inflation Adjustment*. The Baseline Total Annual Special Assessment billed to domestic utilities shall be adjusted for inflation using the most recently published monthly CPI-U and the CPI-U for October 1992. All calculations will be carried out to the fifth significant digit. A hypothetical example of such a calculation follows:

| CPI-U (Mar 93) | | CPI-U (Oct 92) | | Adjustment multiplier |
|---|---|---|---|---|
| 150 | ÷ | 141.8 | = | 1.05783 |

| Utility special Assessment | | Adjustment multiplier | | Adjusted utility assessment |
|---|---|---|---|---|
| $3,152,312.64 | × | 1.05783 | = | $3,334,610.88 |

## § 766.103 Special Assessment invoices.

(a) DOE shall issue annually a Special Assessment invoice to each domestic utility. This invoice will specify itemized quantities of enrichment services by reactor. In each Special Assessment invoice, DOE shall require payment, on or before 30 days from the date of each invoice, of that utility's prorated share of the Baseline Total Annual Special Assessment, as adjusted for inflation using the most recently published monthly CPI-U data.

(b) DOE shall enclose with the Fiscal Year 1993 Special Assessment invoice a sealed, business confidential, summary SWU transaction statement including:

(1) TESS information which documents, by reactor, the basis of the utility's assessment;

(2) A list of domestic utilities subject to the Special Assessment;

(3) The total number of SWUs purchased from DOE by all domestic utilities for all purposes prior to October 24, 1992.

(4) The total number of SWUs purchased from DOE for all purposes prior to October 24, 1992, including SWUs

purchased or produced for defense purposes; and

(5) Such other information as may be appropriate.

(c) With regard to any fiscal year after Fiscal Year 1993, DOE shall enclose a summary SWU transaction statement with Special Assessment invoices that will include updated information regarding adjustments to Special Assessments resulting from the reconciliation and appeals process under Section 766.104.

(d) The date of each Annual Special Assessment invoicing will be set on or about October 1 with payment due 30 calendar days from the date of invoice starting with the Fiscal Year 1995 Special Assessment.

### § 766.104 Reconciliation, adjustments and appeals.

(a) A domestic utility requesting an adjustment shall, within 30 days from the date of a Special Assessment invoice, file a notice requesting an adjustment. Such notice shall include an explanation of the basis for the adjustment and any supporting documents, and may include a request for a meeting with DOE to discuss its invoice. If more time is needed to gather probative information, DOE will consider utility requests for up to 90 days additional time, providing that the initial notice requesting an adjustment was timely filed. The notice shall be filed at the address set forth in the Special Assessment invoice, and filing of this notice is complete only upon receipt by DOE. Domestic utilities are considered to have met the filing requirements upon DOE's receipt of the notice requesting an adjustment without regard to DOE's acceptance of supporting documentation. The filing of a notice for an adjustment shall not stay the obligation to pay.

(b) DOE may request additional information from domestic utilities and may acquire data from other sources.

(c) After reviewing a notice submitted under paragraph (a) of this section and other relevant information, and after making any necessary adjustment to its records in light of reliable and adequately probative records submitted in connection with the request for adjustment or otherwise obtained by DOE, DOE shall make a written determination granting or denying the requested adjustment. As appropriate, DOE shall modify the application of TESS data for any discrepancies or further transactions raised during the reconciliation process.

(d) Any domestic utility that wishes to dispute a written determination under paragraph (c) of this section shall have the right to file an appeal with the Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Avenue S.W., Washington, DC 20585. Except for the Fiscal Year 1993 Special Assessment, any appeal must be filed on or before 30 days from the date of the written determination and should contain information of the type described in 10 CFR part 1003, subpart C. With regard to a written determination under paragraph (c) of this section concerning a Fiscal Year 1993 Special Assessment, a domestic utility must file an appeal on or before 30 days from the effective date of this paragraph or from the date of such written determination, whichever is later. The decision of the Office of Hearings and Appeals shall be the final decision of DOE. Upon completion of the reconciliation process, all records of SWU transactions shall be finalized and shall become the basis of subsequent Special Assessment invoices. These records shall be revised to reflect any decisions from the Office of Hearings and Appeals and any applicable court rulings.

(e) Refunds of Special Assessments shall be provided in cases where DOE has determined, as a result of reconciliation, that an overpayment has been made by a domestic utility, and that the domestic utility has no further current obligation to DOE.

[59 FR 41963, Aug. 15, 1994, as amended at 60 FR 15017, Mar. 21, 1995]

### § 766.105 Payment procedures.

DOE shall specify payment details and instructions in all Special Assessment invoices. Each domestic utility shall make payments to the Fund by wire transfer to the Department of Treasury.

### § 766.106 Late payment fees.

In the case of a late payment by a domestic utility of its Special Assessment, the domestic utility shall pay interest at the per annum rate (365-day basis) established by DOE for general application to monies due DOE and not received by DOE on or before a designated due date. Interest shall accrue beginning the date of the designated payment except that, whenever the due date falls on a Saturday, Sunday, or a United States legal holiday, interest shall commence on the next day immediately following which is not a Saturday, Sunday, or United States legal holiday. Late payment provisions for the Special Assessment to the Fund shall be based on the Treasury Current Value of Funds Rate (which is published annually by the Treasury and used in assessing interest charges for outstanding debts on claims owed to the United States Government), plus six (6) percent pro rata on a daily basis. The additional six (6) percent charge shall not go into effect until five (5) business days after payment was originally due. Late payment fees shall be invoiced within two days of receipt of utility payment of the special assessment when delinquency is less than 30 days. For longer periods of delinquency, DOE will submit additional invoices, as appropriate. Late payment fees will be due 30 days from the date of invoice.

### § 766.107 Prepayment of future Special Assessments

DOE shall accept prepayment of future Special Assessments upon request by a domestic utility. A domestic utility's liability for the future assessments shall be satisfied to the extent of the prepayments. DOE shall use the pro rata share of prepayments attributable to a given fiscal year plus the Special Assessments collected from utilities who did not prepay for that fiscal year, in order to determine that the total amount of Special Assessments collected from domestic utilities in a given fiscal year does not exceed $150 million, annually adjusted for inflation.

## PART 770—TRANSFER OF REAL PROPERTY AT DEFENSE NUCLEAR FACILITIES FOR ECONOMIC DEVELOPMENT

Sec.

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770.2 What real property does this part cover?
770.3 What general limitations apply to this part?
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770.10 When must a person or entity, who wishes to contest a DOE denial of request for indemnification of a claim, begin legal action?
770.11 When does a claim ''accrue'' for purposes of notifying the Field Office Manager under § 770.9(a) of this part?

AUTHORITY: 50 U.S.C. 2811.

SOURCE: 65 FR 10689, Feb. 29, 2000, unless otherwise noted.

### § 770.1 What is the purpose of this part?

(a) This part establishes how DOE will transfer by sale or lease real property at closed or downsized defense nuclear facilities for economic development.

(b) This part also contains the procedures for a person or entity to request indemnification for any claim that results from the release or threatened release of a hazardous substance or pollutant or contaminant as a result of DOE activities at the defense nuclear facility.

[65 FR 10689, Feb. 29, 2000, as amended at 78 FR 67927, Nov. 13, 2013]

### § 770.2 What real property does this part cover?

(a) DOE may transfer DOE-owned real property by sale or lease at closed or downsized defense nuclear facilities, for the purpose of permitting economic development.

(b) DOE may transfer, by lease only, improvements at defense nuclear facilities on land withdrawn from the public domain, that are unneeded, temporarily underutilized, or underutilized, for the purpose of permitting economic development and for facilitating local reuse or redevelopment.

[65 FR 10689, Feb. 29, 2000, as amended at 78 FR 67927, Nov. 13, 2013]

### § 770.3 What general limitations apply to this part?

(a) Nothing in this part affects or modifies in any way section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620(h)).

(b) Individual proposals for transfers of property are subject to NEPA review as implemented by 10 CFR part 1021.

(c) Any indemnification agreed to by the DOE is subject to the availability of funds.

### § 770.4 What definitions are used in this part?

*Community Reuse Organization or CRO* means a governmental or non-governmental organization that is recognized by DOE and that represents a community adversely affected by DOE work force restructuring at a defense nuclear facility..

*Claim* means a request for reimbursement of monetary damages.

*Defense Nuclear Facility* means ''Department of Energy defense nuclear facility'' within the meaning of section 318 of the Atomic Energy Act of 1954 (42 U.S.C. 2286g).

*DOE* means the United States Department of Energy.

*DOE Field Office* means any of DOE's officially established organizations and components located outside the Washington, D.C., metropolitan area. (See Field Office Manager.)

*Economic Development* means the use of transferred DOE real property in a way that enhances the production, distribution, or consumption of goods and services in the surrounding region(s) or which furthers reuse or redevelopment, and furthers the public policy objectives of the laws governing the downsizing of DOE's defense nuclear facilities.

*Field Office Manager* means the head of the DOE Operations Offices or Field Offices associated with the management and control of defense nuclear facilities.

*Hazardous Substance* means a substance within the definition of ''hazardous substances'' in subchapter I of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. 9601(14)).

*Indemnification* means the responsibility for reimbursement of payment for any suit, claim, demand or action, liability, judgment, cost, or other fee arising out of any claim for personal injury or property damage, including business losses consistent with generally accepted accounting practices, which involve the covered real property transfers. Indemnification payments are subject to the availability of appropriated funds.

*Person or Entity* means any state, any political subdivision of a state or any individual person that acquires ownership or control of real property at a defense nuclear facility.

*Pollutant or Contaminant* means a substance identified within the definition of ''pollutant or contaminant'' in section 101(33) of CERCLA (42 U.S.C. 9601(33)).

*Real Property* means all interest in land, together with the improvements, structures, and fixtures located on the land (usually including prefabricated or movable structures), and associated appurtenances under the control of any federal agency.

*Release* means a ''release'' as defined in subchapter I of CERCLA (42 U.S.C. 9601(22)).

*Underutilized Real Property or Temporarily Underutilized Real Property* means the entire property or a portion of the real property (with or without improvements) that is used only at irregular intervals, or which is used by current DOE missions that can be satisfied with only a portion of the real property. Underutilized property is available by lease only.

*Unneeded Real Property* means any property under DOE control that the Field Office, cognizant program, or the Secretary of Energy have determined, according to applicable procedures, to be no longer needed for the purposes of conducting DOE business.

[65 FR 10689, Feb. 29, 2000, as amended at 78 FR 67927, Nov. 13, 2013]

### § 770.5 How does DOE notify persons and entities that defense nuclear facility real property is available for transfer for economic development?

(a) Field Office Managers annually make available to Community Reuse Organizations, local government, and Tribal nations, and other persons and entities a list of real property at defense nuclear facilities that DOE has identified as appropriate for transfer for economic development. Field Office Managers may use any effective means of publicity to notify potentially-interested persons or entities of the availability of the list.

(b) Upon request, Field Office Managers provide to interested persons and entities relevant information about listed real property, including information about a property's physical condition, environmental, safety and health matters, and any restrictions or terms of transfer.

[65 FR 10689, Feb. 29, 2000, as amended at 78 FR 67927, Nov. 13, 2013]

### § 770.6 May interested persons and entities request that real property at defense nuclear facilities be transferred for economic development?

Any person or entity may request that specific real property be made available for transfer for economic development pursuant to procedures in § 770.7. A person or entity must submit such a request in writing to the Field Office Manager who is responsible for the real property.

### § 770.7 What procedures are to be used to transfer real property at defense nuclear facilities for economic development?

(a) *Proposal*. The transfer process starts when a potential purchaser or lessee submits to the Field Office Manager a proposal for the transfer of real property that DOE has included on a list of available real property, as provided in § 770.5 of this part.

(1) A proposal must include (but is not limited to):

(i) A description of the real property proposed to be transferred;

(ii) The intended use and duration of use of the real property, including potential users and an indication that these users are interested in participating in the economic development of the property;

(iii) A description of the economic development that would be furthered by the transfer (*e.g.*, jobs to be created or retained, improvements to be made) or what reuse or reutilization would be accomplished by means of a description of the business to be created (direct and indirect economic benefits that will result due to the proposed transfer);

(iv) Information supporting the economic viability of the proposed development; and

(v) The consideration offered and any financial requirements.

(2) The person or entity should state in the proposal whether it is or is not requesting indemnification against claims based on the release or threatened release of a hazardous substance or pollutant or contaminant resulting from DOE activities.

(3) If a proposal for transfer does not contain a statement regarding indemnification, the Field Office Manager will notify the person or entity by letter of the potential availability of indemnification under this part, and will request that the person or entity either modify the proposal to include a request for indemnification or submit a statement that it is not seeking indemnification.

(b) *Decision to transfer real property*. After review of the proposal, DOE will notify, by letter, the person or entity that submitted the proposal of DOE's decision whether or not a transfer of the real property by sale or lease is in the best interest of the Government. If DOE determines the transfer is in the Government's best interest, then the Field Office Manger will begin development of a transfer agreement.

(c) *Congressional committee notification*. DOE may not transfer real property under this part until 30 days have

elapsed after the date DOE notifies congressional defense committees of the proposed transfer. The Field Office Manager will notify congressional defense committees through the Secretary of Energy.

[65 FR 10689, Feb. 29, 2000, as amended at 78 FR 67927, Nov. 13, 2013]

### § 770.8 May DOE transfer real property at defense nuclear facilities for economic development at less than fair market value?

DOE generally attempts to obtain fair market value for real property transferred for economic development, but DOE may agree to sell or lease such property for less than fair market value if the statutory transfer authority used imposes no market value restriction, and:

(a) The real property requires considerable infrastructure improvements to make it economically viable, or

(b) A conveyance at less than market value would, in the DOE's judgment, further the public policy objectives of the laws governing the downsizing of defense nuclear facilities.

### § 770.9 What conditions apply to DOE indemnification of claims against a person or entity based on the release or threatened release of a hazardous substance or pollutant or contaminant attributable to DOE?

(a) If an agreement for the transfer of real property for economic development contains an indemnification provision, the person or entity requesting indemnification for a particular claim must:

(1) Notify the Field Office Manager in writing within two years after such claim accrues under § 770.11 of this part;

(2) Furnish the Field Office Manager, or such other DOE official as the Field Office Manager designates, with evidence or proof of the claim;

(3) Furnish the Field Office Manager, or such other DOE official as the Field Office Manager designates, with copies of pertinent papers (*e.g.*, legal documents) received by the person or entity;

(4) If requested by DOE, provide access to records and personnel of the person or entity for purposes of defending or settling the claim; and

(5) Provide certification that the person or entity making the claim did not contribute to any such release or threatened release.

(b) DOE will enter into an indemnification agreement if DOE determines that indemnification is essential for the purpose of facilitating reuse or redevelopment.

(c) DOE may not indemnify any person or entity for a claim if the person or entity contributed to the release or threatened release of a hazardous substance or pollutant or contaminant that is the basis of the claim.

(d) DOE may not indemnify a person or entity for a claim made under an indemnification agreement if the person or entity refuses to allow DOE to settle or defend the claim.

(e) Any indemnification provided will apply to any successor, assignee, transferee, lender or lessee of the original entity that acquires ownership or control.

[65 FR 10689, Feb. 29, 2000, as amended at 78 FR 67927, Nov. 13, 2013]

### § 770.10 When must a person or entity, who wishes to contest a DOE denial of request for indemnification of a claim, begin legal action?

If DOE denies the claim, DOE must provide the person or entity with a notice of final denial of the claim by DOE by certified or registered mail. The person or entity must begin legal action within six months after the date of mailing.

### § 770.11 When does a claim "accrue" for purposes of notifying the Field Office Manager under § 770.9(a) of this part?

For purposes of § 770.9(a) of this part, a claim ''accrues'' on the date on which the person asserting the claim knew, or reasonably should have known, that the injury to person or property was caused or contributed to by the release or threatened release of a hazardous substance, pollutant, or contaminant as a result of DOE activities at the defense nuclear facility on which the real property is located.

# PART 780—PATENT COMPENSATION BOARD REGULATIONS

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AUTHORITY: 42 U.S.C. 7151, 7254; 42 U.S.C. 5814, 5815; 42 U.S.C. 2183, 2187, 2223; 35 U.S.C. 183; North American Free Trade Agreement, Article 1709(10), as implemented by the North American Free Trade Agreement Implementing Act, Pub. L. 103–182.

SOURCE: 46 FR 39581, Aug. 4, 1981, unless otherwise noted.

## Subpart A—General Provisions

### § 780.1 Scope.

The regulations in this part establish the procedures, terms, and conditions for Patent Compensation Board:

(a) Proceedings to declare a patent affected with the public interest pursuant to section 153a of the Atomic Energy Act of 1954 (Pub. L. 83–703; 42 U.S.C. 2183);

(b) Proceedings to determine a reasonable royalty fee pursuant to section 157 of the Atomic Energy Act of 1954;

(c) Proceedings for the grant of an award pursuant to section 157 of the Atomic Energy Act of 1954;

(d) Proceedings to obtain compensation pursuant to section 173 of the Atomic Energy Act of 1954 and the Invention Secrecy Act (35 U.S.C. 183);

And for applications to the Department of Energy (DOE) for a patent license pursuant to sections 153b(2) and 153c of the Atomic Energy Act of 1954.

### § 780.2 Definitions.

(a) *Act* means the Atomic Energy Act of 1954 (Pub. L. 83–703; 42 U.S.C. 2011).

(b) *Application* means the application filed by an applicant for a patent license, for the determination of a reasonable royalty fee, for an award, or for compensation under this part.

(c) *Board* means the Patent Compensation Board.

(d) *Chairman* means the Chairman of the Patent Compensation Board.

(e) *Department*, or *DOE*, or *Department of Energy* means the Department of Energy, established by the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101).

(f) *Party* means the applicant, patent owner, Department representative, and any person admitted as a party by the Board for any proceeding under this part.

(g) *Patent Owner* means the owner of record in the United States Patent and Trademark Office.

(h) *Secretary* means the Secretary of the Department of Energy or the delegate of the Secretary of Energy.

### § 780.3 Jurisdiction of the Patent Compensation Board.

The Patent Compensation Board was established by section 157 of the Atomic Energy Act of 1954. It was transferred to the Energy Research and Development Administration pursuant to section 104(d) of the Energy Reorganization Act of 1974 (42 U.S.C. 5814) and subsequently to the Department of Energy by section 301 of the Department of Energy Organization Act (42 U.S.C. 7151). Under section 157, the Board is given authority to determine reasonable royalty fees or resolve issues involving the grant of awards. In addition, the Board has authority:

(a) To hear and make decisions as to compensation under section 173 of the Act (42 U.S.C. 2223) and the Invention Secrecy Act (35 U.S.C. 183);

(b) To hear and make decisions as to whether a specific patent is affected with the public interest pursuant to section 153a of the Act;

(c) To hear and make decisions as to whether a specific patent license should be granted under sections 153b(2) and 153e of the Act;

(d) To give notices, hold hearings and take such other actions as may be necessary under section 153; and

(e) To exercise all powers available under the Act and necessary for the performance of these duties, including the issuance of such rules of procedure as may be necessary.

### § 780.4 Filing and service of documents.

(a) All communications regarding proceedings subject to this part should be addressed to: Chairman, Patent Compensation Board, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585. All documents offered for filing shall be accompanied by proof of service upon all parties to the proceeding or their attorneys of record as required by law, rule, or order of the Department. Service on the Department shall be by mail or delivery to: Office of Assistant General Counsel for Technology Transfer and Intellectual Property, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585.

(b) Filing by mail will be deemed to be complete as of the time of deposit in the United States mail.

[77 FR 4887, Feb. 1, 2012]

### § 780.5 Applications—General form, content, and filing.

(a) Each application shall be signed by the applicant and shall state the applicant's name and address. If the applicant is a corporation, the application shall be signed by an authorized officer of the corporation, and the application shall indicate the state of incorporation. Where the applicant elects to be represented by counsel, a signed notice to that effect shall be filed with the Board.

(b) Each application must contain a concise statement of all of the essential facts upon which it is based. No particular form of statement is required. Each application shall be verified by the applicant or by the person having the best knowledge of such facts. In the case of facts stated on information and belief, the source of such information and grounds of belief shall be given.

(c) Each application must identify any person whose interest the applicant believes may be affected by the proceeding before the Board.

(d) Three copies of each application shall be filed with the Board. However, only one copy of the accompanying exhibits need be filed.

(e) The Board will acknowledge the receipt of the application in writing

and advise the applicant of the docket number assigned to the application.

### § 780.6 Department participation.

The Department shall be a party to all proceedings under this part, and the Office of the General Counsel will represent the Department's interests before the Board.

### § 780.7 Designation of interested persons as parties.

In any proceeding under this part, the Board shall admit as a party any person, upon application of such person or on the Board's own initiative, whose interest may be affected by the proceeding.

### § 780.8 Security.

In any proceeding under this part, the Board shall take such steps as necessary pursuant to chapter 12 of the Act and section 181 of the Act to assure compliance with Department security regulations and the common defense.

### § 780.9 Make-up of the Patent Compensation Board.

The DOE Secretary of Energy, or a person acting in that position, shall appoint a three member panel to serve as the Patent Compensation Board to hear and decide cases falling under the subject matter jurisdiction set forth in § 780.3 of this part. The Secretary of Energy shall further designate one member as the chairman. The Board may be appointed to hear cases on an ad hoc basis, or on other such term of service deemed appropriate by the Secretary. All proceedings shall be conducted pursuant to rules of procedure provided by the Board.

[77 FR 4887, Feb. 1, 2012]

### § 780.10 Decision of the Board.

The decision of the Board in any proceeding under this part shall constitute the final action of the Department on the matter.

### § 780.11 Records of the Board.

The records of the Board in cases filed before it, including the pleadings, the transcript, and the final decision, shall be open to public inspection, except to the extent that such records or portions thereof are withheld from disclosure by the Board pursuant to 10 CFR part 1004.

## Subpart B—Declaring Patents Affected With the Public Interest Under Section 153a of the Atomic Energy Act of 1954

### § 780.20 Initiation of proceeding.

When any person in the Department believes that the Department should declare a patent affected with the public interest pursuant to section 153a of the Act, that person shall make such a recommendation to the Under Secretary. If, after consultation with the General Counsel, the Under Secretary agrees with the recommendation, the Under Secretary shall initiate in writing a proceeding under section 153a before the Board. The communication of the Under Secretary to the Board shall identify the patent and state the basis for the proposed declaration.

### § 780.21 Notice.

The Board will serve upon the patent owner and all other parties a written notice of the Department's proposed action to declare the patent affected with the public interest, and the notice shall identify the patent and state the basis for the proposed declaration.

### § 780.22 Opposition, support and request for hearing.

(a) Any party may, within thirty (30) days after service of the notice or such other time as may be provided by the terms of the notice, file with the Board a written statement in opposition to or in support of the Department's proposed action. Such statement may also include a request for hearing. The statement shall contain a concise description of the facts, law, or any other relevant matter which the party believes should be reviewed by the Board during its consideration of the proposed declaration. If the request for a hearing is timely received, the Board shall call a hearing and provide notice of the time and place to all parties.

(b) Failure of all parties to oppose the proposed action or to request a hearing within the time specified in

the notice shall be deemed an acquiescence to that action and may result in a declaration by the Board that the patent is affected with the public interest.

### § 780.23 Hearing and decision.

If a timely request for a hearing is made by any party, the Board will proceed with a hearing and decision. If a hearing is not requested, the Board shall prepare and issue its decision on the record.

### § 780.24 Criteria for declaring a patent affected with the public interest.

A patent shall be declared to be affected with the public interest pursuant to section 153a of the Act upon the Board's final decision that:

(a) The invention or discovery covered by the patent is of primary importance in the production or utilization of special nuclear material or atomic energy; and

(b) The licensing of such invention or discovery under section 153 of the Act is of primary importance to effectuate the policies and purposes of the Act.

## Subpart C—Application for a License Pursuant to Section 153b(2) of the Atomic Energy Act of 1954

### § 780.30 Filing of application.

An applicant for a license pursuant to section 153b(2) of the Act, under a patent which the Department has declared to be affected with the public interest, shall file an application with the Board in accordance with § 780.5. The Board will docket the application and serve notice of the docketing upon all parties.

### § 780.31 Contents of application.

Each application shall contain, in addition to the requirements specified in § 780.5, the following information:

(a) The activities in the production or utilization of special nuclear material or atomic energy to which applicant proposes to apply the patent license;

(b) The nature and purpose of the applicant's intended use of the patent license;

(c) The relationship of the invention or discovery to the authorized activities to which it is to be applied, including an estimate of the effect on such activities stemming from the grant or denial of the license;

(d) Efforts made by the applicant to obtain a patent license from the owner of the patent;

(e) Terms, if any, on which the owner of the patent proposes to grant the applicant a patent license;

(f) The terms the applicant proposes for the patent license; and

(g) A request for either a hearing or a decision on the record.

### § 780.32 Response and request for hearing.

Any party within thirty (30) days after service of the notice of docketing of the application:

(a) May file with the Board a response containing a concise statement of the facts or law or any other relevant information which that party believes should be considered by the Board in opposition to or in support of the proposed application; and

(b) May file a request for a hearing or for a decision on the record.

### § 780.33 Hearing and decision.

If any party requests a hearing, the Board will proceed with a hearing and decision. If a hearing is not requested, the Board shall on the basis of the record prepare and issue its decision.

### § 780.34 Criteria for decision to issue a license.

A license shall issue to the applicant to use the invention covered by the patent declared to be affected with the public interest pursuant to subsection 153b(2) of the Act upon a final decision that:

(a) The activities to which the patent license is proposed to be applied are of primary importance to the applicant's conduct of an activity authorized under the Act; and

(b) The applicant has made efforts to obtain reasonable commercial terms and conditions and such efforts have not been successful within a reasonable period of time. The requirement to make such efforts may be waived by the Board in the case of a national

emergency or other circumstances of extreme urgency or in cases of public non-commercial use. Where this requirement is waived due to national emergency or other circumstances of extreme urgency, the owner of the patent shall be notified as soon as reasonably practicable. Where this requirement is waived for a public non-commercial use, the owner of the patent shall be notified promptly.

[46 FR 39581, Aug. 4, 1981, as amended at 58 FR 68734, Dec. 29, 1993]

### § 780.35 Communication of decision to General Counsel.

Following a determination to issue a patent license under section 153b(2) of the Act, the Board shall send the decision to the General Counsel and instruct the General Counsel to issue the license on terms deemed equitable by the Department and generally not less fair than those granted by the patentee or by the Department to similar licensees for comparable use.

### § 780.36 Conditions and issuance of license.

(a) Upon receipt of the Board's decision and instruction to issue a patent license, the General Counsel shall issue a license which complies with the following:

(1) The scope and durations of such use shall be limited to the purpose for which it was authorized;

(2) Such use shall be non-exclusive;

(3) Such use shall be non-assignable, except with that part of the enterprise or goodwill that enjoys such use;

(4) Any such use shall be authorized predominantly for the supply of the U.S. market; and,

(5) Authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances that led to it cease to exist and are unlikely to recur.

(b) The Board shall have the authority to review, on motivated request, the continued existence of these circumstances. The parties will propose and agree on a reasonable royalty fee within a reasonable time as determined by the General Counsel. A reasonable royalty shall provide adequate remuneration for the circumstances of each case, taking into account the economic value of the authorization. If a party does not agree with the terms and conditions of the license as determined by the General Counsel or if a royalty fee cannot be agreed upon within the reasonable time period established by the General Counsel, any party may, within 30 days after the expiration of such time period, initiate a proceeding before the Board, in accordance with subpart E of this part, for a reconsideration of the General Counsel's determination. After the proceeding under subpart E of this part is completed, the General Counsel shall modify the patent license in accordance with the Board's determination.

[58 FR 68734, Dec. 29, 1993]

## Subpart D—Application for a License Pursuant to Section 153c of the Atomic Energy Act of 1954

### § 780.40 Filing of application.

An application to the Department, pursuant to section 153c of the Act, for the issuance of a license to use the invention or discovery covered by a patent useful in the production or utilization of special nuclear material or atomic energy shall be filed with the Board in accordance with requirements of § 780.5.

### § 780.41 Contents of application.

In addition to the information specified in § 780.5, each application shall contain the following:

(a) The applicant's contention, with supporting data, that the invention or discovery covered by the patent is of primary importance in the production or utilization of special nuclear material or atomic energy;

(b) The applicant's contention, with supporting data, that the licensing of such invention or discovery is of primary importance to the conduct of the activities of the applicant, including information concerning:

(1) The activities in the production or utilization of special nuclear material or atomic energy to which applicant proposes to apply the license;

(2) The nature and purpose of the applicant's intended use of the patent license; and

(3) The relationship of the invention or discovery to the activities to which it is to be applied, including an estimate of the effect of such activities stemming from the grant or denial of the license.

(c) The applicant's contention, with supporting data, that the activities to which the patent license are proposed to be applied are of primary importance to the furtherance of policies and purposes of the Act;

(d) The applicant's contention, with supporting data, that such applicant cannot otherwise obtain a patent license from the owner of the patent on terms which are reasonable for the applicant's intended use of the patent, including information concerning:

(1) Efforts made by applicant to obtain a patent license from the owner of the patent; and

(2) Terms, if any, on which the owner of the patent proposed to grant applicant a patent license.

(e) The terms the applicant proposes as reasonable for the patent license; and

(f) A copy of any license, permit, or lease obtained by the applicant under the procedures outlined in section 153(c) of the Act.

### § 780.42 Notice of hearing.

Within thirty (30) days after the filing of the application, the Board will serve on all parties a notice of hearing to be held not later than sixty (60) days after the filing of the application.

### § 780.43 Response.

Any party may file a response with the Board containing a concise statement of the facts or law or any other relevant information in opposition to or in support of the application which that party believes should be considered by the Board. Such response must be filed by a party within twenty (20) days after being served a copy of the application.

### § 780.44 Hearing and decision.

In accordance with section 153d of the Act, the Board shall hold a hearing and issue a final decision on the application.

### § 780.45 Criteria for decision to issue a license.

A license shall issue to the applicant to use the invention covered by the patent for the purposes stated in the application upon a final decision that:

(a) The invention or discovery covered by the patent is of primary importance in the production or utilization of special nuclear material or atomic energy;

(b) The licensing of such invention or discovery is of primary importance to the conduct of the activities of the applicant;

(c) The activities to which the patent license is proposed to be applied by such applicant are of primary importance to the furtherance of policies and purposes of the Act; and

(d) The applicant has made efforts to obtain reasonable commercial terms and conditions and such efforts have not been successful within a reasonable period of time. The requirement to make such efforts may be waived by the Board in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. Where this requirement is waived due to national emergency or other circumstances of extreme urgency, the owner of the patent shall be notified as soon as reasonably practicable. Where this requirement is waived for a public non-commercial use, the owner of the patent shall be notified promptly.

[46 FR 39581, Aug. 4, 1981, as amended at 58 FR 68734, Dec. 29, 1993]

### § 780.46 Communication of decision to General Counsel.

When the Board decides to issue a patent license under section 153c of the Act, the Board shall send the decision to the General Counsel and instruct the General Counsel to issue the license on terms deemed equitable by the Department and generally not less fair than those granted by the patentee or by the Department to similar licensees for comparable use.

### § 780.47 Conditions and issuance of license.

(a) Upon receipt of the Board's decision and instruction to issue a patent license, the General Counsel shall issue a license which complies with the following:

(1) The scope and durations of such use shall be limited to the purpose for which it was authorized;

(2) Such use shall be non-exclusive;

(3) Such use shall be non-assignable, except with that part of the enterprise or goodwill that enjoys such use;

(4) Any such use shall be authorized predominantly for the supply of the U.S. market; and,

(5) Authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances that led to it cease to exist and are unlikely to recur.

(b) The Board shall have the authority to review, on motivated request, the continued existence of these circumstances. The parties will propose and agree on a reasonable royalty fee within a reasonable time as determined by the General Counsel. A reasonable royalty shall provide adequate remuneration for the circumstances of each case, taking into account the economic value of the authorization. If a party does not agree with the terms and conditions of the license as determined by the General Counsel or if a royalty fee cannot be agreed upon within the reasonable time period established by the General Counsel, any party may, within 30 days after the expiration of such time period, initiate a proceeding before the Board, in accordance with subpart E of this part, for a reconsideration of the General Counsel's determination. After the proceeding under subpart E of this part is completed, the General Counsel shall modify the patent license in accordance with the Board's determination.

[46 FR 39581, Aug. 4, 1981, as amended at 58 FR 68734, Dec. 29, 1993]

## Subpart E—Application for Royalties and Awards Under Section 157 of the Atomic Energy Act of 1954 and Compensation Under Section 173 of the Atomic Energy Act of 1954 and the Invention Secrecy Act (35 U.S.C. 183)

### § 780.50 Applicants.

(a) Any owner or licensee of a patent licensed under section 158 or subsections b or e of section 153 of the Act may file an application with the Board for the determination of a reasonable royalty fee.

(b) Any owner or licensee of a patent licensed under subsections b or e of section 153 of the Act may file an application with the Board for the modification of any terms and conditions of the license.

(c) Any person who has made an invention or discovery useful in the production or utilization of special nuclear material or atomic energy, has complied with the provisions of section 151c, but, under the Act, is not entitled to a royalty for such invention or discovery, may file an application for an award.

(d) Any owner of a patent application that contains restricted data not belonging to the United States which the Department has communicated to any foreign nation may make application for just compensation pursuant to section 173 of the Act.

(e) Any patent applicant, whose patent is withheld because of a secrecy order issued at the request of the Department may, beginning at the date the patent applicant is notified that, except for such order, the application is otherwise in condition for allowance, apply for compensation for the damage caused by the secrecy order and/or for the use of the invention by the Government, resulting from any disclosure to the Department required by the Invention Secrecy Act.

### § 780.51 Form and content.

(a) Each application shall contain a statement of the applicant's interest in the patent, patent application, invention or discovery and identify any

other claimants of whom the applicant has knowledge.

(b) Each application must contain a concise statement of all of the essential facts upon which it is based. No particular form of statement is required, but it will facilitate consideration of the application if the following specific data accompany the application:

(1) In the case of an issued patent, a copy of the patent.

(2) In the case of a patent application, a copy of the application and of all Patent and Trademark Office actions and responses thereto.

(3) In the case of an invention or discovery as to which a report has been filed with the Department pursuant to subsection c of section 151 of the Act, a copy of such report.

(4) In the case of an award, the date relied upon as the date of invention.

(5) In all cases, a statement of the extent to which the invention or discovery was developed through federally financed research or with other Federal support.

(6) In all cases, the degree of the utility, novelty, and importance of the invention or discovery.

(7) In all cases, a statement of the actual use by the Federal Government or others of such invention or discovery, to the extent known to the applicant.

(8) In all cases, the cost of developing the invention or discovery and acquiring the patent or patent application.

(9) The royalty fee proposed, the proposed terms and conditions of a license agreement, or the amount sought as compensation or award, as well as the basis used in calculating such fee, compensation or award and whether a lump sum or periodic payments are sought.

(10) In an application for just compensation pursuant to section 173 of the Act, the ownership of the invention that is the subject matter of the patent application at the time the Department communicated the restricted data shall be set forth, and any restricted data contained in the application shall be specifically identified.

(11) In an application for compensation under the authority provided in the Invention Secrecy Act (35 U.S.C. 183), for the damage caused by imposition of a secrecy order on a patent application and/or for the use of the invention by the Government, the date of the secrecy order, the date of the notice that the patent application is in condition for allowance, and, if known to the applicant, the date of the first use of the invention by the Government.

### § 780.52 Notice and hearing.

The Board shall, in its discretion, afford the applicable party an opportunity for a hearing for the presentation of relevant evidence. Thirty (30) days notice shall be given of the time and place of such hearing. After expiration of the notice period, the Board shall proceed with a hearing and render its decision.

### § 780.53 Criteria for decisions for royalties, awards and compensation.

(a) In deciding a reasonable royalty fee for a patent licensed under section 158 or sections 153b or 153e of the Act, the Board shall consider:

(1) The economic value of the compulsory license and the Board shall strive to provide adequate remuneration for the circumstances of each case.

(2) Any defense, general or special, that a defendant could plead in an action for infringement;

(3) The extent to which such patent was developed through federally financed research or with other Federal support;

(4) The degree of utility, novelty, and importance of the invention or discovery; and

(5) The cost to the owner of the patent of developing such invention or discovery or of acquiring such patent.

(b) In deciding whether or not to grant an award, under section 157 of the Act, for the making of an invention or discovery useful in the production or utilization of special nuclear material or atomic energy, the Board shall take into account the considerations set forth in § 780.53(a) of this part and the actual use of such invention or discovery.

(c) In deciding whether or not to provide compensation, pursuant to section 173 of the Act, to a person who owns a patent application that contains restricted data not belonging to the United States which the Department

has communicated to a foreign nation, the Board shall take into account the considerations set forth in §780.53(b) of this part and the damage to the applicant resulting from such communication.

(d) In the course of its review of an application to provide compensation, pursuant to 35 U.S.C. 183, to an applicant whose patent was withheld because of a secrecy order issued at the request of the Department, the Board shall take into account the considerations set forth in §780.53(b) of this part and:

(1) The damage sustained by the applicant as a result of the secrecy order; and

(2) The use of the invention by the Government resulting from the disclosure of such invention to the Department.

[46 FR 39581, Aug. 4, 1981, as amended at 58 FR 68735, Dec. 29, 1993]

# PART 781—DOE PATENT LICENSING REGULATIONS

GENERAL PROVISIONS

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781.1 Scope.
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TYPES OF LICENSES AND CONDITIONS FOR LICENSING

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SPECIAL PROVISIONS

781.71 [Reserved]
781.81 [Reserved]

AUTHORITY: 42 U.S.C. 2186, 42 U.S.C. 2201(g), and 35 U.S.C. 207–209.

SOURCE: 45 FR 73447, Nov. 4, 1980, unless otherwise noted.

## GENERAL PROVISIONS

### §781.1 Scope.

The regulations of this part supplement the U.S. Department of Commerce regulations, entitled LICENSING OF GOVERNMENT OWNED INVENTIONS, at 37 CFR Part 404.

[77 FR 4889, Feb. 1, 2012]

### §781.2 Policy.

(a) It is the policy of this regulation to use the patent system to promote the utilization of inventions arising from Department of Energy supported research and development.

(b) Decisions as to grants or denials of any license application will, in the discretion of the Secretary of Energy, be based on the Department of Energy's view of what is in the best interests of the United States and the general public under the provisions of these regulations. Decisions of the Department of Energy under these regulations may be made on the Secretary of Energy's behalf by the Assistant General Counsel for Technology Transfer and Intellectual Property, except where otherwise delegated.

[77 FR 4889, Feb. 1, 2012]

### §781.3 [Reserved]

### §781.4 Communications.

All communications concerning the regulations in this part, including applications for licenses, should be addressed or delivered to the General Counsel, Attention: Assistant General Counsel for Technology Transfer and Intellectual Property, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585.

[77 FR 4889, Feb. 1, 2012]

## TYPES OF LICENSES AND CONDITIONS FOR LICENSING

### §§781.51–781.52 [Reserved]

### §781.53 Additional licenses.

Subject to any outstanding licenses, nothing in this part shall preclude the Department of Energy from granting additional nonexclusive, or exclusive, or partially exclusive licenses for inventions covered by this part when the Department of Energy determines that to do so would provide for an equitable exchange of patent rights. The following circumstances are examples in which such licenses may be granted:

(a) In consideration of the settlement of interferences or other administrative proceedings before the U.S. Patent and Trademark Office;

(b) In consideration of a release of any claims;

(c) In exchange for or as a part of the consideration for a license under adversely held patents;

(d) As necessary for meeting obligations of the U.S. under any treaty, international agreement arrangement or cooperation, memorandum of understanding or similar arrangement; or

(e) In consideration for the settlement or resolution of any proceeding under the Department of Energy Organization Act or other law.

[77 FR 4889, Feb. 1, 2012]

PROCEDURES

**§§ 781.61–781.64 [Reserved]**

**§ 781.65 Appeals.**

(a) Standing. The following parties have the right to appeal under this part:

(1) Pursuant to 37 CFR 404.11:

(i) A person whose application for a license has been denied;

(ii) A licensee whose license has been modified or terminated, in whole or in part;

(iii) A person who timely filed a written objection in response to the notice required by 37 CFR 404.7(a)(1)(i) or (b)(1)(i) and who can demonstrate to the satisfaction of the Federal agency that such person may be damaged by the agency action; or

(2) A management and operating contractor appealing an agency decision to grant a copyright license to a third party pursuant to the Rights in Data-Technology Transfer clause for DOE management and operating contracts per 48 CFR part 970.

(b) Notice of Appeal. Appeal under paragraph (a) of this section shall be initiated by filing a Notice of Appeal with the Secretary, ATTN: Deputy General Counsel for Technology Transfer and Procurement (''Deputy General Counsel''), within thirty (30) days from the date of receipt of a written notice by the Department of Energy of an action set forth in paragraph (a) of this section. The Notice of Appeal shall specify the portion of the decision from which the appeal is taken. A statement of fact and argument in the form of a brief in support of the appeal shall be submitted with the Notice of Appeal or within thirty (30) days thereafter.

(c) Procedure. Appeals under this section shall be conducted pursuant to rules of procedure provided by the Deputy General Counsel.

(d) Within sixty (60) days of receiving appellant's brief pursuant to paragraph (b) of this section or such other time period set by the Deputy General Counsel, the Office of the Assistant General Counsel for Technology Transfer and Intellectual Property shall submit to the Deputy General Counsel a response brief and shall timely serve a copy of the response brief to appellant.

(e) The Deputy General Counsel shall consider the facts and arguments submitted in appellant's brief submitted under paragraph (b) of this section, as well as those presented by the Assistant General Counsel for Technology Transfer and Intellectual Property. An appeal by a licensee under paragraph (a)(1)(ii) of this section may include a hearing, upon request of the licensee, to address a dispute over any relevant fact. Such request for a hearing must be received by the Deputy General Counsel within thirty (30) days of appellant's receipt of the response brief.

(f) The Deputy General Counsel shall issue a written decision, which shall constitute the final action of the Department on the matter.

(g) The parties may agree to Alternate Dispute Resolution in lieu of an appeal.

(h) Appeals Arising Under National Nuclear Security Administration (NNSA) Management and Operating Contracts. For appeals pursuant to paragraph (a)(2) of this section arising under management and operating contracts administered by NNSA for NNSA facilities, the NNSA Deputy General Counsel for Procurement shall be designated as the appeal authority (Deputy General Counsel) pursuant to paragraphs (b) through (f) of this section.

[77 FR 4890, Feb. 1, 2012]

**§ 781.66 [Reserved]**

SPECIAL PROVISIONS

**§ 781.71 [Reserved]**

**§ 781.81 [Reserved]**

# PART 782—CLAIMS FOR PATENT AND COPYRIGHT INFRINGEMENT

## Subpart A—General

Sec.
782.1 Purpose.
782.2 Objectives.
782.3 Authority.

## Subpart B—Requirements and Procedures

782.5 Contents of communication initiating claim.
782.6 Processing of administrative claims.
782.7 Incomplete notice of infringement.
782.8 Indirect notice of infringement.

AUTHORITY: Dept. of Energy Organization Act; sec. 651, 91 Stat. 601, 42 U.S.C. 7261; Atomic Energy Act of 1954; sec. 107(d), 88 Stat. 1241, 42 U.S.C. 5817(d); sec. 161(g), 80 Stat. 443, 42 U.S.C. 2201(g); sec. 172, 62 Stat. 933, 42 U.S.C. 2223; Foreign Assistance Act of 1961, sec. 2356, 75 Stat. 440, 22 U.S.C. 2356; Patents, Invention Secrecy Act; sec. 183, 66 Stat. 4, 35 U.S.C. 183; Judiciary and Judical Procedure Act, sec. 1498, 62 Stat. 601, 28 U.S.C. 1498.

SOURCE: 45 FR 26950, Apr. 22, 1980, unless otherwise noted.

## Subpart A—General

### § 782.1 Purpose.

The purpose of this regulation is to set forth policies and procedures for the filing and disposition of claims asserted against the Department of Energy of infringement of privately owned rights in patented inventions or copyrighted works.

### § 782.2 Objectives.

Whenever a claim of infringement of privately owned rights in patented inventions or copyrighted works is asserted against the Department of Energy, all necessary steps shall be taken to investigate and to settle administratively, to deny, or otherwise to dispose of such claim prior to suit against the United States.

### § 782.3 Authority.

The General Counsel or the General Counsel's delegate is authorized to investigate, settle, deny, or otherwise dispose of all claims of patent and copyright infringement pursuant to 42 U.S.C. 2201(g), 2223, 5817(d) and 7261; the Foreign Assistance Act of 1961, 22 U.S.C. 2356 (formerly the Mutual Security Acts of 1951 and 1954); the Invention Secrecy Act, 35 U.S.C. 183; and 28 U.S.C. 1498.

## Subpart B—Requirements and Procedures

### § 782.5 Contents of communication initiating claim.

(a) *Requirements for claim.* A patent or copyright infringement claim for compensation, asserted against the United States as represented by the Department of Energy under any of the applicable statutes cited in § 782.3, must be actually communicated to and received by an agency, organization, office, or field establishment within the Department of Energy. Claims must be in writing and must include the following:

(1) An allegation of infringement;

(2) A request, either expressed or implied, for compensation;

(3) A citation of the patents or copyrighted items alleged to be infringed;

(4) In the case of a patent infringement claim, a sufficiently specific designation to permit identification of the items or processes alleged to infringe the patents, giving the commercial designation if known to the claimant, or, in the case of a copyright infringement claim, the acts alleged to infringe the copyright;

(5) In the case of a patent infringement claim, a designation of at least one claim of each patent alleged to be infringed or, in the case of a copyright infringement claim, a copy of each work alleged to be infringed;

(6) As an alternative to paragraphs (a) (4) and (5) of this section, certification that the claimant has made a bona fide attempt to determine the items or processes which are alleged to infringe the patents, or the acts alleged

to infringe the copyrights, but was unable to do so, giving reasons, and stating a reasonable basis for the claimant's belief that the patents or copyrighted items are being infringed.

(b) *Additional information for patent infringement claims.* In addition to the information listed in paragraph (a) of this section the following material and information generally is necessary in the course of processing a claim of patent infringement. Claimants are encouraged to furnish this information at the time of filing a claim to permit rapid processing and resolution of the claim.

(1) A copy of the asserted patents and identification of all claims of the patents alleged to be infringed.

(2) Identification of all procurements known to claimant that involve the accused items or processes, including the identity of the vendors or contractors and the Government acquisition activity or activities.

(3) A detailed identification and description of the accused articles or processes, particularly where the articles or processes relate to components or subcomponents of the item acquired, and an element-by-element comparison of representative claims with the accused articles or processes. If available, the identification and description should include documentation and drawings to illustrate the accused articles or processes in sufficient detail to enable verification that the claims of the asserted patents read on the accused articles or processes.

(4) Names and addresses of all past and present licensees under the patents and copies of all license agreements and releases involving the patents.

(5) A brief description of all litigation in which the patents have been or are now involved, and their present status.

(6) A list of all persons to whom notices of infringement have been sent, including all departments and agencies of the Government, and a statement of the status or ultimate disposition of each.

(7) A description of Government employment or military service, if any, by the inventors or patent owner.

(8) A list of all contracts between the Government and inventors, patent owner, or anyone in privity with them that were in effect at the time of conception or actual reduction to practice of the inventions covered by the patents.

(9) Evidence of title to the asserted patents or other right to make the claim.

(10) If it is available to claimant, a copy of the Patent Office file of each patent.

(11) Pertinent prior art of which the claimant has become aware after issuance of the asserted patents.

In addition to the foregoing, if claimant can provide a statement that the investigation may be limited to the specifically identified accused articles or processes, or to a specific acquisition (e.g. identified contracts), it may speed disposition of the claim.

(c) *Denial for refusal to provide information.* In the course of investigating a claim, it may become necessary for the Department of Energy to request information in the control and custody of claimant that is relevant to the disposition of the claim. Failure of the claimant to respond to a request for such information may be sufficient reason alone for denying a claim.

### § 782.6 Processing of administrative claims.

(a) *Filing and forwarding of claims.* All communications regarding claims should be addressed to:

General Counsel, ATTN: Assistant General Counsel for Patents, Office of the General Counsel, U.S. Department of Energy, Washington, DC 20545.

If any communication relating to a claim or possible claim of patent or copyright infringement is received by an agency, organization, office, or field establishment within the Department of Energy, it should be forwarded to the Assistant General Counsel for Patents.

(b) *Disposition and notification.* The General Counsel shall investigate and administratively settle, deny, or otherwise dispose of each claim by denial or settlement. When a claim is denied, the Department shall so notify the claimant or his authorized representative and provide the claimant with the reasons for denying the claim. Disclosure

of information shall be subject to applicable statutes, regulations, and directives pertaining to security, access to official records, and the rights of others.

### § 782.7 Incomplete notice of infringement.

(a) If a communication alleging patent or copyright infringement is received that does not meet the requirements set forth above in § 782.5, the sender shall be advised in writing by the General Counsel:

(1) That the claim for infringement has not been satisfactorily presented; and

(2) Of the elements considered necessary to establish a claim.

(b) A communication, such as a mere offer of a license, in which an infringement is not alleged in accordance with § 782.5(a) of this part shall not be considered a claim for infringement.

### § 782.8 Indirect notice of infringement.

If a patent or copyright owner communicates an allegation of infringement in the performance of a Government contract, grant, or other arrangement to addressees other than those specified in § 782.5(a), such as Department of Energy contractors including contractors operating government-owned facilities, the communication shall not be considered a claim within the meaning of § 782.5 until it meets the requirements of that section.

## PART 783—WAIVER OF PATENT RIGHTS

Sec.
783.1 Waiver.
783.2 Limitations.

AUTHORITY: Secs. 152, 161, 68 Stat. 944, 948, as amended; (42 U.S.C. 2182, 2201).

SOURCE: 41 FR 56784, Dec. 30, 1976, unless otherwise noted.

### § 783.1 Waiver.

The Department of Energy, hereinafter ''DOE'', waives its rights under section 152 of the Atomic Energy Act of 1954 (66 Stat. 944) with respect to inventions and discoveries resulting from the use of the following materials and services:

(a) Source materials, special nuclear materials, and heavy water distributed by DOE in accordance with the ''Schedules of Base Charges for Materials Sold of Leased by DOE for Use in Private Atomic Energy Development and Base Prices Which DOE Will Pay for Certain Products From Private Reactors.''

(b) Radioactive and stable isotopes, irradiation services (this waiver does not include inventions or discoveries made by DOE or DOE contractor personnel in the course of or in connection with the performance of an irradiation service), and radioactive material resulting from the performance of an irradiation service sold or distributed by DOE in accordance with the prices and charges established by:

(1) Oak Ridge National Laboratory Inventory and Price List of electromagnetically enriched and other stable isotopes.

(2) Oak Ridge National Laboratory Catalog and Price List of radioisotopes, special materials, and services.

(3) Idaho National Engineering Laboratory Catalog of Price and charges on irradiation services at the materials testing reactor. The waiver does include inventions or discoveries made by sponsor personnel in the course of their use of the Gamma Irradiation Facility at the Idaho National Engineering Laboratory.

(4) Argonne National Laboratory schedule of charges for irradiation services at its irradiation facilities.

(5) Brookhaven National Laboratory schedule of prices and charges for irradiation services and radioisotopes.

### § 783.2 Limitations.

(a) Except with regard to the use of the Gamma facility at the Idaho National Engineering Laboratory, nothing contained in this part shall be deemed to waive any rights in inventions or discoveries where a person or a group of persons acting on behalf of the person requesting the irradiation service works at the DOE facility in connection with the irradiation service. In such event, special arrangements are made.

(b) Nothing contained in this part shall be construed to affect the provisions of any written agreement to which DOE has or may become a party.

# PART 784—PATENT WAIVER REGULATION

Sec.
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AUTHORITY: 42 U.S.C. 7151; 42 U.S.C. 5908; 42 U.S.C. 2182; 35 U.S.C. 202 and 210; 42 U.S.C. 7261a.

SOURCE: 61 FR 36614, July 12, 1996, unless otherwise noted.

## § 784.1 Scope and applicability.

(a) This part states the policy and establishes the procedures, terms and conditions governing waiver of the Government's rights in inventions made under contracts, grants, agreements, understandings or other arrangements with the Department of Energy (DOE).

(b) This part applies to all inventions conceived or first actually reduced to practice in the course of or under any contract, grant, agreement, understanding, or other arrangement with or for the benefit of DOE (including any subcontract, subgrant, or subagreement), the patent rights disposition of which is governed by section 152 of the Atomic Energy Act of 1954, 42 U.S.C. 2182, or section 9 of the Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. 5908. In funding agreements with nonprofit organizations or small business firms, when title or other rights are reserved to the Government under the authority of 35 U.S.C. 202(a), this part will apply to any waiver of such rights. The patent waiver provisions in this part supersede the patent waiver regulations previously included with patent regulations at 41 CFR part 9–9.100.

## § 784.2 Definitions.

As used in this part:

*Contract* means procurement contracts, grants, agreements, understandings and other arrangements (including Cooperative Research and Development Agreements [CRADAs], Work for Others and User Facility agreements, which includes research, development, or demonstration work, and includes any assignment or substitution of the parties, entered into, with, or for the benefit of DOE.

*Contractor* means entities performing under contracts as defined above.

*Patent Counsel* means the DOE Patent Counsel assisting the contracting activity.

## § 784.3 Policy.

(a) Section 6 of Public Law 96–517 (the Bayh-Dole patent and trademark amendments of 1980), as amended, as codified at 35 U.S.C. 200—212, provides that title to inventions conceived or first actually reduced to practice in the course of or under any contract, grant, agreement, understanding, or other arrangement entered into with or for the benefit of the Department of Energy (DOE) vests in the United States, except where 35 U.S.C. 202 provides otherwise for nonprofit organizations or small business firms. However, where title to such inventions vests in the United States, the Secretary of Energy (hereinafter Secretary) or designee may waive all or any part of the rights of the United States, subject to required terms and conditions, with respect to any invention or class of inventions made or which may be made by any person or class of persons in the course of or under any contract of DOE if it is determined that the interests of the United States and the general public will best be served by such waiver. In making such determinations, the Secretary or designee shall have the following objectives:

(1) Making the benefits of the energy research, development, and demonstration program widely available to the public in the shortest practicable time;

(2) Promoting the commercial utilization of such inventions;

(3) Encouraging participation by private persons in DOE's energy research, development, and demonstration programs; and

(4) Fostering competition and preventing undue market concentration or the creation or maintenance of other situations inconsistent with the antitrust laws.

(b) If it is not possible to attain the objectives in paragraphs (a)(1) through (4) immediately and simultaneously for any specific waiver determination, the Secretary or designee will seek to reconcile these objectives in light of the overall purposes of the DOE patent waiver policy, as set forth in section 152 of the Atomic Energy Act of 1954, 42 U.S.C. 2182, section 9 of the Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. 5908, Public Law 99–661, 42 U.S.C. 7261a, and, where not inconsistent therewith, the Presidential Memorandum to the Heads of Executive Departments and Agencies on Government Patent Policy issued February 18, 1983 and Executive Order No. 12591 issued April 10, 1987.

(c) The policy set forth in this section is applicable to all types of contracts as defined in § 784.2 of this part.

### § 784.4 Advance waiver.

This section covers inventions that may be conceived or first actually reduced to practice in the course of or under a particular contract. In determining whether an advance waiver will best serve the interests of the United States and the general public, the Secretary or designee (currently the Assistant General Counsel for Technology Transfer and Intellectual Property) shall, at a minimum, specifically include as considerations the following:

(a) The extent to which the participation of the contractor will expedite the attainment of the purposes of the program;

(b) The extent to which a waiver of all or any part of such rights in any or all fields of technology is needed to secure the participation of the particular contractor;

(c) The extent to which the work to be performed under the contract is useful in the production or utilization of special nuclear material or atomic energy;

(d) The extent to which the contractor's commercial position may expedite utilization of the research, development, and demonstration results;

(e) The extent to which the Government has contributed to the field of technology to be funded under the contract;

(f) The purpose and nature of the contract, including the intended use of the results developed thereunder;

(g) The extent to which the contractor has made or will make substantial investment of financial resources or technology developed at the contractor's private expense which will directly benefit the work to be performed under the contract;

(h) The extent to which the field of technology to be funded under the contract has been developed at the contractor's private expense;

(i) The extent to which the Government intends to further develop to the point of commercial utilization the results of the contract effort;

(j) The extent to which the contract objectives are concerned with the public health, public safety, or public welfare;

(k) The likely effect of the waiver on competition and market concentration;

(l) In the case of a domestic nonprofit educational institution under an agreement not governed by Chapter 18 of Title 35, United States Code, the extent to which such institution has a technology transfer capability and program approved by the Secretary or designee as being consistent with the applicable policies of this section;

(m) The small business status of the contractor under an agreement not governed by Chapter 18 of Title 35, United States Code, and

(n) Such other considerations, such as benefit to the U.S. economy, that the Secretary or designee may deem appropriate.

### § 784.5 Waiver of identified inventions.

This section covers the relinquishing by the Government to the contractor or inventor of title rights in a particular identified subject invention. In determining whether such a waiver of an identified invention will best serve the interests of the United States and

the general public, the Secretary or designee shall, at a minimum, specifically include as considerations the following:

(a) The extent to which such waiver is a reasonable and necessary incentive to call forth private risk capital for the development and commercialization of the invention;

(b) The extent to which the plans, intentions, and ability of the contractor or inventor will obtain expeditious commercialization of such invention;

(c) The extent to which the invention is useful in the production or utilization of special nuclear material or atomic energy;

(d) The extent to which the Government has contributed to the field of technology of the invention;

(e) The purpose and nature of the invention, including the anticipated use thereof;

(f) The extent to which the contractor has made or will make substantial investment of financial resources or technology developed at the contractor's private expense which will directly benefit the commercialization of the invention;

(g) The extent to which the field of technology of the invention has been developed at the contractor's expense;

(h) The extent to which the Government intends to further develop the invention to the point of commercial utilization;

(i) The extent to which the invention is concerned with the public health, public safety, or public welfare;

(j) The likely effect of the waiver on competition and market concentration;

(k) In the case of a domestic nonprofit educational institution under an agreement not governed by Chapter 18, Title 35, United States Code, the extent to which such institution has a technology transfer capability and program approved by the Secretary or designee as being consistent with the applicable policies of this section;

(l) The small business status of the contractor, under an agreement not governed by Chapter 18 of Title 35, United States Code; and,

(m) Such other considerations, such as benefit to the U.S. economy that the Secretary or designee may deem appropriate.

### § 784.6 National security considerations for waiver of certain sensitive inventions.

(a) Whenever, in the course of or under any Government contract or subcontract of the Naval Nuclear Propulsion Program or the nuclear weapons programs or other atomic energy defense activities of the Department of Energy, a contractor makes an invention or discovery to which title vests in the Department of Energy pursuant to statute, the contractor may request waiver of any or all of the Government's property rights. The Secretary of Energy or designee may decide to waive the Government's rights.

(b) In making a decision under this section, the Secretary or designee shall consider, in addition to the objectives of DOE waiver policy as specified in § 784.3(a)(1) through (4), and the considerations specified in § 784.4 for advance waivers, and § 784.5 for waiver of identified inventions, the following:

(1) Whether national security will be compromised;

(2) Whether sensitive technical information (whether classified or unclassified) under the Naval Nuclear Propulsion Program or the nuclear weapons programs or other atomic energy defense activities of the Department of Energy for which dissemination is controlled under Federal statutes and regulations will be released to unauthorized persons;

(3) Whether an organizational conflict of interest contemplated by Federal statutes and regulations will result, and

(4) Whether waiving such rights will adversely affect the operation of the Naval Nuclear Propulsion Program or the nuclear weapons programs or other atomic energy defense activities of the Department of Energy.

(c) A decision under this § 784.6 shall be made within 150 days after the date on which a complete request for waiver, as described by paragraph (d) of this section, has been submitted to the Patent Counsel by the contractor.

(d) In addition to the requirements for content which apply generally to all waiver requests under paragraph (a)

of this section, a requestor must include a full and detailed statement of facts, to the extent known by or available to the requestor, directed to the considerations set forth in paragraphs (b)(1) through (4) of this section, as applicable. To be considered complete, a waiver request must contain sufficient information, in addition to the content requirements under paragraphs (a) and (b) of this section, to allow the Secretary or designee to make a decision under this section. For advance waiver requests, such information shall include, at a minimum:

(1) An identification of all of the requestor's contractual arrangements involving the Government (including contracts, subcontracts, grants, or other arrangements) in which the technology involved in the contract was developed or used and any other funding of the technology by the Government, whether direct or indirect, involving any other party, of which the requestor is aware;

(2) A description of the requestor's past, current, and future private investment in and development of the technology which is the subject of the contract. This includes expenditures not reimbursed by the Government on research and development which will directly benefit the work to be performed under the instant contract, the amount and percentage of contract costs to be shared by the requestor, the out-of-pocket costs of facilities or equipment to be made available by the requestor for performance of the contract work which are not charged directly or indirectly to the Government under contract, and the contractor's plans and intentions to further develop and commercialize the technology at private expense;

(3) A description of competitive technologies or other factors which would ameliorate any anticompetitive effect of granting the waiver.

(4) Identification of whether the contract pertains to work that is classified, or sensitive, i.e., unclassified but controlled pursuant to section 148 of the Atomic Energy Action of 1954, as amended (42 U.S.C. 2168), or subject to export control under Chapter 17 of the Military Critical Technology List (MCTL) contained in Department of Defense Directive 5230.25 including identification of all principal uses of the subject matter of the contract, whether inside or outside the contractor program, and an indication of whether any such uses involve classified or sensitive technologies.

(5) Identification of all DOE and DOD programs and projects in the same general technology as the contract for which the requestor intends to be providing program planning advice or has provided program planning advice within the last three years.

(e) For identified invention requests under this section, such requests shall include at a minimum:

(1) A brief description of the intentions of the requestor (or its present or intended licensee) to commercialize the invention. This description should include:

(i) Estimated expenditures,

(ii) Anticipated steps,

(iii) The associated time periods to bring the invention to commercialization, and

(iv) A statement that requestor (or its present or intended licensee) has the capability to carry out its stated intentions.

(2) A description of any continuing Government funding of the development of the invention (including investigation of materials or processes for use therewith), from whatever Government source, whether direct or indirect, and, to the extent known by the requestor, any anticipated future Government funding to further develop the invention.

(3) A description of competitive technologies or other factors which would ameliorate any anticompetitive effects of granting the waiver.

(4) A statement as to whether or not the requestor would be willing to reimburse the Department of Energy for any and all costs and fees incurred by the Department in the preparation and prosecution of the patent applications covering the invention that is the subject of the waiver request.

(5) Where applicable, a statement of reasons why the request was not timely filed in accordance with the applicable patent rights clause of the contract, or why a request for an extension of time

to file the request was not filed in a timely manner.

(6) Identification of whether the invention pertains to work that is classified, or sensitive, i.e., unclassified but controlled pursuant to section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168), or subject to export control under Chapter 17 of the Military Critical Technology List (MCTL) contained in Department of Defense Directive 5230.25, including identification of all principal uses of the invention inside or outside the contractor program, and an indication of whether any such uses involve classified or sensitive technologies.

(7) Identification of all DOE and DOD programs and projects in the same general technology as the invention for which the requestor intends to be providing program planning advice or has provided program planning advice within the last three years.

(8) A statement of whether a classification review of the invention disclosure, any resulting patent application(s), and/or any reports and other documents disclosing a substantial portion of the invention, has been made, together with any determinations on the existence of classified or sensitive information in either the invention disclosure, the patent application(s), or reports or other documents disclosing a substantial portion of the invention; and

(9) Identification of any and all proposals, work for other activities, or other arrangements submitted by the requestor, DOE, or a third party, of which requestor is aware, which may involve further funding of the work on the invention at either the contractor facility where the invention arose or another facility owned by the Government.

(f) Patent Counsel will notify the requestor promptly if the waiver request is found not to be a complete request and, in that event, will provide the requestor with a reasonable period, not to exceed 60 days, to correct any such incompleteness. If requestor does not respond within the allotted time period, the waiver request will be considered to be withdrawn. If requestor responds within the allotted time period, but the submittal is still deemed incomplete or insufficient, the waiver request may be denied.

(g) As set forth in paragraph (c) of this section, waiver decisions shall be made within 150 days after the date on which a complete request for waiver of such rights, as specified in this section, has been submitted by the requestor to the DOE Patent Counsel. If the original waiver request does not result in a communication from DOE Patent Counsel indicating that the request is incomplete, the 150-day period for decision commences on the date of receipt of the waiver request. If the original waiver request results in a communication from DOE Patent Counsel indicating that the request is incomplete, the 150-day period for decision commences on the date on which supplementary information is received by Patent Counsel sufficient to make the waiver request complete. For advance waiver requests, if requestor is not notified that the request is incomplete, the 150-day period for decision commences on the date of receipt of the request, or on the date on which negotiation of contract terms is completed, whichever is later.

(h) Failure of DOE to make a patent waiver decision within the prescribed 150-day period shall in no way be construed as a grant of the waiver.

### § 784.7 Class waiver.

This section covers relinquishing of patent title rights by the Government to a class of persons or to a class of inventions. The authorization for class waivers is to be found at 42 U.S.C. 5908(c). Class waivers may be appropriate in situations where all members of a particular class would likely qualify for an advance or identified invention waiver. Normally, class waivers are originated by the Department. However, any person with a direct and substantial interest in a DOE program may request a class waiver by forwarding a written request therefor to the Patent Counsel. While no particular format for requesting a class waiver is prescribed, any request for a class waiver and any resulting determination by the Secretary or designee must address the pertinent objectives and considerations set forth in §§ 784.3(a), 784.4, 784.5, and 784.6.

**§ 784.8 Procedures.**

(a) All requests for waivers shall be in writing. Each request for a waiver other than a class waiver shall include the information set forth in § 784.9. Such requests may be submitted by existing or prospective contractors in the case of requests for an advance waiver and by contractors, including successor contractors at a facility, or employee-inventors in the case of requests for waiver of identified inventions.

(b) A request for an advance waiver should be submitted to the Contracting Officer (subcontractors may submit through their prime contractors) at any time prior to execution of the contract or subcontract, or within thirty days thereafter, or within such longer period as may be authorized by Patent Counsel for good cause shown in writing. If the purpose, scope, or cost of the contract is substantially altered by modification or extension after the waiver is granted, a new waiver request will be required. When advance waivers are granted, the provisions of the ''Patent Rights—Waiver'' clause set forth in § 784.12 shall be used in contracts which are the subject of the waivers, unless modified with the approval of the Patent Counsel to conform to the scope of the waiver granted. (See § 784.12.) Advance waivers may be requested for all inventions which may be conceived or first actually reduced to practice under a DOE contract. An advance waiver may also be requested for an identified invention conceived by the contractor before the contract but which may be first actually reduced to practice under the contract. Such waiver request must include a copy of any patent or patent application covering the identified invention, or if no patent application has been filed, a complete description of the invention.

(c) A request for waiver (other than an advance or class waiver) for an identified invention must be submitted to the Patent Counsel at the time the invention is to be reported to DOE or not later than eight months after conception and/or first actual reduction to practice, whichever occurs first in the course of or under the contract, or such longer period as may be authorized by Patent Counsel for good cause shown in writing by the requestor. The time for submitting a waiver request will not normally be extended past the time the invention has been advertised for licensing by DOE. If the Government has already filed a patent application on the invention, the requestor should indicate whether or not it is willing to reimburse the Government for the costs of searching, prosecution, filing and maintenance fees, in the event the waiver is granted.

(d) If the request for waiver contains insufficient information, the Patent Counsel may seek additional information from the requestor and from other sources. The Patent Counsel will thoroughly analyze the request in view of each of the objectives and considerations and shall also consider the overall rights obtained by the Government in the patent, copyright, and data clauses of the contract. Where it appears that a waiver of a lesser part of the rights of the United States than requested would be more appropriate in view of the policies set forth, the Patent Counsel should attempt to negotiate a compromise acceptable to both the requestor and DOE. If approval of a waiver is recommended, Patent Counsel shall obtain an indication of agreement by the requestor to the proposed waiver scope, terms and conditions.

(e) The Patent Counsel will prepare a Statement of Considerations setting forth the rationale for either approving or denying the waiver request and will forward the Statement to the General Counsel or designee for review thereof. While the Statement need not provide specific findings as to each and every consideration of § 784.4 or § 784.5 of this part, it will cover those that are decisive, and it will explain the basis for the recommended determination. There may be occasions when the application of the various individual considerations of § 784.4 or § 784.5 of this part to a particular case could conflict, and in those instances the conflict will be reconciled giving due regard to the overall policies set forth in 784.3(a) (1) through (4).

(f) The Patent Counsel will also obtain comments from the appropriate DOE program organization to assist the Patent Counsel in the waiver determination. Additionally, if any other

Federal Government entity has provided funding or will be providing funding, or if a subject invention has been made in whole or in part by an employee of that entity, Patent Counsel shall obtain permission to waive title to the undivided interest in the invention from the cognizant official of that entity. In situations where time does not permit a delay in contract negotiations for the preparation and mailing of a full written statement, field Patent Counsel may submit a recommendation on the waiver orally to the Assistant General Counsel for Technology Transfer and Intellectual Property, who upon verbal consultation with the appropriate DOE program organization, shall provide a verbal decision to field Patent Counsel. All oral actions shall be promptly confirmed in writing. In approving waiver determinations, the Secretary or designee shall objectively review all requests for waiver in view of the objectives and considerations set forth in §§ 784.3 through 784.6. If the determination and the rationale therefor is not accurately reflected in the Statement of Considerations which has been submitted for approval, a new Statement of Considerations shall be prepared.

(g) In the event that a request for advance waiver is approved after the effective date of the contract, the Patent Counsel shall promptly notify the requestor by letter of the determination and the basis therefor. The letter shall state the scope, terms and conditions of such waiver. If the terms and conditions of an approved advance waiver were not incorporated in the contract when executed, the letter shall inform the requestor that the advance waiver shall be effective as of the effective date of the contract for an advance waiver of inventions identified, i.e., conceived prior to the effective date of the contract, or as of the date the invention is reported with an election by the contractor to retain rights therein, i.e., for an invention conceived or first actually reduced to practice after the effective date of the contract; provided a copy of the letter is signed and returned to the Contracting Officer by the requestor acknowledging the acceptance of the scope, terms and conditions of the advance waiver. After acceptance by the contractor of an advance waiver, the Contracting Officer shall cause a unilateral no-cost modification to be made to the contract incorporating the terms and conditions of the waiver in lieu of previous patent rights provisions.

(h) In the event that a waiver request is denied, the requestor may, within thirty days after notification of the denial, request reconsideration. Such a request shall include any additional facts and rationale not previously submitted which support the request. Request for reconsideration shall be submitted and processed in accordance with the procedures for submitting waiver requests set forth in this section.

### § 784.9 Content of waiver requests.

(a) Forms (OMB No. 1901–0800) for submitting requests for advance and identified invention waivers, indicating the necessary information, may be obtained from the Contracting Officer or Patent Counsel. All requests for advance and identified invention waivers shall include the following information:

(1) The requestor's identification, business address, and, if represented by Counsel, the Counsel's name and address;

(2) An identification of the pertinent contract or proposed contract and a copy of the contract Statement of Work or a nonproprietary statement which fully describes the proposed work to be performed;

(3) The nature and extent of waiver requested;

(4) A full and detailed statement of facts, to the extent known by or available to the requestor, directed to each of the considerations set forth in §§ 784.4 or 784.5 of this part, as applicable, and a statement applying such facts and considerations to the policies set forth in § 784.3 of this part. It is important that this submission be tailored to the unique aspects of each request for waiver, and be as complete as feasible; and

(5) The signature of the requestor or authorized representative with the following statement: ''The facts set forth in this request for waiver are within the knowledge of the requestor and are

submitted with the intention that the Secretary or designee rely on them in reaching the waiver determination.''

(b) In addition to the requirements of paragraph (a) of this section, requests for waiver of identified inventions shall include:

(1) The full names of all inventors;

(2) A statement of whether a patent application has been filed on the invention, together with a copy of such application if filed or, if not filed, a complete description of the invention;

(3) If a patent application has not been filed, any information which may indicate a potential statutory bar to the patenting of the invention under 35 U.S.C. 102 or a statement that no such bar is known to exist; and

(4) Where the requestor is the inventor, written authorization from the applicable contractor or subcontractor permitting the inventor to request a waiver.

(c) Subject to statutes, DOE regulations, requirements, and restrictions on the treatment of proprietary and classified information; all material submitted in requests for waiver or in support thereof will be made available to the public after a determination on the waiver request has been made, regardless of whether a waiver is granted. Accordingly, requests for waiver should not normally contain information or data that the requestor is not willing to have made public. If proprietary or classified information is needed to make the waiver determination, such information shall be submitted only at the request of Patent Counsel.

### § 784.10 Record of waiver determinations.

The Assistant General Counsel for Technology Transfer and Intellectual Property shall maintain and periodically update a publicly available record of waiver determinations.

### § 784.11 Bases for granting waivers.

(a) The various factual situations which are appropriate for waivers cannot be categorized precisely because the appropriateness of a waiver will depend upon the manner in which the considerations set forth in §§ 784.4 or 784.5, and 784.6 if applicable, of this part relate to the facts and circumstances surrounding the particular contracting situation or the particular invention, in order to best achieve the objectives set forth in § 784.3 of this part. However, some examples where advance waivers might be appropriate are:

(1) Cost-shared contracts;

(2) Situations in which DOE is providing increased funding to a specific ongoing privately-sponsored research, development, or demonstration project;

(3) Situations such as Work for Others Agreements, User Facility Agreements or CRADAs, involving DOE-approved private use of Government facilities where the waiver requestor is funding a substantial part of the costs; and

(4) Situations in which the equities of the contractor are so substantial in relation to that of the Government that the waiver is necessary to obtain the participation of the contractor.

(b) Waivers may be granted as to all or any part of the rights of the United States to an invention subject to certain rights retained by the United States as set forth in § 784.12 of this part. The scope of the waiver will depend upon the relationship of the contractual situation or identified invention to considerations set forth in §§ 784.4 or 784.5, and 784.6, if applicable, in order to best achieve the objectives set forth in § 784.3. For example, waivers may be restricted to a particular field of use in which the contractor has substantial equities or a commercial position, or restricted to those uses that are not the primary object of the contract effort. Waivers may also be made effective for a specified duration of time, may be limited to particular geographic locations, may require the contractor to license others at reduced royalties in consideration of the Government's contribution to the research, development, or demonstration effort, or may require return of a portion of the royalties or revenue to the Government.

(c) Contractors shall not use their ability to award subcontracts as economic leverage to acquire rights for themselves in the subcontractor inventions, where the subcontractor(s) would prefer to petition for title. A

waiver granted to a prime contractor is not normally applicable to inventions of subcontractors. However, in appropriate circumstances, the waiver given to the prime contractor may be made applicable to the waivable inventions of any or all subcontractors, such as where there are pre-existing special research and development arrangements between the prime contractor and subcontractor, or where the prime contractor and subcontractor are partners in a cooperative effort. In addition, in such circumstances, the prime contractor may be permitted to acquire nonexclusive licenses in the subcontractors' inventions when a waiver of the subcontractor inventions is not covered by the prime contractor's waiver.

(d) In advance waivers of identified inventions, the invention will be deemed to be a subject invention and the waiver will be considered as being effective as of the effective date of the contract (see § 784.13(a)). This will be true regardless of whether the identified invention had been first actually reduced to practice prior to the time of contracting or would be reduced to practice under the contract or after expiration of the contract. One purpose of advance waivers of identified inventions is to establish the rights of the parties to such inventions when the facts surrounding the first actual reduction to practice prior to or during the contract are or will be difficult to establish.

### § 784.12 Terms and conditions of waivers.

The terms and conditions for waivers are set forth in the ''Patent Rights—Waiver'' clause in this section. A waiver of all foreign and domestic patent rights under a contract authorizes the use of this clause with any additions prescribed by the DOE Acquisition Regulations (48 CFR Chapter 9) or the terms of the waiver. This clause shall not be used in contracts with small business firms or nonprofit organizations subject to 35 U.S.C. 200 *et seq*. If a waiver of different scope is granted, the clause shall be modified to conform to the scope of the waiver granted. Advance waivers for arrangements other than contracts, grants, and cooperative agreements may use other clause provisions approved by the Assistant General Counsel for Technology Transfer and Intellectual Property, except that all waivers for funding agreements shall be subject to the license of clause paragraph (b) and the provisions of clause paragraphs (i) and (j). The terms and conditions of the clause shall also constitute the basis for confirmatory licenses regarding waivers of identified inventions. For inventions under advance waivers, a duly executed and approved instrument fully confirmatory of all rights to which the Government is entitled is required to be submitted promptly after filing a patent application thereon. If, however, a waiver request is pending, delivery of the confirmatory instrument may be delayed until a determination on the waiver request is made. In the case of a waiver of an identified invention pursuant to a request for greater rights, the confirmatory instrument shall be agreed to or submitted to Patent Counsel before or at the time the waiver is granted.

PATENT RIGHTS—WAIVER

Use the clause at 48 CFR 52.227–12 with the following changes:

(1) In paragraph (a) ''Definitions'' add the following definitions:

*Background patent* means a domestic patent covering an invention or discovery which is not a Subject Invention and which is owned or controlled by the Contractor at any time through the completion of this contract:

(i) Which the Contractor, but not the Government, has the right to license to others without obligation to pay royalties thereon, and

(ii) Infringement of which cannot reasonably be avoided upon the practice of any specific process, method, machine, manufacture or composition of matter (including relatively minor modifications thereof) which is a subject of the research, development, or demonstration work performed under this contract.

*Contract* means any contract, grant, agreement, understanding, or other arrangement, which includes research, development, or demonstration work, and includes any assignment or substitution of parties.

*DOE patent waiver regulations* means the Department of Energy patent waiver regulations at 10 CFR part 784.

*Patent Counsel* means the Department of Energy Patent Counsel assisting the procuring activity.

*Secretary* means the Secretary of Energy.

(2) In paragraph (a) in the definition of ''Subject invention'' substitute: ''course of or'' for: ''performance of work''.

(3) In paragraph (b) ''Allocation of principal rights,'' add at the beginning of first sentence:

''Whereas DOE has granted a waiver of rights to subject inventions to the Contractor,''.

(4) In paragraph (c)(1), substitute:

''Patent Counsel within six months after conception or first actual reduction to practice, whichever occurs first in the course of or under this contract, but in any event, prior to any sale, public use, or public disclosure of such invention known to the Contractor.'' for.

''Contractor officer within 2 months after the inventor discloses it in writing to Contractor Personnel responsible for Patent matters * * * earlier.''

(5) In paragraph (c)(2) add at the end: ''The Contractor shall notify the Patent Counsel as to those countries (including the United States) in which the Contractor will retain title not later than 60 days prior to the end of the statutory period.''

(6) In paragraph (c)(3) substitute: ''but not later than at least 60 days'' for ''or, if earlier,''

(7) In paragraph (d) add (d)(5):

''(5) If the waiver authorizing the use of this clause is terminated as provided in paragraph (p) of this clause.''

(8) In paragraph (e)(1) add: ''under paragraph (d) of this clause'' after ''Government obtains title.''

(9) In paragraph (e)(2) substitute ''37 CFR part 404 and DOE licensing regulations.'' for ''the Federal Property Management regulations and agency licensing regulations (if any)''

(10) In paragraph (f)(5) substitute ''the course of or'' for ''performance of work''.

(11) In paragraph (g) substitute paragraphs (1), (2) and (3) as follows:

(1) Unless otherwise directed by the Contracting Officer, the Contractor shall include the clause at 48 CFR 952.227–11, suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental, or research work to be performed by a small business firm or nonprofit organization, except where the work of the subcontract is subject to an Exceptional Circumstances Determination by DOE. In all other subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work, the Contractor shall include the patent rights clause at 48 CFR 952.227–13 (suitably modified to identify the parties).

(2) The Contractor shall not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(3) In the case of subcontractors at any tier, Department, the subcontractor, and Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and the Department with respect to those matters covered by this clause.

(12) Substitute the following for paragraph (k):

(k) Background Patents

(1) The Contractor agrees:

(i) to grant to the Government a royalty-free, nonexclusive license under any Background Patent for purposes of practicing a subject of this contract by or for the Government in research, development, and demonstration work only.

(ii) that, upon written application by DOE, it will grant to responsible parties for purposes of practicing a subject of this contract, nonexclusive licenses under any Background Patent on terms that are reasonable under the circumstances. If, however, the Contractor believes that exclusive or partially exclusive rights are necessary to achieve expeditious commercial development or utilization, then a request may be made to DOE for DOE approval of such licensing by the Contractor.

(2) Notwithstanding paragraph (k)(1)(ii), the Contractor shall not be obligated to license any Background Patent if the Contractor demonstrates to the satisfaction of the Secretary or his designee that:

(i) a competitive alternative to the subject matter covered by said Background Patent is commercially available from one or more other sources; or

(ii) the Contractor or its licensees are supplying the subject matter covered by said Background Patent in sufficient quantity and at reasonable prices to satisfy market needs, or have taken effective steps or within a reasonable time are expected to take effective steps to so supply the subject matter.

(13) Add new paragraph (l) Communications as follows:

All reports and notifications required by this clause shall be submitted to the Patent Counsel unless otherwise instructed.

(14) In paragraph (m) add to end of sentence: '', except with respect to Background Patents, above.''

(15) In paragraph (n)(4) substitute ''conducted in such a manner as'' for ''subject to appropriate conditions.''

(16) In paragraph (o) add at the end of the parenthetical phrase in the heading to the paragraph: ''or grants''.

(17) In paragraph (o) add paragraph (o)(1)(v) as follows:

(v) Convey to the Government, using a DOE-approved form, the title and/or rights of the Government in each subject invention as required by this clause.

(18) In paragraph (o), substitute the following for (o)(3):

(3) Final payment under this contract shall not be made before the Contractor delivers to the Patent Counsel all disclosures of subject inventions required by paragraph (c)(1) of this clause, an acceptable final report pursuant to paragraph (f)(7)(ii) of this clause, and all past due confirmatory instruments, and the Patent Counsel has issued a patent clearance certification to the Contracting Officer.

(19) Add paragraphs (p), (q), (r), and (s) as follows:

(p) Waiver Terminations.

Any waiver granted to the Contractor authorizing the use of this clause (including any retention of rights pursuant thereto by the Contractor under paragraph (b) of this clause) may be terminated at the discretion of the Secretary or his designee in whole or in part, if the request for waiver by the Contractor is found to contain false material statements or nondisclosure of material facts, and such were specifically relied upon by DOE in reaching the waiver determination. Prior to any such termination, the Contractor will be given written notice stating the extent of such proposed termination and the reasons therefor, and a period of 30 days, or such longer period as the Secretary or his designee shall determine for good cause shown in writing, to show cause why the waiver of rights should not be so terminated. Any waiver termination shall be subject to the Contractor's minimum license as provided in paragraph (e) of this clause.

(q) Atomic Energy.

No claim for pecuniary award or compensation under the provisions of the Atomic Energy Act of 1954, as amended, shall be asserted by the Contractor or its employees with respect to any invention or discovery made or conceived in the course of or under this contract.

(r) Publication.

It is recognized that during the course of work under this contract, the Contractor or its employees may from time to time desire to release or publish information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this contract. In order that public disclosure of such information will not adversely affect the patent interests of DOE or the Contractor, approval for release of publication shall be secured from Patent Counsel prior to any such release or publication. In appropriate circumstances, and after consultation with the Contractor, Patent Counsel may waive the right of prepublication review.

(s) Forfeiture of rights in unreported subject inventions.

(1) The Contractor shall forfeit and assign to the Government, at the request of the Secretary of Energy or designee, all rights in any subject invention which the Contractor fails to report to Patent Counsel within six months after the time the Contractor:

(i) Files or causes to be filed a United States or foreign patent application thereon; or

(ii) Submits the final report required by paragraph (e)(2)(ii) of this clause, whichever is later.

(2) However, the Contractor shall not forfeit rights in a subject invention if, within the time specified in paragraph (m)(1) of this clause, the Contractor:

(i) Prepares a written decision based upon a review of the record that the invention was neither conceived nor first actually reduced to practice in the course of or under the contract and delivers the decision to Patent Counsel, with a copy to the Contracting Officer; or

(ii) Contending that the subject invention is not a subject invention, the Contractor nevertheless discloses the subject invention and all facts pertinent to this contention to the Patent Counsel, with a copy to the Contracting Officer, or

(iii) Establishes that the failure to disclose did not result from the Contractor's fault or negligence.

(3) Pending written assignment of the patent application and patents on a subject invention determined by the Contracting Officer to be forfeited (such determination to be a Final Decision under the Disputes clause of this contract), the Contractor shall be deemed to hold the invention and the patent applications and patents pertaining thereto in trust for the Government. The forfeiture provision of this paragraph shall be in addition to and shall not supersede any other rights and remedies which the Government may have with respect to subject inventions.

### § 784.13 Effective dates.

Waivers shall be effective on the following dates:

(a) For advance waivers of identified inventions, i.e., inventions conceived prior to the effective date of the contract, on the effective date of the contract, even though the advance waiver may have been requested after that date;

(b) For identified inventions under advance waivers, i.e., inventions conceived or first actually reduced to practice after the effective date of the contract, on the date the invention is reported with the election to retain rights as to that invention; and

(c) For waivers of identified inventions (other than under an advance waiver), on the date of the letter from Patent Counsel notifying the requestor that the waiver has been granted.

# PART 800—LOANS FOR BID OR PROPOSAL PREPARATION BY MINORITY BUSINESS ENTERPRISES SEEKING DOE CONTRACTS AND ASSISTANCE

### Subpart A—General

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800.307 Appeals.

AUTHORITY: Sec. 211(e) of the Department of Energy (DOE) Organization Act, Pub. L. 95–91, Title II, as amended by Pub. L. 95–619, Title VI, sec. 641, Nov. 9, 1978, 92 Stat. 3284 (42 U.S.C. 7141).

SOURCE: 46 FR 44689, Sept. 4, 1981, unless otherwise noted.

## Subpart A—General

### § 800.001 Purpose.

The purpose of this regulation is to set forth policies and procedures for the award and administration of loans to minority business enterprises. The loans are to assist such enterprises in participating fully in research, development, demonstration and contract activities of the Department of Energy. The loans are to defray a percentage of the cost of obtaining DOE contracts and other agreements, including procurements, cooperative agreements, grants, loans and loan guarantees; of obtaining subcontracts with DOE operating contractors; and of obtaining contracts with first-tier subcontractors of DOE operating contractors in furtherance of the research, development, demonstration or other contract activities of DOE. Issuance of loans under this regulation is limited to the extent funds are provided in advance in appropriation acts. This regulation implements the authority for such loans in section 211(e) of the Department of Energy (DOE) Organization Act, Public Law 95–619, title VI, section 641, November 9, 1978, 92 Stat. 3284 (42 U.S.C.A. 7141).

[48 FR 17574, Apr. 25, 1983]

### § 800.002 Program management.

Program management responsibility for financial assistance awarded under this regulation has been assigned to the Office of Minority Economic Impact.

### § 800.003 Definitions.

For the purpose of this regulation:

*Act* means the DOE Organization Act, Public Law 95–91, title II, as amended by the National Energy Conservation Policy Act, Public Law 95–619, title VI, section 641.

*Applicant* means a minority business enterprise which is seeking a loan under this regulation.

*Application Approving Official* means the Director of the Office of Minority Economic Impact.

*Application Evaluation Panel* (also referred to as the *Panel*) means a team of Federal employees appointed by the Application Approving Official to evaluate loan applications and make approval or disapproval recommendations regarding such applications.

*Borrower* means an applicant who enters into a loan agreement with DOE.

*Contracting Officer* means the DOE official warranted and authorized to contractually bind the Department of Energy and execute written agreements that are binding on the Department.

*Costs* of a bid or proposal means the cost of preparing, submitting and supporting a bid or proposal, whether solicited or not, for a DOE contract or

other agreement such as a procurement contract, grant, cooperative agreement, loan or loan guarantee; or a subcontract with a DOE operating contractor; or a contract with a first-tier subcontractor of a DOE operating contractor in furtherance of the research, development, demonstration or other contract activities of DOE.

*Default* means the actual failure by the borrower to make payment of principal or interest in accordance with the terms and conditions of a loan issued under this regulation, or the failure of the borrower to meet any other requirement specified as a default condition in the loan agreement.

*Director* means the Director of the Office of Minority Economic Impact (OMEI).

*Loan*, in reference to a loan made pursuant to the regulation, means a transaction in which a contractual instrument (''loan agreement'') is executed between the United States, as lender, acting through the Secretary of Energy, and a borrower. The instrument must obligate the United States to provide the borrower with a specified amount(s) of United States funds for a specified period of time and must obligate the borrower to use the moneys to bid for and attempt to obtain contracts and other agreements relating to DOE research, development, demonstration and contract activities, and to repay the moneys at a specified time at an agreed rate of interest. The words 'loan', 'loan agreement' and 'transaction' include (where the context does not require otherwise) the terms and conditions of related documents, such as the borrower's note or bond or other evidence of, or security for, the borrower's indebtedness.

*Minority Business Enterprise* means a firm including a sole proprietorship, corporation, association, or partnership which is at least 50 percent owned or controlled by a member of a minority or group of members of a minority. For the purpose of this definition, 'control' means direct or indirect possession of the power to direct, or cause the direction of, management and policies, whether through the ownership of voting securities, by contract or otherwise. An individual who is a citizen of the United States and who is a Negro, Puerto Rican, American Indian, Eskimo, Oriental, or Aleut, or is a Spanish speaking individual of Spanish descent, is a member of a ''minority'' as used in this regulation.

*Operating Contractors* means contractors under contracts having one of the following purposes, in accordance with the provisions of § 9.50.001(a)(1) of the DOE procurement regulations (title 41 CFR part 9–50):

(a) DOE prime contracts for the management of Federal Government-owned laboratories, production plants, and research facilities located on Federal Government-owned or Federal Government-leased sites, where the programs being conducted are considered of a long-term, continuing nature; or

(b) DOE prime contracts for the operation of Federal Government-owned facilities located on contractor-owned or leased sites where the programs being conducted are of a long-term, continuing nature. An example of this category would be those contracts with universities for the operation of Federal Government-owned facilities, for the purpose of conducting long-term basic research programs.

(c) Other contracts performed on sites owned by the Federal Government when so designated by the appropriate procurement official.

*Secretary* means the Secretary of the Department of Energy or his delegate.

[46 FR 44689, Sept. 4, 1981, as amended at 48 FR 17574, Apr. 25, 1983]

### § 800.004 Eligibility.

In order to be eligible for a loan, an applicant must be a minority business enterprise as defined in § 800.003.

## Subpart B—Loan Solicitation, Application and Review

### § 800.100 Solicitation of applications.

The Secretary will periodically issue an announcement soliciting applications under this regulation. The announcement will be published in the FEDERAL REGISTER, synopsized in the *Commerce Business Daily*, and circulated to minority trade associations and organizations and to the Minority Business Development Agency and Small

Business Administration. The announcement will indicate funds availability, eligibility requirements, application instructions, interest rates, maturities and other key loan terms and any applicable restrictions. In such solicitations, DOE shall further indicate that, in the case of applications for loans relating to bids or proposals for contracts with first-tier subcontractors of DOE operating contractors, information necessary to substantiate such applications may be unavailable to DOE from such subcontractors. If the substantiating information is not made available to DOE in a timely manner, the application may be rejected.

[46 FR 44689, Sept. 4, 1981, as amended at 48 FR 17574, Apr. 25, 1983]

### § 800.101 Application requirements.

(a) Applications for loans shall be filed, one original and three copies with: Department of Energy, Washington, DC 20585, Attention: Announcement No. DE-PS60-MI.

(b) An application for a loan under this regulation must include the following information. Items described in paragraphs (b)(1) through (7) of this section may be submitted for preliminary review in advance of a specific loan request but must be updated at time of loan request to reflect substantial changes.

(1) Applicant's name and address, with a description of the kind and size of its business, its business experience and its history as a minority business enterprise.

(2) Financial statements of applicant and its principals, including source of revenue and balance sheets for the current year and, as to applicant, for the two preceding years of applicant's existence as a business entity. The Secretary may require applicant to provide certification by a public accountant, or other certification acceptable to the Secretary.

(3) A description of any other Federal financial backing (direct loans, guaranteed loans, grants, etc.) applied for or obtained by the applicant within the previous five years, or expected to be applied for.

(4) A description of applicant's management structure, with list of applicant's key persons with their responsibilities and qualifications.

(i) In the case of a specific loan request this list should include any contractor or consultant whose services are proposed in connection with the bid or proposal for which the loan is sought.

(5) Affidavit(s) of eligibility (see § 800.004).

(6) Documentation as to applicant's authority to undertake the activities contemplated by the application. Such documentation shall take substantially the following form:

(i) If the applicant is a corporation, a copy of the charter or certificate and articles of incorporation, with any amendments, duly certified by the Secretary of State of the State where organized, and a copy of the by-laws. There shall also be included a copy of all minutes, resolutions of stockholders or directors or other representatives of the applicant, properly attested, authorizing the filing of the application.

(ii) If the applicant is an association, a verified copy of its articles of association, if any, with an attested copy of the resolution of its governing board, if any, authorizing the filing of the application.

(iii) If the applicant is a business trust, a verified copy of the trust instrument and an attested copy of the resolution or other authority under which the application is made.

(iv) If the applicant is a joint stock company, a verified copy of the articles of association and of the authorizing resolution.

(v) If the application is made on behalf of a partnership, a copy of the partnership agreement, if any; if on behalf of a limited partnership, a duly certified copy, also, of the certificate of limited partnership, if such certificate is required to be obtained under state law governing such limited partnership.

(7) Credit references.

(8) Information on the award to be sought through the bid or proposal, as follows:

(i) Title, and whether in response to a solicitation or unsolicited.

(ii) Brief description of work to be performed.

(iii) Sponsoring DOE office, including solicitation number, if any.

(iv) If an unsolicited proposal is planned, the loan application shall indicate the appropriate DOE program personnel to be consulted as to whether there is potential for the proposal to be supported.

(v) Schedule for preparation and submission of the bid or proposal.

(9) Itemized cost estimates (and whether yet incurred).

(10) The required loan amount, not to exceed 75 percent of total bid or proposal costs, in accordance with § 800.200 on allowable costs.

(11) Requested loan maturity, in accordance with § 800.202(a)(3).

(12) How applicant will finance performance of work under a successful bid or proposal.

(13) Such other information as the Application Approving Official may deem necessary for evaluation in accordance with § 800.103 and for compliance with the provisions of this regulation.

(14) The application shall be signed by the applicant or on behalf of the applicant by an authorized representative. Verification may be by affidavit of an authorized representative of an applicant; attestation shall be by the authorized officer of an applicant.

NOTE: Title 18 United States Code, section 1001 provides criminal penalties for fraud and intentional false statements in information submitted in such an application.

### § 800.102 Review by Application Evaluation Panel.

(a) Applications for loans under this regulation shall be reviewed by an Application Evaluation Panel, which shall be appointed by the Application Approving Official. The Panel shall include, at a minimum, a representative of the Office of Minority Economic Impact, the contracting officer and a representative of the Office of the Controller.

(b) Panel review shall be conducted pursuant to paragraph (c) or (d) of this section, as applicable, to evaluate, to clarify and to develop information contained in the application and such other information as the Application Approving Official or the Panel may request.

(1) The Panel shall give priority to applications relating to a competitive solicitation, because of time limits on such solicitations. The Panel may defer action a maximum of five days after a solicitation has been announced in the *Commerce Business Daily* to provide all interested applicants an opportunity to apply.

(2) Initial screening will be in the order applications are received, but time required to process an application may vary from case to case.

(c) *Panel review of specific loan requests.* (1) If an application contains a specific loan request, and complies with § 800.101, the Panel shall arrange for risk analysis, independent of any such analysis submitted by or on behalf of the applicant. Risk analysis shall be directed both to the loan request and to applicant's prospective performance of work pursuant to the bid or proposal.

(2) The Panel shall evaluate the loan request in light of the risk analysis, and shall give its conclusions in writing to the Application Approving Official, with respect to the following and to such other considerations as that official may direct:

(i) Applicant's eligibility as a minority business enterprise.

(ii) Compliance with the application requirements of § 800.101.

(iii) Compliance with § 800.200 on allowable costs.

(iv) Applicant's financial ability to make the bid or proposal without the loan.

(v) Applicant's contribution of, or ability to contribute, the 25% minimum share of allowable costs, or more.

(vi) Applicant's ability to prepare an adequate bid or proposal, if the loan is made.

(vii) Possibility of award to applicant pursuant to its bid or proposal.

NOTE: Normally, not more than three loans will be approved for the same competitive award.

(viii) Applicant's ability to perform pursuant to the bid or proposal.

(ix) Likelihood that applicant will repay the requested loan, regardless of success of applicant's bid or proposal.

(x) Optimal use of available program funds.

(xi) The Panel's recommendation.

(d) *Panel review of other applications.* If the application was submitted without a specific loan request, the Panel shall review the application in accordance with paragraph (b) of this section with the limited purpose of determining whether the applicant has complied with § 800.101, except as to matters determinable only with respect to a future specific loan request, and shall inform the Application Approving Official in writing as to its determinations.

### § 800.103 Review by Application Approving Official.

(a) The Application Approving Official shall consider the results of the Panel's review under section 102 (c) or (d), and such other information as the Application Approving Official determines to be relevant pursuant to the provisions of this regulation, and shall either approve or disapprove the application, giving it priority in accordance with the provisions of § 800.102(b).

(b) The Application Approving Official shall authorize a contracting officer to notify the applicant of approval or disapproval.

(c) An applicant whose application has been rejected will be informed, on request, of the reason for rejection. Rejection is not a bar to submission of an appropriately revised application.

## Subpart C—Loans

### § 800.200 Maximum loan; allowable costs.

(a) A loan under this regulation shall not exceed 75 percent of allowable costs of a bid or proposal to obtain a DOE contract or other agreement (such as a procurement contract, cooperative agreement, grant, loan or loan guarantee), or a subcontract with a DOE operating contractor, or a contract with a first-tier subcontractor of a DOE operating contractor in furtherance of the research, development, demonstration or other contract activities of DOE.

(b) To be allowable, costs must, in DOE's judgment:

(1) Be consistent with the bidding cost principles of the Federal Procurement Regulation (41 CFR Ch. 1, 1–15.205–3) and DOE Procurement Regulation (41 CFR Ch. 9, 9–15.205–3); and;

(2) Be necessary, reasonable and customary for the bid or proposal contemplated by the application; and

(3) Be incurred, or expected to be incurred, by the applicant.

(c) Costs which are, in general, allowable, if consistent with paragraph (b) of this section include, but are not limited to:

(1) Bid bond premiums.

(2) Financial, accounting, legal, engineering and other professional, consulting or similar fees and service charges.

(3) Printing and reproduction costs.

(4) Travel and transportation costs.

(5) Costs of the loan application under this rule.

(d) Costs that are not considered as allowable costs include the following:

(1) Fees and commissions charged to the applicant, including finder's fees, for obtaining Federal funds.

(2) Expenses, which, in DOE's judgment, have primarily an application broader than the specific loan request.

(3) Costs which, in DOE's judgment, fail to conform to paragraph (b) of this section.

[46 FR 44689, Sept. 4, 1981, as amended at 48 FR 17574, Apr. 25, 1983]

### § 800.201 Findings.

A loan shall issue under this regulation only if the Secretary, having reviewed the action of the Application Approving Official, and having considered such other information as the Secretary may deem pertinent, has made all the findings that follow:

(a) That the applicant is a minority business enterprise.

(b) That the loan will assist the enterprise to participate in the research, development, demonstration or contract activities of the Department of Energy by providing funds needed by applicant for bid or proposal purposes.

(c) That, by terms of the loan, applicant's use of the funds will be limited to bidding for and obtaining a contract or other agreement with the Department of Energy, a subcontract with a DOE operating contractor, or a contract with a first-tier subcontractor of a DOE operating contractor in furtherance of the research, development,

demonstration or other contract activities of DOE.

(d) That the funds to be loaned will not exceed 75% of applicant's costs in bidding for and obtaining the contract or agreement.

(e) That the rate of interest on the loan has been determined in consultation with the Secretary of the Treasury.

(f) That there is a reasonable prospect that the applicant will make the bid or proposal which is the purpose of the loan, will perform according to its bid or proposal, and will repay the loan according to the terms thereof, regardless of the success of its bid or proposal.

(g) That the terms and conditions of the loan are acceptable to the Secretary and comply with this regulation and with section 211(e) of the Department of Energy Organization Act.

[46 FR 44689, Sept. 4, 1981, as amended at 48 FR 17574, Apr. 25, 1983]

### § 800.202 Loan terms and conditions.

(a) The loan shall be based upon a loan agreement and the borrower's separate promissory note for the proceeds of the loan, including interest. The agreement and note shall be executed in writing between the borrower and the Secretary. The contracting officer shall execute the loan agreement on behalf of the Secretary. The loan agreement and the promissory note shall provide as follows, either at full length or by incorporation by reference to terms of the other of the two documents.

(1) The borrower agrees to repay the loan of funds provided by the Secretary.

(2) The interest rate on the loan is as established in consultation with the Secretary of the Treasury, taking into consideration the current average market yields of outstanding marketable obligations of the United States having maturities comparable to the loan.

(3) The loan shall be repaid over a maximum period as follows, in equal monthly installments of principal and interest, unless a different frequency of installments is specified by the Secretary:

| Loan value | Maximum repayment [1] |
|---|---|
| $0—$5,000 | 3 years 3 months. |
| $5,000—$25,000 | 5 years 3 months. |
| Excess of $25,000 | 8 years 3 months. |

[1] Maximum repayment period from date of initial disbursement.

Repayment of principal and interest shall begin within 90 days following the initial loan disbursement or such longer period as may be acceptable to the Secretary. Installments shall be applied to accrued interest first and then to repayment of principal. Past due installments shall accrue interest at the quarterly current-value-of-funds-rate specified by the Treasury for overdue accounts. Prepayments may be made at any time without penalty.

(4) The borrower shall have appropriate opportunities, as specified in the loan agreement, to cure any default, failure, or breach of any of the covenants, conditions and obligations undertaken by the borrower pursuant to the provisions of the loan agreement.

(5) Loans of $10,000 or less will be disbursed in a single disbursement. Disbursement of loans larger than $10,000 shall be per schedule and documentation specified by the Secretary.

(6) The loan may be used by the borrower to defray as much as, but no more than, 75 percent of the cost of the bid or proposal within the limitations specified in § 800.200, on allowable costs. Costs incurred by the borrower prior to the effective date of the loan agreement, and allowable under § 800.200, may be credited toward the borrower's share of costs if, in DOE's judgment, they were primarily related to the bid or proposal, but shall not be reimbursed from the loan.

(7) The borrower shall make periodic reports regarding the bid or proposal.

(8) The borrower shall maintain good standing under Federal, State and local laws and regulations applicable to the conduct of its business, including current payment of all taxes, fees and other charges and all requisite licenses and other governmental authorization necessary for the continued operation of the business throughout the term of the loan.

(9) The borrower shall remain a minority business enterprise throughout the term of the loan.

(10) The borrower shall return funds disbursed, but not required together with accrued interest thereon, to DOE, or to the servicing agent, if applicable, when its bid or proposal is ready for submission. The return of unrequired funds shall be by check separate from any payment of interest or principal, shall be identified by the borrower as a return of unrequired funds, and shall be accompanied by the borrower's certification that so much of the loan as has been disbursed to the borrower and not returned has been, or will be, expended by the borrower for costs allowable under § 800.200.

(11) Such other provisions as the Secretary deems appropriate.

(b) The loan agreement shall also provide for loan servicing and monitoring in accordance with § 800.300 and § 800.301, loan limitation in accordance with § 800.302, assignment and transfer in accordance with § 800.303, default in accordance with § 800.304 and appeals in accordance with § 800.307.

(c) The Secretary may require, as preconditions to disbursement, that the borrower have specified amounts of working capital (including amounts derived from Federal financial assistance) and maintain specified financial ratios, where in the Secretary's judgment satisfaction of such preconditions is necessary to assure the borrower's ability to make and perform the contract, agreement or subcontract according to the bid or proposal, or is otherwise necessary to protect the interests of the United States.

(d) The Secretary may require pledges, personal guarantees and other collateral security, and the maintenance of insurance on the borrower's assets and principals, in amounts and on terms appropriate in the Secretary's judgment, to protect the interests of the United States.

### § 800.203 Loan limits.

The Secretary shall not make a loan in excess of $50,000, or make aggregate loans to the same minority business enterprise, including its affiliates, in any Federal fiscal year in excess of $100,000. In addition, the Secretary shall not increase a loan to an amount which would cause the limits set forth in the previous sentence to be exceeded. Nothing in this regulation shall be interpreted to restrict the Secretary, in making the various determinations provided for in this regulation, from taking into account considerations relating to the Office of Minority Economic Impact loan program as a whole.

### § 800.204 Deviations.

(a) To the extent consistent with the Act, relevant appropriations acts, and other applicable statutes, DOE may deviate on an individual application basis from the requirements of this regulation upon a finding by the Secretary that such deviation is necessary or appropriate in the individual case for the accomplishment of program objectives.

(b) The contracting officer may, subject to written agreement by other necessary parties, modify or amend the terms and conditions of a loan provided that such modification or amendment shall be consistent with this regulation.

## Subpart D—Loan Administration

### § 800.300 Loan servicing.

(a) Servicing of a loan under this regulation may be performed by DOE, by another Federal agency, or by a servicing agent (commercial bank, broker, or other financial institution or entity) having the capability, and legally qualified, to service the loan consistently with the requirements of this regulation, which contracts with DOE to act as servicing agent. In determining the capability of a prospective servicing agent, DOE shall give due consideration to the experience of the agent in providing financial services to minority business enterprises.

(b) If the servicing of the loan is by contract or other agreement, such contract or other agreement shall provide that the loan shall be serviced in accordance with this regulation and with the terms and conditions of the loan, under a standard of performance that a reasonable and prudent lender would require as to its own similar loan. Servicing responsibilities shall include, but not necessarily be limited to, the following:

(1) Loan disbursements as set forth in the loan agreement.

(2) Collection of principal and interest payments on a monthly basis.

(3) Maintenance of records on loan accounts.

(4) Notification of the Secretary, without delay, as to the following:

(i) That the initial disbursement or loan drawdown is ready to be made, together with evidence from the borrower that the bid or proposal preparation has begun or is about to begin.

(ii) The date and amount of each subsequent disbursement under the loan.

(iii) Any nonreceipt of payment within 10 days after the date specified for payment, together with evidence of appropriate notification to the borrower.

(iv) Any known failure by the borrower to comply with the terms and conditions of the loan agreement.

(v) Evidence, if any, that the borrower is likely to default on any condition set forth in the loan agreement or may be unable to make the next scheduled payment of principal or interest.

(5) Submittal to DOE of periodic (semi-annual or annual) reports on the status and conditions of the loan and of the borrower.

**§ 800.301 Monitoring.**

The Secretary shall have the right to audit any and all costs of the bid or proposal for which the loan is sought or made and to exclude or reduce the includible amount of any cost in accordance with § 800.200. Auditors who are employees of the United States Government, who are designated by the Secretary of Energy or by the Comptroller General of the United States, shall have access to, and the right to examine, any directly pertinent documents and records of an applicant or borrower at reasonable times under reasonable circumstances. The servicing agent, if any, shall make information regarding the loan available to the Secretary of Energy and Comptroller General to the extent lawful and within its ability. The Secretary may direct the applicant or borrower to submit to an audit by public accountant or equivalent acceptable to the Secretary.

**§ 800.302 Loan limitation.**

The Secretary may limit the loan by written notice to the borrower to those amounts, if any, already disbursed under the loan, if the Secretary has determined that the borower has failed to comply with a material term or condition set forth in the loan agreement.

**§ 800.303 Assignment or transfer of loan.**

Assignment or transfer of the loan and obligations thereunder may be made only with the prior written consent of the Secretary.

**§ 800.304 Default.**

(a) In the event that the borrower fails to perform the terms and conditions of the loan, the borrower shall be in default and the Secretary shall have the right, at the Secretary's option, to accelerate the indebtedness and demand full payment of all principal and interest amounts outstanding under the loan.

(b) No failure on the part of the Secretary to make demand at any time shall constitute a waiver of the rights held by the Secretary.

(c) Upon demand by the Secretary, the borrower shall have a period of not more than 30 days from the date of receipt of the Secretary's demand to make payment in full.

(d) In the event that the failure on the part of the borrower to perform the terms and conditions of the loan does not constitute an intentional act, but is brought about as a result of circumstances largely beyond the control of the borrower, or is deemed by, the Secretary to be insubstantial, the Secretary may elect, at the Secretary's option, to defer such performance and/or restructure the repayment required by the loan agreement in any mutually acceptable manner.

(e) Should the borrower fail to pay after demand as provided in paragraph (c) of this section, and no deferral or restructuring is agreed to by the Secretary as provided in paragraph (d) of this section, the Secretary shall undertake collection in accordance with the terms of the loan agreement and the applicable law.

**§ 800.305 Disclosure.**

Information received from an applicant by DOE may be available to the public subject to the provision of 5

U.S.C. 552, 18 U.S.C. 1905 and 10 CFR part 1004; provided that:

(a) Subject to the requirements of law, information such as trade secrets, commercial and financial information, and other information concerning the minority business enterprise that the enterprise submits to DOE in writing, in an application, or at other times throughout the duration of the loan on a privileged or confidential basis, will not be disclosed without prior notice to submitter in accordance with DOE regulations concerning public disclosure of information. Any submitter asserting that the information is privileged or confidential should appropriately identify and mark such information.

(b) Upon a showing satisfactory to the Secretary that any information or portion thereof obtained under this regulation would, if made public, divulge trade secrets or other proprietary information of the minority business enterprise, the Secretary may not disclose such information.

(c) This section shall not be construed as authority to withhold information from Congress or from any committee of Congress upon request of the Chairman.

### § 800.306 Noninterference with other laws.

Nothing in this regulation shall be construed to modify requirements imposed on the borrower by Federal, State and local government agencies in connection with permits, licenses, or other authorizations to conduct or finance its business.

### § 800.307 Appeals.

Any dispute concerning questions of fact arising under the loan agreement shall be decided in writing by the contracting officer. The borrower may request the contracting officer to reconsider any such decision, which reconsideration shall be promptly undertaken. If not satisfied with the contracting officer's final decision, the borrower, upon receipt of such written decision, may appeal the decision within 60 days in writing to the Chairman, Financial Assistance Appeals Board (FAAB), Department of Energy, Washington, DC 20585. The Board shall proceed in accordance with the Department of Energy's rules and regulations for such purpose. The decision of the Board with respect to such appeals shall be the final decision of the Secretary.

## PART 810—ASSISTANCE TO FOREIGN ATOMIC ENERGY ACTIVITIES

Sec.

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APPENDIX A TO PART 810—GENERALLY AUTHORIZED DESTINATIONS

AUTHORITY: Secs. 57, 127, 128, 129, 161, 222, and 232 Atomic Energy Act of 1954, as amended by the Nuclear Nonproliferation Act of 1978, Pub. L. 95–242, 68 Stat. 932, 948, 950, 958, 92 Stat. 126, 136, 137, 138 (42 U.S.C. 2077, 2156, 2157, 2158, 2201, 2272, 2280), and the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108–458, 118 Stat. 3768; Sec. 104 of the Energy Reorganization Act of 1974, Pub. L. 93–438; Sec. 301, Department of Energy Organization Act, Pub. L. 95–91; National Nuclear Security Administration Act, Pub. L. 106–65, 50 U.S.C. 2401 *et seq.*, as amended.

SOURCE: 80 FR 9375, Feb. 23, 2015, unless otherwise noted.

### § 810.1 Purpose.

The regulations in this part implement section 57 b.(2) of the Atomic Energy Act, which empowers the Secretary, with the concurrence of the Department of State, and after consultation with the Nuclear Regulatory Commission, the Department of Commerce,

and the Department of Defense, to authorize persons to directly or indirectly engage or participate in the development or production of special nuclear material outside the United States. The purpose of the regulations in this part is to:

(a) Identify activities that are generally authorized by the Secretary and thus require no other authorization under this part;

(b) Identify activities that require specific authorization by the Secretary and explain how to request authorization; and

(c) Specify reporting requirements for authorized activities.

**§ 810.2 Scope.**

(a) Part 810 (this part) applies to:

(1) All persons subject to the jurisdiction of the United States who directly or indirectly engage or participate in the development or production of any special nuclear material outside the United States; and

(2) The transfer of technology that involves any of the activities listed in paragraph (b) of this section either in the United States or abroad by such persons or by licensees, contractors or subsidiaries under their direction, supervision, responsibility, or control.

(b) The activities referred to in paragraph (a) of this section are:

(1) Chemical conversion and purification of uranium and thorium from milling plant concentrates and in all subsequent steps in the nuclear fuel cycle;

(2) Chemical conversion and purification of plutonium and neptunium;

(3) Nuclear fuel fabrication, including preparation of fuel elements, fuel assemblies and cladding thereof;

(4) Uranium isotope separation (uranium enrichment), plutonium isotope separation, and isotope separation of any other elements (including stable isotope separation) when the technology or process can be applied directly or indirectly to uranium or plutonium;

(5) Nuclear reactor development, production or use of the components within or attached directly to the reactor vessel, the equipment that controls the level of power in the core, and the equipment or components that normally contain or come in direct contact with or control the primary coolant of the reactor core;

(6) Development, production or use of production accelerator-driven subcritical assembly systems;

(7) Heavy water production and hydrogen isotope separation when the technology or process has reasonable potential for large-scale separation of deuterium ($^{2}H$) from protium ($^{1}H$);

(8) Reprocessing of irradiated nuclear fuel or targets containing special nuclear material, and post-irradiation examination of fuel elements, fuel assemblies and cladding thereof, if it is part of a reprocessing program; and

(9) The transfer of technology for the development, production, or use of equipment or material especially designed or prepared for any of the above listed activities. (*See* Nuclear Regulatory Commission regulations at 10 CFR part 110, Appendices A through K, and O, for an illustrative list of items considered to be especially designed or prepared for certain listed nuclear activities.)

(c) This part does not apply to:

(1) Exports authorized by the Nuclear Regulatory Commission, Department of State, or Department of Commerce;

(2) Transfer of publicly available information, publicly available technology, or the results of fundamental research;

(3) Uranium and thorium mining and milling (*e.g.*, production of impure source material concentrates such as uranium yellowcake and all activities prior to that production step);

(4) Nuclear fusion reactors per se, except for supporting systems involving hydrogen isotope separation technologies within the scope defined in paragraph (b)(7) of this section and § 810.7(c)(3);

(5) Production or extraction of radiopharmaceutical isotopes when the process does not involve special nuclear material; and

(6) Transfer of technology to any individual who is lawfully admitted for permanent residence in the United States or is a protected individual under the Immigration and Naturalization Act (8 U.S.C. 1324b(a)(3)).

(d) Persons under U.S. jurisdiction are responsible for their foreign licensees, contractors, or subsidiaries to the extent that the former have control over the activities of the latter.

### § 810.3 Definitions.

As used in this part 810:

*Agreement for cooperation* means an agreement with another nation or group of nations concluded under sections 123 or 124 of the Atomic Energy Act.

*Assistance* means assistance in such forms as instruction, skills, training, working knowledge, consulting services, or any other assistance as determined by the Secretary. Assistance may involve the transfer of technical data.

*Atomic Energy Act* means the Atomic Energy Act of 1954, as amended.

*Classified information* means national security information classified under Executive Order 13526 or any predecessor or superseding order, and Restricted Data classified under the Atomic Energy Act.

*Cooperative enrichment enterprise* means a multi-country or multi-company (where at least two of the companies are incorporated in different countries) joint development or production effort. The term includes a consortium of countries or companies or a multinational corporation.

*Country*, as well as government, nation, state, and similar entity, shall be read to include Taiwan, consistent with section 4 of the Taiwan Relations Act (22 U.S.C. 3303).

*Development* means any activity related to all phases before production such as: Design, design research, design analysis, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, and layouts.

*DOE* means the U.S. Department of Energy.

*Enrichment* means isotope separation of uranium or isotope separation of plutonium, regardless of the type of process or separation mechanism used.

*Fissile material* means isotopes that readily fission after absorbing a neutron of any energy, either fast or slow. Fissile materials are uranium-235, uranium-233, plutonium-239, and plutonium-241.

*Foreign national* means an individual who is not a citizen or national of the United States, but excludes U.S. lawful permanent residents and protected individuals under the Immigration and Naturalization Act (8 U.S.C. 1324b(a)(3)).

*Fundamental research* means basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons.

*General authorization* means an authorization granted by the Secretary under section 57 b.(2) of the Atomic Energy Act to provide assistance or technology to foreign atomic energy activities subject to this part and which does not require a request for, or the Secretary's issuance of, a specific authorization.

*IAEA* means the International Atomic Energy Agency.

*NNPA* means the Nuclear Non-Proliferation Act of 1978, 22 U.S.C. 3201 *et seq*.

*NPT* means the Treaty on the Non-Proliferation of Nuclear Weapons, done on July 1, 1968.

*Nuclear reactor* means an apparatus, other than a nuclear explosive device, designed or used to sustain nuclear fission in a self-sustaining chain reaction.

*Operational safety* means the capability of a reactor to be operated in a manner that complies with national standards or requirements or widely-accepted international standards and recommendations to prevent uncontrolled or inadvertent criticality, prevent or mitigate uncontrolled release of radioactivity to the environment, monitor and limit staff exposure to radiation and radioactivity, and protect off-site population from exposure to radiation or radioactivity. Operational safety may be enhanced by providing expert advice, equipment, instrumentation, technology, software, services, analyses, procedures, training, or other

assistance that improves the capability of the reactor to be operated in compliance with such standards, requirements or recommendations.

*Person* means:

(1) Any individual, corporation, partnership, firm, association, trust, estate, public or private institution;

(2) Any group, government agency other than DOE, or any State or political entity within a State; and

(3) Any legal successor, representative, agent, or agency of the foregoing.

*Production* means all production phases such as: Construction, production engineering, manufacture, integration, assembly or mounting, inspection, testing, and quality assurance.

*Production accelerator* means a particle accelerator especially designed, used, or intended for use with a production subcritical assembly.

*Production accelerator-driven subcritical assembly system* means a system comprised of a production subcritical assembly and a production accelerator and which is especially designed, used, or intended for the production of plutonium or uranium-233. In such a system, the production accelerator target provides a source of neutrons used to effect special nuclear material production in the production subcritical assembly.

*Production reactor* means a nuclear reactor especially designed or used primarily for the production of plutonium or uranium-233.

*Production subcritical assembly* means an apparatus that contains source material or special nuclear material to produce a nuclear fission chain reaction that is not self-sustaining and that is especially designed, used, or intended for the production of plutonium or uranium-233.

*Publicly available information* means information in any form that is generally accessible, without restriction, to the public.

*Publicly available technology* means technology that is already published or has been prepared for publication; arises during, or results from, fundamental research; or is included in an application filed with the U.S. Patent Office and eligible for foreign filing under 35 U.S.C. 184.

*Restricted Data* means all data concerning:

(1) Design, manufacture, or utilization of atomic weapons;

(2) The production of special nuclear material; or

(3) 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 Atomic Energy Act.

*Secretary* means the Secretary of Energy.

*Sensitive nuclear technology* means any information (including information incorporated in a production or utilization facility or important component part thereof) which is not available to the public (see definition of ''publicly available information'') and which is important to the design, construction, fabrication, operation, or maintenance of a uranium enrichment or nuclear fuel reprocessing facility or a facility for the production of heavy water, but shall not include Restricted Data controlled pursuant to chapter 12 of the Atomic Energy Act. The information may take a tangible form such as a model, prototype, blueprint, or operation manual or an intangible form such as assistance.

*Source material* means:

(1) Uranium or thorium, other than special nuclear material; or

(2) Ores that contain by weight 0.05 percent or more of uranium or thorium, or any combination of these materials.

*Special nuclear material* means:

(1) Plutonium,

(2) Uranium-233, or

(3) Uranium enriched above 0.711 percent by weight in the isotope uranium-235.

*Specific authorization* means an authorization granted by the Secretary under section 57b.(2) of the Atomic Energy Act, in response to an application filed under this part, to engage in specifically authorized nuclear activities subject to this part.

*Technical data* means data in such forms as blueprints, plans, diagrams, models, formulae, engineering designs, specifications, manuals, and instructions written or recorded on other media or devices such as disks, tapes,

read-only memories, and computational methodologies, algorithms, and computer codes that can directly or indirectly affect the production of special nuclear material.

*Technology* means assistance or technical data required for the development, production or use of any plant, facility, or especially designed or prepared equipment for the activities described in § 810.2(b).

*Use* means operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing.

*United States*, when used in a geographical sense, includes Puerto Rico and all territories and possessions of the United States.

### § 810.4 Communications.

(a) All communications concerning the regulations in this part should be addressed to: U.S. Department of Energy, Washington, DC 20585. Attention: Senior Policy Advisor, National Nuclear Security Administration/Office of Nonproliferation and Arms Control (NPAC), Telephone (202) 586–1007.

(b) Communications also may be delivered to DOE's headquarters at 1000 Independence Avenue SW., Washington, DC 20585. All clearly marked proprietary information will be given the maximum protection allowed by law.

(c) Communications may also be delivered by email to: *Part810@nnsa.doe.gov*. For ''fast track'' activities described in §§ 810.6(c)(1) and (c)(2) emails should be sent to: *Part810-OperationalSafety@nnsa.doe.gov*. Notifications regarding activity in the Ukraine should be delivered by email to: *Part810-Ukraine@nnsa.doe.gov*.

### § 810.5 Interpretations.

(a) The advice of the DOE Office of Nonproliferation and Arms Control may be requested on whether a proposed activity falls outside the scope of this part, is generally authorized under § 810.6, or requires a specific authorization under § 810.7. However, unless authorized by the Secretary in writing, no interpretation of the regulations in this part other than a written interpretation by the DOE General Counsel is binding upon DOE.

(b) When advice is requested from the DOE Office of Nonproliferation and Arms Control, or a binding, written determination is requested from the DOE General Counsel, a response normally will be made within 30 calendar days and, if this is not feasible, an interim response will explain the reason for the delay.

(c) The DOE Office of Nonproliferation and Arms Control may periodically publish abstracts of general or specific authorizations that may be of general interest, exclusive of proprietary business-confidential data submitted to DOE or other information protected by law from unauthorized disclosure.

### § 810.6 Generally authorized activities.

The Secretary has determined that the following activities are generally authorized, provided that no sensitive nuclear technology or assistance described in § 810.7 is involved:

(a) Engaging directly or indirectly in the production of special nuclear material at facilities in countries or with entities listed in the Appendix to this part;

(b) Transfer of technology to a citizen or national of a country other than the United States not listed in the Appendix to this part and working at an NRC-licensed facility, provided:

(1) The foreign national is lawfully employed by or contracted to work for a U.S. employer in the United States;

(2) The foreign national executes a confidentiality agreement with the U.S. employer to safeguard the technology from unauthorized use or disclosure;

(3) The foreign national has been granted unescorted access in accordance with NRC regulations at an NRC-licensed facility; and

(4) The foreign national's U.S. employer authorizing access to the technology complies with the reporting requirements in § 810.12(g).

(c) Activities at any safeguarded or NRC-licensed facility to:

(1) Prevent or correct a current or imminent radiological emergency posing a significant danger to the health and safety of the off-site population, which emergency in DOE's assessment

cannot be met by other means, provided DOE is notified in writing in advance and does not object within 48 hours of receipt of the advance notification;

(2) Furnish operational safety information or assistance to existing safeguarded civilian nuclear reactors outside the United States in countries with safeguards agreements with the IAEA or an equivalent voluntary offer, provided DOE is notified in writing and approves the activity in writing within 45 calendar days of the notice. The applicant should provide all the information required under § 810.11 and specific references to the national or international safety standards or requirements for operational safety for nuclear reactors that will be addressed by the assistance; or

(3) Furnish operational safety information or assistance to existing, proposed, or new-build civilian nuclear facilities in the United States, provided DOE is notified by certified mail return receipt requested and approves the activity in writing within 45 calendar days of the notice. The applicant should provide all the information required under § 810.11.

(d) Participation in exchange programs approved by the Department of State in consultation with DOE;

(e) Activities carried out in the course of implementation of the ''Agreement between the United States of America and the IAEA for the Application of Safeguards in the United States,'' done on December 9, 1980;

(f) Activities carried out by persons who are full-time employees of the IAEA or whose employment by or work for the IAEA is sponsored or approved by the Department of State or DOE; or

(g) Extraction of Molybdenum-99 for medical use from irradiated targets of enriched uranium, provided that the activity does not also involve purification and recovery of enriched uranium materials, and provided further, that the technology used does not involve significant components relevant for reprocessing spent nuclear reactor fuel (*e.g.*, high-speed centrifugal contactors, pulsed columns).

### § 810.7 Activities requiring specific authorization.

Any person requires a specific authorization by the Secretary before:

(a) Engaging in any of the activities listed in § 810.2(b) with any foreign country or entity not specified in the Appendix to this part;

(b) Providing or transferring sensitive nuclear technology to any foreign country or entity; or

(c) Engaging in or providing technology (including assistance) for any of the following activities with respect to any foreign country or entity (or a citizen or national of that country other than U.S. lawful permanent residents or protected individuals under the Immigration and Naturalization Act (8 U.S.C. 1324b(a)(3)):

(1) Uranium isotope separation (uranium enrichment), plutonium isotope separation, or isotope separation of any other elements (including stable isotope separation) when the technology or process can be applied directly or indirectly to uranium or plutonium;

(2) Fabrication of nuclear fuel containing plutonium, including preparation of fuel elements, fuel assemblies, and cladding thereof;

(3) Heavy water production, and hydrogen isotope separation, when the technology or process has reasonable potential for large-scale separation of deuterium ($^{2}H$) from protium ($^{1}H$);

(4) Development, production or use of a production accelerator-driven subcritical assembly system;

(5) Development, production or use of a production reactor; or

(6) Reprocessing of irradiated nuclear fuel or targets containing special nuclear material.

### § 810.8 Restrictions on general and specific authorization.

A general or specific authorization granted by the Secretary under this part:

(a) Is limited to activities involving only unclassified information and does not permit furnishing classified information;

(b) Does not relieve a person from complying with the relevant laws or

the regulations of other U.S. Government agencies applicable to exports; and

(c) Does not authorize a person to engage in any activity when the person knows or has reason to know that the activity is intended to provide assistance in designing, developing, fabricating, or testing a nuclear explosive device.

### § 810.9 Grant of specific authorization.

(a) An application for authorization to engage in activities for which specific authorization is required under § 810.7 should be made to the U.S. Department of Energy, National Nuclear Security Administration, Washington, DC 20585, Attention: Senior Policy Advisor, Office of Nonproliferation and Arms Control (NPAC).

(b) The Secretary will approve an application for specific authorization if it is determined, with the concurrence of the Department of State and after consultation with the Nuclear Regulatory Commission, Department of Commerce, and Department of Defense, that the activity will not be inimical to the interest of the United States. In making such a determination, the Secretary will take into account the following factors:

(1) Whether the United States has an agreement for cooperation in force covering exports to the country or entity involved;

(2) Whether the country is a party to, or has otherwise adhered to, the NPT;

(3) Whether the country is in good standing with its acknowledged nonproliferation commitments;

(4) Whether the country is in full compliance with its obligations under the NPT;

(5) Whether the country has accepted IAEA safeguards obligations on all nuclear materials used for peaceful purposes and has them in force;

(6) Whether other nonproliferation controls or conditions exist on the proposed activity, including that the recipient is duly authorized by the country to receive and use the technology sought to be transferred;

(7) Significance of the assistance or transferred technology relative to the existing nuclear capabilities of the country;

(8) Whether the transferred technology is part of an existing cooperative enrichment enterprise or the supply chain of such an enterprise;

(9) The availability of comparable assistance or technology from other sources; and

(10) Any other factors that may bear upon the political, economic, competitiveness, or security interests of the United States, including the obligations of the United States under treaties or other international agreements, and the obligations of the country under treaties or other international agreements.

(c) If the proposed activity involves the export of sensitive nuclear technology, the requirements of sections 127 and 128 of the Atomic Energy Act and of any applicable United States international commitments must also be met. For the export of sensitive nuclear technology, in addition to the factors in paragraph (b) of this section, the Secretary will take into account:

(1) Whether the country has signed, ratified, and is implementing a comprehensive safeguards agreement with the IAEA and has in force an Additional Protocol based on the Model Additional Protocol, or, pending this, in the case of a regional accounting and control arrangement for nuclear materials, is implementing, in cooperation with the IAEA, a safeguards agreement approved by the IAEA Board of Governors prior to the publication of INFCIRC/540 (September 1997); or alternatively whether comprehensive safeguards, including the measures of the Model Additional Protocol, are being applied in the country;

(2) Whether the country has not been identified in a report by the IAEA Secretariat that is under consideration by the IAEA Board of Governors, as being in breach of obligations to comply with the applicable safeguards agreement, nor continues to be the subject of Board of Governors decisions calling upon it to take additional steps to comply with its safeguards obligations or to build confidence in the peaceful nature of its nuclear program, nor as to which the IAEA Secretariat has reported that it is unable to implement the applicable safeguards agreement. This criterion would not apply in cases

where the IAEA Board of Governors or the United Nations Security Council subsequently decides that adequate assurances exist as to the peaceful purposes of the country's nuclear program and its compliance with the applicable safeguards agreements. For the purposes of this paragraph, ''breach'' refers only to serious breaches of proliferation concern;

(3) Whether the country is adhering to the Nuclear Suppliers Group Guidelines and, where applicable, has reported to the Security Council of the United Nations that it is implementing effective export controls as identified by Security Council Resolution 1540; and

(4) Whether the country adheres to international safety conventions relating to nuclear or other radioactive materials or facilities.

(d) Unless otherwise prohibited by U.S. law, the Secretary may grant an application for specific authorization for activities related to the enrichment of source material and special nuclear material, provided that:

(1) The U.S. Government has received written nonproliferation assurances from the government of the country;

(2) That it/they accept(s) the sensitive enrichment equipment and enabling technologies or an operable enrichment facility under conditions that do not permit or enable unauthorized replication of the facilities;

(3) That the subject enrichment activity will not result in the production of uranium enriched to greater than 20% in the isotope uranium-235; and

(4) That there are in place appropriate security arrangements to protect the activity from use or transfer inconsistent with the country's national laws.

(e) Approximately 30 calendar days after the Secretary's grant of a specific authorization, a copy of the Secretary's determination may be provided to any person requesting it at DOE's Public Reading Room, unless the applicant submits information demonstrating that public disclosure will cause substantial harm to its competitive position. This provision does not affect any other authority provided by law for the non-disclosure of information.

### § 810.10 Revocation, suspension, or modification of authorization.

The Secretary may revoke, suspend, or modify a general or specific authorization:

(a) For any material false statement in an application for specific authorization or in any additional information submitted in its support;

(b) For failing to provide a report or for any material false statement in a report submitted pursuant to § 810.12;

(c) If any authorization governed by this part is subsequently determined by the Secretary to be inimical to the interest of the United States or otherwise no longer meets the legal criteria for approval; or

(d) Pursuant to section 129 of the Atomic Energy Act.

### § 810.11 Information required in an application for specific authorization.

(a) An application letter must include the following information:

(1) The name, address, and citizenship of the applicant, and complete disclosure of all real parties in interest; if the applicant is a corporation or other legal entity, where it is incorporated or organized; the location of its principal office; and the degree of any control or ownership by any foreign individual, corporation, partnership, firm, association, trust, estate, public or private institution or government agency;

(2) The country or entity to receive the assistance or technology; the name and location of any facility or project involved; and the name and address of the person for which or whom the activity is to be performed;

(3) A description of the assistance or technology to be provided, including a complete description of the proposed activity, its approximate monetary value, and a detailed description of any specific project to which the activity relates as specified in §§ 810.9(b)(7), (8), and (9); and

(4) The designation of any information that if publicly disclosed would cause substantial harm to the competitive position of the applicant.

(b) Except as provided in § 810.6(b), an applicant seeking to employ a citizen or national of a country not listed in the Appendix in a position that could result in the transfer of technology

subject to § 810.2, or seeking to employ any foreign national in the United States or in a foreign country that could result in the export of assistance or transfer of technology subject to § 810.7 must request a specific authorization. The applicant must provide, with respect to each foreign national to whom access to technology will be granted, the following:

(1) A description of the technology that would be made available to the foreign national;

(2) The purpose of the proposed transfer, a description of the applicant's technology control program, and any Nuclear Regulatory Commission standards applicable to the employer's grant of access to the technology;

(3) A copy of any confidentiality agreement to safeguard the technology from unauthorized use or disclosure between the applicant and the foreign national;

(4) Background information about the foreign national, including the individual's citizenship, all countries where the individual has resided for more than six months, the training or educational background of the individual, all work experience, any other known affiliations with persons engaged in activities subject to this part, and any current immigration or visa status in the United States; and

(5) A statement signed by the foreign national that he/she will comply with the regulations under this part; will not disclose the applicant's technology without DOE's prior written authorization; and will not, at any time during or after his/her employment with the applicant, use the applicant's technology for any nuclear explosive device, for research on or development of any nuclear explosive device, or in furtherance of any military purpose.

(c) An applicant for a specific authorization related to the enrichment of fissile material must submit information that demonstrates that the proposed transfer will avoid, so far as practicable, the transfer of enabling design or manufacturing technology associated with such items; and that the applicant will share with the recipient only information required for the regulatory purposes of the recipient country or to ensure the safe installation and operation of a resulting enrichment facility, without divulging enabling technology.

**§ 810.12 Reports.**

(a) Each person who has received a specific authorization shall, within 30 calendar days after beginning the authorized activity, provide to DOE a written report containing the following information:

(1) The name, address, and citizenship of the person submitting the report;

(2) The name, address, and citizenship of the person for whom or which the activity is being performed;

(3) A description of the activity, the date it began, its location, status, and anticipated date of completion; and

(4) A copy of the DOE letter authorizing the activity.

(b) Each person carrying out a specifically authorized activity shall inform DOE, in writing within 30 calendar days, of completion of the activity or of its termination before completion.

(c) Each person granted a specific authorization shall inform DOE, in writing within 30 calendar days, when it is known that the proposed activity will not be undertaken and the granted authorization will not be used.

(d) DOE may require reports to include such additional information that may be required by applicable U.S. law, regulation, or policy with respect to the specific nuclear activity or country for which specific authorization is required.

(e) Each person, within 30 calendar days after beginning any generally authorized activity under § 810.6, shall provide to DOE:

(1) The name, address, and citizenship of the person submitting the report;

(2) The name, address, and citizenship of the person for whom or which the activity is being performed;

(3) A description of the activity, the date it began, its location, status, and anticipated date of completion; and

(4) A written assurance that the applicant has an agreement with the recipient ensuring that any subsequent transfer of materials, equipment, or technology transferred under general

authorization under circumstances in which the conditions in § 810.6 would not be met will take place only if the applicant obtains DOE's prior written approval.

(f) Individuals engaging in generally authorized activities as employees of persons required to report are not themselves required to submit the reports described in paragraph (e) of this section.

(g) Persons engaging in generally authorized activities under § 810.6(b) are required to notify DOE that a citizen or national of a country not listed in the Appendix to this part has been granted access to information subject to § 810.2 in accordance with Nuclear Regulatory Commission access requirements. The report should contain the information required in § 810.11(b).

(h) All reports should be sent to: U.S. Department of Energy, National Nuclear Security Administration, Washington, DC 20585, Attention: Senior Policy Advisor, Office of Nonproliferation and Arms Control (NPAC).

### § 810.13 Additional information.

DOE may at any time require a person engaging in any generally or specifically authorized activity to submit additional information.

### § 810.14 Special provisions regarding Ukraine.

(a) *Pre-activity notification requirements.* Any person beginning any generally authorized activity involving Ukraine shall provide to DOE at least ten days prior to beginning that activity a report containing the following information:

(1) The name, address, and citizenship of the person submitting the notification;

(2) The name, address, and citizenship of the person for which the activity is to be performed;

(3) A description of the activity, the date it is proposed to begin, its location, status, and anticipated date of completion; and

(4) A written assurance that the person that is to perform the activity has an agreement with the recipient that any subsequent transfer of technology or information transferred under general authorization will not be transferred to a country that is not listed in the Appendix to this part without the prior written approval of DOE.

(b) *Post-activity reporting requirements.* Every person completing a generally authorized activity in Ukraine shall provide to DOE within ten days following the original transfer of technology or information written confirmation that such transfer was completed in accordance with the description of the activity provided as required by paragraph (a) of this section.

### § 810.15 Violations.

(a) The Atomic Energy Act provides that:

(1) In accordance with section 232 of the AEA, permanent or temporary injunctions, restraining or other orders may be granted to prevent a violation of any provision of the Atomic Energy Act or any regulation or order issued thereunder.

(2) In accordance with section 222 of the AEA, whoever willfully violates, attempts to violate, or conspires to violate any provision of section 57 of the Atomic Energy Act may be fined up to $10,000 or imprisoned up to 10 years, or both. If the offense is committed with intent to injure the United States or to aid any foreign nation, the penalty could be up to life imprisonment or a $20,000 fine, or both.

(b) In accordance with Title 18 of the United States Code, section 1001, whoever knowingly and willfully falsifies, conceals, or covers up a material fact or makes or uses false, fictitious or fraudulent statements or representations shall be fined under that title or imprisoned up to five or eight years depending on the crime, or both.

### § 810.16 Effective date and savings clause.

(a) The regulations in this part are effective March 25, 2015.

(b) Except for actions that may be taken by DOE pursuant to § 810.10, the regulations in this part do not affect the validity or terms of any specific authorizations granted under regulations in effect before March 25, 2015 or generally authorized activities under

those regulations for which the contracts, purchase orders, or licensing arrangements were already in effect. Persons engaging in activities that were generally authorized under regulations in effect before March 25, 2015, but that require specific authorization under the regulations in this part, must request specific authorization by August 24, 2015 and may continue their activities until DOE acts on the request.

APPENDIX A TO PART 810—GENERALLY AUTHORIZED DESTINATIONS

Argentina
Australia
Austria
Belgium
Brazil
Bulgaria
Canada
Chile (For all activities related to INFCIRC/834 only)
Colombia
Croatia
Cyprus
Czech Republic
Denmark
Egypt
Estonia
Finland
France
Germany
Greece
Hungary
Indonesia
International Atomic Energy Agency
Ireland
Italy
Japan
Kazakhstan
Korea, Republic of
Latvia
Lithuania
Luxembourg
Malta
Mexico (For all activities related to INFCIRC/203 Parts 1 and 2 and INFCIRC/825 only)
Morocco
Netherlands
Norway
Poland
Portugal
Romania
Slovakia
Slovenia
South Africa
Spain
Sweden
Switzerland
Taiwan
Turkey
Ukraine (Refer to §810.14 for specific information and requirements)
United Arab Emirates
United Kingdom
Vietnam

# PART 820—PROCEDURAL RULES FOR DOE NUCLEAR ACTIVITIES

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AUTHORITY: 42 U.S.C. 2201; 2282(a); 7191; 28 U.S.C. 2461 note; 50 U.S.C. 2410.

SOURCE: 58 FR 43692, Aug. 17, 1993, unless otherwise noted.

## Subpart A—General

### § 820.1 Purpose and scope.

(a) *Scope*. This part sets forth the procedures to govern the conduct of persons involved in DOE nuclear activities and, in particular, to achieve compliance with the DOE Nuclear Safety Requirements by all persons subject to those requirements.

(b) *Questions not addressed by these rules*. Questions that are not addressed in this part shall be resolved at the discretion of the DOE Official.

(c) *Exclusion*. Activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval nuclear propulsion are excluded from the requirements of subparts D and E of this part regarding interpretations and exemptions related to this part. The Deputy Administrator for Naval Reactors or his designee will be responsible for formulating, issuing, and maintaining appropriate records of interpretations and exemptions for these facilities and activities.

[58 FR 43692, Aug. 17, 1993, as amended at 71 FR 68732, Nov. 28, 2006]

### § 820.2 Definitions.

(a) The following definitions apply to this part:

*Act* or *AEA* means the Atomic Energy Act of 1954, as amended.

*Administrative Law Judge* means an Administrative Law Judge appointed under 5 U.S.C. 3105.

*Consent Agreement* means any written document, signed by the Director and a person, containing stipulations or conclusions of fact or law and a remedy acceptable to both the Director and the person.

*Contractor* means any person under contract (or its subcontractors or suppliers) with the Department of Energy with the responsibility to perform activities or to supply services or products that are subject to DOE Nuclear Safety Requirements.

*Department* means the United States Department of Energy or any predecessor agency.

*Director* means the DOE Official to whom the Secretary has assigned the authority to issue Notices of Violation under subpart B of this part, including the Director of Enforcement, or his designee. With regard to activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval nuclear propulsion, the Director shall mean the Deputy Administrator for Naval Reactors or his designee.

*Docketing Clerk* means the Office in DOE with which documents for an enforcement action must be filed and which is responsible for maintaining a record and a public docket for enforcement actions commencing with the filing of a Preliminary Notice of Violation. It is also the Office with which interpretations, exemptions, and any other documents designated by the Secretary shall be filed.

*DOE* means the United States Department of Energy or any predecessor agency.

*DOE Nuclear Safety Requirements* means the set of enforceable rules, regulations, or orders relating to nuclear safety adopted by DOE (or by another Agency if DOE specifically identifies the rule, regulation, or order) to govern the conduct of persons in connection with any DOE nuclear activity and includes any programs, plans, or other provisions intended to implement these rules, regulations, orders, a Nuclear Statute or the Act, including technical specifications and operational safety requirements for DOE nuclear facilities. For purposes of the assessment of civil penalties, the definition of DOE Nuclear Safety Requirements is limited to those identified in 10 CFR 820.20(b).

*DOE Official* means the person, or his designee, in charge of making a decision under this part.

*Enforcement adjudication* means the portion of the enforcement process that commences when a respondent requests an on-the-record adjudication of the assessment of a civil penalty and terminates when a Presiding Officer files an initial decision.

*Exemption* means the final order that sets forth the relief, waiver, or release, either temporary or permanent, from a DOE Nuclear Safety Requirement, as granted by the appropriate Secretarial Officer pursuant to the provisions of subpart E of this part.

*Filing* means, except as otherwise specifically indicated, the completion of providing a document to the Office of the Docketing Clerk and serving the document on the person to whom the document is addressed.

*Final Notice of Violation* means a document issued by the Director in which the Director determines that the respondent has violated or is continuing to violate a DOE Nuclear Safety Requirement and includes:

(i) A statement specifying the DOE Nuclear Safety Requirement to which the violation relates;

(ii) A concise statement of the basis for the determination;

(iii) Any remedy, including the amount of any civil penalty;

(iv) A statement explaining the reasoning behind any remedy; and

(v) If the Notice assesses a civil penalty, notice of respondent's right:

(A) To waive further proceedings and pay the civil penalty;

(B) To request an on-the-record adjudication of the assessment of the civil penalty; or

(C) To seek judicial review of the assessment of the civil penalty.

*Final Order* means an order of the Secretary that represents final agency action and, where appropriate, imposes a remedy with which the recipient of the order must comply.

*General Counsel* means the General Counsel of DOE or his designee.

*Hearing* means an on-the-record enforcement adjudication open to the public and conducted under the procedures set forth in subpart B of this part.

*Initial Decision* means the decision filed by the Presiding Officer based upon the record of the enforcement adjudication out of which it arises.

*Interpretation* means a statement by the General Counsel concerning the meaning or effect of the Act, a Nuclear Statute, or a DOE Nuclear Safety Requirement which relates to a specific factual situation but may also be a ruling of general applicability where the General Counsel determines such action to be appropriate.

*NNSA* means the National Nuclear Security Administration.

*Nuclear Statute* means any statute or provision of a statute that relates to a DOE nuclear activity and for which DOE is responsible.

*Party* means the Director and the respondent in an enforcement adjudication under this part.

*Person* means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency, any State or political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity and any legal successor, representative, agent or agency of the foregoing; provided that person does not include the Department or the United States Nuclear Regulatory Commission. For purposes of civil penalty assessment, the term also includes affiliated entities, such as a parent corporation.

*Preliminary Notice of Violation* means a document issued by the Director in which the Director sets forth the preliminary conclusions that the respondent has violated or is continuing to violate a DOE Nuclear Safety Requirement and includes:

(i) A statement specifying the DOE Nuclear Safety Requirement to which the violation relates;

(ii) A concise statement of the basis for alleging the violation;

(iii) Any proposed remedy, including the amount of any proposed civil penalty; and

(iv) A statement explaining the reasoning behind any proposed remedy.

*Presiding Officer* means the Administrative Law Judge designated to be in charge of an enforcement adjudication who shall conduct a fair and impartial hearing, assure that the facts are fully elicited, adjudicate all issues, avoid delay, and shall have authority to:

(i) Conduct an adjudicatory hearing under this part;

(ii) Rule upon motions, requests, and offers of proof, dispose of procedural requests, and issue all necessary orders;

(iii) Exercise the authority set forth in § 820.8;

(iv) Admit or exclude evidence;

(v) Hear and decide questions of fact, law, or discretion, except for the validity of regulations and interpretations issued by DOE;

(vi) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;

(vii) Draw adverse inferences against a party that fails to comply with his orders;

(viii) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules.

*Remedy* means any action necessary or appropriate to rectify, prevent, or penalize a violation of the Act, a Nuclear Statute, or a DOE Nuclear Safety Requirements, including the assessment of civil penalties, the requirement of specific actions, or the modification, suspension or recision of a contract.

*Respondent* means any person to whom the Director addresses a Notice of Violation.

*Secretarial Officer* means 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 or the head of a departmental element who is primarily responsible for the conduct of an activity under the Act. With regard to activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval nuclear propulsion, Secretarial Officer means the Deputy Administrator for Naval Reactors.

*Secretary* means the Secretary of Energy or his designee.

(b) Terms defined in the Act and not defined in these rules are used consistent with the meanings given in the Act.

(c) As used in this part, words in the singular also include the plural and words in the masculine gender also include the feminine and vice versa, as the case may require.

[58 FR 43692, Aug. 17, 1993, as amended at 71 FR 68732, Nov. 28, 2006; 72 FR 31921, June 8, 2007]

EFFECTIVE DATE NOTE: At 81 FR 94913, Dec. 27, 2016, § 820.2 was amended by revising the definition for ''DOE Nuclear Safety Requirements'' to read as follows, effective Jan. 26, 2017. For the convenience of the user, the revised text is set forth as follows:

**§ 820.2 Definitions.**

* * * * *

*DOE Nuclear Safety Requirements* means the set of rules, regulations, orders, and other requirements relating to nuclear safety adopted by DOE to govern the conduct of persons in connection with any DOE nuclear activity and includes any program, plan, or other provision required to implement these rules, regulations, orders, or other requirements. DOE Nuclear Safety Requirements include the following:

(i) 10 CFR part 830;

(ii) 10 CFR part 835;

(iii) 10 CFR 820.11;

(iv) Compliance Orders issued pursuant to 10 CFR part 820, subpart C; and

(v) 10 CFR 708.43, to the extent that subject activities concern nuclear safety.

**§ 820.3 Separation of functions.**

(a) *Separation of functions*. After a respondent requests an on-the-record adjudication of an assessment of a civil penalty contained in a Final Notice of Violation, no person shall participate in a decision-making function in an enforcement proceeding if he has been, is or will be responsible for an investigative or prosecutorial function related to that proceeding or if he reports to the person responsible for the investigative or prosecutorial function.

(b) *Director*. The Director shall be responsible for the investigation and prosecution of violations of the DOE Nuclear Safety Requirements. After the request for an enforcement adjudication, the Director shall not discuss *ex parte* the merits of the proceeding with a DOE Official or any person likely to advise the DOE Official in the decision of the proceeding.

(c) *Presiding Officer*. A Presiding Officer shall perform no duties inconsistent with his responsibilities as a Presiding Officer, and will not be responsible to or subject to the supervision or direction of any officer or employee engaged in the performance of an investigative or prosecutorial function. The Presiding Officer may not consult any person other than a member of his staff or a special assistant on any fact at issue unless on notice and opportunity for all parties to participate, except as required for the disposition of *ex parte* matters as authorized by law.

### § 820.4 Conflict of interest.

A DOE Official may not perform functions provided for in this part regarding any matter in which he has a financial interest or has any relationship that would make it inappropriate for him to act. A DOE Official shall withdraw at any time from any action in which he deems himself disqualified or unable to act for any reason. Any interested person may at any time request the General Counsel to disqualify a DOE Official or request that the General Counsel disqualify himself. In the case of an enforcement adjudication, a motion to disqualify shall be made to the Presiding Officer. The request shall be supported by affidavits setting forth the grounds for disqualification of the DOE Official. A decision shall be made as soon as practicable and information may be requested from any person concerning the matter. If a DOE Official is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in this section shall replace him.

### § 820.5 Service.

(a) *General rule.* Any document filed with the Docketing Clerk must be served on the addressee of the document and shall not be considered filed until service is complete and unless accompanied by proof of service; provided that the filing with the Docketing Clerk of any document addressed to the DOE Official shall be considered service on the DOE Official.

(b) *Service in an Enforcement Adjudication.* Any document filed in an enforcement adjudication must be served on all other participants in the adjudication.

(c) *Who may be served.* Any paper required to be served upon a person shall be served upon him or upon the representative designated by him or by law to receive service of papers. When an attorney has entered an appearance on behalf of a person, service must be made upon the attorney of record.

(d) *How service may be made.* Service may be made by personal delivery, by first class, certified or registered mail or as otherwise authorized or required by the DOE Official. The DOE Official may require service by express mail.

(e) *When service is complete.* Service upon a person is complete:

(1) By personal delivery, on handing the paper to the individual, or leaving it at his office with his clerk or other person in charge or, if there is no one in charge, leaving it in a conspicuous place therein or, if the office is closed or the person to be served has no office, leaving it at his usual place of residence with some person of suitable age and discretion then residing there;

(2) By mail, on deposit in the United States mail, properly stamped and addressed; or

(3) By any other means authorized or required by the DOE Official.

(f) *Proof of service.* Proof of service, stating the name and address of the person on whom served and the manner and date of service, shall be shown for each document filed, and may be made by:

(1) Written acknowledgement of the person served or his counsel;

(2) The certificate of counsel if he has made the service;

(3) The affidavit of the person making the service; or

(4) Any other means authorized or required by the DOE Official.

(g) *Deemed service.* If a document is deemed filed under this part, then the service requirements shall be deemed satisfied when the document is deemed filed.

### § 820.6 Computation and extension of time.

(a) *Computation.* In computing any period of time set forth in this part, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday or Federal legal holiday, the stated time period shall be extended to include the next business day.

(b) *Extensions of time.* A DOE Official may grant an extension of any time period set forth in this part.

(c) *Service by mail.* Where a pleading or document is served by mail, five (5) days shall be added to the time allowed by these rules for the filing of a responsive pleading or document. Where a

pleading or document is served by express mail, only two (2) days shall be added.

### § 820.7 Questions of policy or law.

(a) *Certification*. There shall be no interlocutory appeal from any ruling order, or action decision of a DOE Official except as permitted by this section. A Presiding Officer in an enforcement adjudication may certify, in his discretion, a question to the Secretary, when the order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion, and either an immediate decision will materially advance the ultimate termination of the proceeding, or subsequent review will be inadequate or ineffective.

(b) *Decision*. The certified question shall be decided as soon as practicable. If the Secretary determines that the question was improvidently certified, or if he takes no action within thirty days of the certification, the certification is dismissed. The Secretary may decide the question on the basis of the submission made by the Presiding Officer or may request further information from any person.

### § 820.8 Evidentiary matters.

(a) *General*. A DOE Official may obtain information or evidence for the full and complete investigation of any matter related to a DOE nuclear activity or for any decision required by this part. A DOE Official 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) *Special Report Orders*. A DOE Official may issue a Special Report Order (SRO) requiring any person involved in a DOE nuclear activity or otherwise subject to the jurisdiction of DOE to file a special report providing information relating to a DOE Nuclear Safety Requirement, the Act, or a Nuclear Statute, including but not limited to written answers to specific questions. The SRO may be in addition to any other reports required by this part.

(c) *Extension of Time*. The DOE Official who issues a subpoena or SRO pursuant to this section, 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) *Reconsideration*. 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 request reconsideration of the subpoena or SRO with the DOE Official who issued the document. If the subpoena or SRO is not modified or rescinded within 10 days of the date of the filing of the request, the subpoena or SRO shall be effective as issued and the person upon whom the document was served shall comply with the subpoena or SRO within 20 days of the date of the filing. There is no administrative appeal of a subpoena or SRO.

(e) *Service*. A subpoena or SRO shall be served in the manner set forth in § 820.5, except that service by mail must be made by registered or certified mail.

(f) *Fees*. (1) A witness subpoenaed by a DOE Official shall be paid the same fees and mileage as paid to a witness in the district courts of the United States.

(2) If 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 shall be paid by the DOE if the person shows:

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

(ii) The person who requested that the subpoena be issued would suffer a serious hardship if required to pay the witness fees and mileage. The DOE Official issuing the subpoena shall make

the determination required by this subsection.

(g) *Enforcement*. 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 United States District Court to enforce the subpoena or SRO.

(h) *Certification*. (1) 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 a diligent search has been made for each document responsive to the subpoena, and to the best of his knowledge, information, and belief all such documents responsive to the subpoena are being produced unless withheld on the grounds of privilege pursuant to paragraph (i) of this section.

(2) 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 to the best of his knowledge, information and belief a diligent effort has been made to provide all information required by the SRO, and all information furnished is true, complete, and correct unless withheld on grounds of privilege pursuant to paragraph (i) of this section.

(3) 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.

(i) *Withheld information*. 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 (h) 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, a memorandum of law supporting the claim of privilege, and an identification of the person whose privilege is being asserted.

(j) *Statements/testimony*. (1) If a person's statement/testimony is taken pursuant to a subpoena, the DOE Official shall determine whether the statement/testimony shall be recorded and the means by which it is recorded.

(2) A person whose statement/testimony is recorded may procure a copy of the transcript by making a written request for a copy and paying the appropriate fees. Upon proper identification, any potential witness or his attorney has the right to inspect the official transcript of the witness' own statement or testimony.

(k) *Sequestration*. The DOE Official may sequester any person who furnishes documents or gives testimony. Unless permitted by the DOE Official, neither a witness nor his attorney shall be present during the examination of any other witnesses.

(l) *Attorney*. (1) Any person whose statement or testimony is taken may be accompanied, represented and advised by his attorney; provided that, 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.

(2) The DOE Official 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. The DOE Official 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.

### § 820.9 Special assistant.

A DOE Official may appoint a person to serve as a special assistant to assist the DOE Official in the conduct of any proceeding under this part. Such appointment may occur at any appropriate time. A special assistant shall be subject to the disqualification provisions in § 820.5. A special assistant may perform those duties assigned by the DOE Official, including but not limited

to, serving as technical interrogators, technical advisors and special master.

### § 820.10 Office of the docketing clerk.

(a) *Docket*. The Docketing Clerk shall maintain a docket for enforcement actions commencing with the issuance of a Preliminary Notice of Violation, interpretations issued pursuant to subpart D of this part, exemptions issued pursuant to subpart E of this part, and any other matters designated by the Secretary. A docket for an enforcement action shall contain all documents required to be filed in the proceeding.

(b) *Public inspection*. Subject to the provisions of law restricting the public disclosure of certain information, any person may, during Department business hours, inspect and copy any document filed with the Docketing Clerk. The cost of duplicating documents shall be borne by the person seeking copies of such documents. The DOE Official may waive this cost in appropriate cases.

(c) *Transcript*. Except as otherwise provided in this part, after the filing of a Preliminary Notice of Violation, all hearings, conferences, and other meetings in the enforcement process shall be transcribed verbatim. A copy of the transcript shall be filed with the Docketing Clerk promptly. The Docketing Clerk shall serve all participants with notice of the availability of the transcript and shall furnish the participants with a copy of the transcript upon payment of the cost of reproduction, unless a participant can show that the cost is unduly burdensome.

### § 820.11 Information requirements.

(a) Any information pertaining to a nuclear activity provided to DOE by any person or maintained by any person for inspection by DOE shall be complete and accurate in all material respects.

(b) No person involved in a DOE nuclear activity shall conceal or destroy any information concerning a violation of a DOE Nuclear Safety Requirement, a Nuclear Statute, or the Act.

### § 820.12 Classified, confidential, and controlled information

(a) *General rule*. The DOE Official in charge of a proceeding under this part may utilize any procedures deemed appropriate to safeguard and prevent disclosure of classified, confidential, and controlled information, including Restricted Data and National Security Information, to unauthorized persons, with minimum impairment of rights and obligations under this part.

(b) *Obligation to protect restricted information*. Nothing in this part shall relieve any person from safeguarding classified, confidential, and controlled information, including Restricted Data or National Security Information, in accordance with the applicable provisions of federal statutes and the rules, regulations, and orders of any federal agency.

### § 820.13 Direction to NNSA contractors.

(a) Notwithstanding any other provision of this part, and pursuant to section 3213 of Pub. L. 106–65, as amended (codified at 50 U.S.C. 2403), the NNSA, rather than the Director, signs, issues and serves the following actions that direct NNSA contractors:

(1) Subpoenas;

(2) Orders to compel attendance;

(3) Disclosures of information or documents obtained during an investigation or inspection;

(4) Preliminary notices of violations; and

(5) Final notices of violations.

(b) The NNSA Administrator shall act after consideration of the Director's recommendation.

[72 FR 31921, June 8, 2007]

### § 820.14 Whistleblower protection.

(a) *Covered acts*. An act of retaliation (as defined in 10 CFR 708.2) by a DOE contractor, prohibited by 10 CFR 708.43, that results from a DOE contractor employee's involvement in an activity listed in 10 CFR 708.5(a) through (c) may constitute a violation of a DOE Nuclear Safety Requirement if it concerns nuclear safety.

(b) *Commencement of investigation*. The Director may not initiate an investigation or take any other action under this part with respect to an alleged act of retaliation by a DOE contractor until 180 days after an alleged violation of 10 CFR 708.43 occurs.

(c) *Administrative or judicial proceedings*. The Director shall immediately suspend any ongoing activities under this part and suspend any time limits under this part when an administrative or judicial proceeding commences based on the same alleged act of retaliation. While an administrative or judicial proceeding, including appeals, is pending, the Director may not exercise any authority under this part based on an alleged violation of 10 CFR 708.43, including issuing enforcement letters, subpoenas, orders to compel attendance, Consent Orders, Preliminary Notices of Violation, or Final Notices of Violation. Once such a proceeding commences, the Director shall not conduct any activities under this part until sixty days after a final decision of an agency or court finds that a retaliation occurred, or otherwise makes a final disposition of the matter on procedural grounds without explicitly finding that retaliation did not occur.

(d) *Final decision*. For the purposes of this section, a final decision of an agency or court includes any of the following:

(1) A final agency decision pursuant to 10 CFR part 708;

(2) A final decision or order of the Secretary of Labor pursuant to 29 CFR part 24;

(3) A decision by the Secretary upon a report by the Inspector General;

(4) A decision by a federal or state court.

(e) *Evidentiary record*. If a final decision of an agency or court finds that retaliation occurred, the Director may obtain and use information collected as part of those proceedings. The Director has discretion to give appropriate weight to information obtained from these proceedings and to initiate and conduct further investigation if the Director deems necessary, particularly with regard to the relationship between the retaliation and nuclear safety.

(f) *Underlying nuclear safety requirements*. Notwithstanding the commencement of an administrative or judicial proceeding based on an alleged act of retaliation, this section shall not prevent the Director from taking any action consistent with this part regarding compliance with DOE Nuclear Safety Requirements other than 10 CFR 708.43.

EFFECTIVE DATE NOTE: At 81 FR 94914, Dec. 27, 2016, § 820.14 was added, effective Jan. 26, 2017.

## Subpart B—Enforcement Process

### § 820.20 Purpose and scope.

(a) *Purpose*. This subpart establishes the procedures for investigating the nature and extent of violations of the DOE Nuclear Safety Requirements, for determining, whether a violation has occurred, for imposing an appropriate remedy, and for adjudicating the assessment of a civil penalty.

(b) *Basis for civil penalties*. DOE may assess civil penalties against any person subject to the provisions of this part who has entered into an agreement of indemnification under 42 U.S.C. 2210(d) (or any subcontractor or supplier thereto), unless exempted from civil penalties as provided in paragraph (c) of this section, on the basis of a violation of:

(1) Any DOE Nuclear Safety Requirement set forth in the Code of Federal Regulations;

(2) Any Compliance Order issued pursuant to subpart C of this part; or

(3) Any program, plan or other provision required to implement any requirement or order identified in paragraphs (b)(1) or (b)(2) of this section.

(c) *Exemptions*. With respect to a violation occurring under a contract entered into before August 8, 2005, the following contractors, and subcontractors and suppliers to that prime contract only, are exempt from the assessment of civil penalties under this subpart with respect to the activities specified below:

(1) The University of Chicago for activities associated with Argonne National Laboratory;

(2) The University of California for activities associated with Los Alamos National Laboratory, Lawrence Livermore National Laboratory, and Lawrence Berkeley National Laboratory;

(3) American Telephone and Telegraph Company and its subsidiaries for activities associated with Sandia National Laboratories;

(4) University Research Association, Inc. for activities associated with FERMI National Laboratory;

(5) Princeton University for activities associated with Princeton Plasma Physics Laboratory;

(6) The Associated Universities, Inc. for activities associated with the Brookhaven National Laboratory; and

(7) Battelle Memorial Institute for activities associated with Pacific Northwest Laboratory.

(d) *Nonprofit educational institutions.* With respect to a violation occurring under a contract entered into before August 8, 2005, any educational institution that is considered nonprofit under the United States Internal Revenue Code shall receive automatic remission of any civil penalty assessed under this part.

(e) *Limitation for not-for-profits.* With respect to any violation occurring under a contract entered into on or after August 8, 2005, in the case of any not-for-profit contractor, subcontractor, or supplier, the total amount of civil penalties paid under this part may not exceed the total amount of fees paid by DOE to that entity within the U.S. Government fiscal year in which the violation occurs.

(f) *Not-for-profit.* For purposes of this part, a ''not-for-profit'' contractor, subcontractor, or supplier is one for which no part of the net earnings of the contractor, subcontractor, or supplier inures to the benefit of any natural person or for-profit artificial person.

[58 FR 43692, Aug. 17, 1993, as amended at 74 FR 11843, Mar. 20, 2009]

EFFECTIVE DATE NOTE: At 81 FR 94914, Dec. 27, 2016, § 820.20 was amended by revising paragraphs (a) and (b), effective Jan. 26, 2017. For the convenience of the user, the revised text is set forth as follows:

**§ 820.20 Purpose and scope.**

(a) *Purpose.* This subpart establishes the procedures for investigating the nature and extent of violations of DOE Nuclear Safety Requirements, for determining whether a violation of DOE Nuclear Safety Requirements has occurred, for imposing an appropriate remedy, and for adjudicating the assessment of a civil penalty.

(b) *Basis for civil penalties.* DOE may assess civil penalties against any person subject to the provisions of this part who has entered into an agreement of indemnification under 42 U.S.C. 2210(d) (or any subcontractor or supplier thereto), unless exempted from civil penalties as provided in paragraph (c) of this section, on the basis of a violation of a DOE Nuclear Safety Requirement.

**§ 820.21 Investigations.**

(a) The Director may initiate and conduct investigations and inspections relating to the scope, nature and extent of compliance by a person with the Act and the DOE Nuclear Safety Requirements and take such action as he deems necessary and appropriate to the conduct of the investigation or inspection, including any action pursuant to § 820.8.

(b) Any person may request the Director to initiate an investigation or inspection pursuant to paragraph (a) of this section. A request for an investigation or inspection shall set forth the subject matter or activity to be investigated or inspected as fully as possible and include supporting documentation and information. No particular forms or procedures are required.

(c) Any person who is requested to furnish documentary evidence, information or testimony in an investigation or during an inspection shall be informed, upon written request, of the general purpose of the investigation or inspection.

(d) Information or documents that are obtained during any investigation or inspection shall not be disclosed unless the Director directs or authorizes the public disclosure of the investigation. Upon such authorization, the information or documents are a matter of public record and disclosure is not precluded by the Freedom of Information Act, 5 U.S.C. 552 and 10 CFR part 1004. A request for confidential treatment of information for purposes of the Freedom of Information Act shall not prevent disclosure by the Director if disclosure is determined to be in the public interest and otherwise permitted or required by law.

(e) During the course of an investigation or inspection any person may submit at any time any document, statement of facts or memorandum of law for the purpose of explaining the person's position or furnish information which the person considers relevant to a matter or activity under investigation or inspection.

(f) If facts disclosed by an investigation or inspection indicate that further action is unnecessary or unwarranted, the investigation may be closed without prejudice to further investigation or inspection by the Director at any time that circumstances so warrant.

(g) The Director may issue enforcement letters that communicate DOE's expectations with respect to any aspect of the requirements of DOE's Nuclear Safety Requirements, including identification and reporting of issues, corrective actions, and implementation of DOE's Nuclear Safety Requirements, provided that an enforcement letter may not create the basis for any legally enforceable requirement pursuant to this part.

(h) The Director may sign, issue and serve subpoenas.

[58 FR 43692, Aug. 17, 1993, as amended at 72 FR 31921, June 8, 2007]

### § 820.22 Informal conference.

The Director may convene an informal conference to discuss any situation that might be a violation of the Act or a DOE Nuclear Safety Requirement, 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.

### § 820.23 Consent order.

(a) *Settlement policy*. DOE encourages settlement of an enforcement proceeding at any time if the settlement is consistent with the objectives of the Act and the DOE Nuclear Safety Requirements. The Director and a person may confer at any time concerning settlement. These settlement conferences shall not be open to the public and there shall be no transcript.

(b) *Consent order*. Notwithstanding any other provision of this part, DOE may at any time resolve any or all issues in an outstanding enforcement proceeding with a Consent Order. A Consent Order must be signed by the Director and the person who is its subject, or a duly authorized representative, must indicate agreement to the terms contained therein and must be filed. A Consent Order need not constitute an admission by any person that the Act or a DOE Nuclear Safety Requirement has been violated, nor need it constitute a finding by the DOE that such person has violated the Act or a DOE Nuclear Safety Requirement. A Consent Order shall, however, set forth the relevant facts which form the basis for the Order and what remedy, if any, is imposed.

(c) *Effect on enforcement adjudication*. If a Consent Order is signed after the commencement of an enforcement adjudication, the adjudication of the issues subject to the Consent Order shall be stayed until the completion of the Secretarial Review Process. If the Consent Order becomes a Final Order, the adjudication shall be terminated or modified as specified in the Order.

(d) *Secretarial review*. A Consent Order shall become a Final Order 30 days after it is filed unless the Secretary files a rejection of the Consent Order or a Modified Consent Order. A Modified Consent Order shall become a Final Order if the Director and the person who is its subject sign it within 15 days of its filing.

### § 820.24 Preliminary notice of violation.

(a) If the Director has reason to believe a person has violated or is continuing to violate a provision of the Act or a DOE Nuclear Safety Requirement, he may file a Preliminary Notice of Violation. The Notice and any transmittal documents shall contain sufficient information to fairly apprise the respondent of the facts and circumstances of the alleged violations and the basis of any proposed remedy, and to properly indicate what further actions are necessary by or available to respondent.

(b) Within 30 days after the filing of a Preliminary Notice of Violation, the respondent shall file a reply.

(c) The reply shall be in writing and signed by the person filing it. The reply shall contain a statement of all relevant facts pertaining to the situation that is the subject of the Notice. The reply shall state any facts, explanations and arguments which support a denial that a violation has occurred as

alleged; demonstrate any extenuating circumstances or other reason why the proposed remedy should not be imposed or should be mitigated; and furnish full and complete answers to the questions set forth in the Notice. Copies of all relevant documents shall be submitted with the reply. The reply shall include a discussion of the relevant authorities which support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE.

(d) The respondent may terminate an enforcement action if the reply agrees to comply with the proposed remedy and waives any right to contest the Notice or the remedy. If a respondent elects this option, the Preliminary Notice of Violation shall be deemed a Final Order upon the filing of the reply.

**§ 820.25 Final notice of violation.**

(a) *General rule*. If, after reviewing the reply submitted by the respondent, the Director determines that a person violated or is continuing to violate a provision of the Act or a DOE Nuclear Safety Requirement, he may file a Final Notice of Violation. The Final Notice shall concisely state the determined violation, any designated penalty, and further actions necessary by or available to respondent.

(b) *Effect of final notice*. (1) If a Final Notice of Violation does not contain a civil penalty, it shall be deemed filed as a Final Order 15 days after the Final Notice is filed unless the Secretary files a Final Order which modifies the Final Notice.

(2) If a Final Notice of Violation contains a civil penalty, the respondent must file within 30 days after the filing of the Final Notice:

(i) A waiver of further proceedings;

(ii) A request for an on-the-record adjudication; or

(iii) A notice of intent to seek judicial review.

(c) *Effect of waiver*. If a respondent waives further proceedings, the Final Notice of Violation shall be deemed a Final Order enforceable against the respondent. The respondent must pay any civil penalty set forth in the Notice of Violation within 60 days of the filing of waiver unless the Director grants additional time.

(d) *Effect of request*. If a respondent files a request for an on-the-record adjudication, then an enforcement adjudication commences.

(e) *Effect of notice of intent*. If a respondent files a Notice of Intent, the Final Notice of Violation shall be deemed a Final Order enforceable against the respondent.

(f) *Amendment*. The Director may amend the Final Notice of Violation at any time before an action takes place pursuant to paragraph (b) of this section. An amendment shall add fifteen days to the time periods under paragraph (b) of this section.

(g) *Withdrawal*. The Director may withdraw the Final Notice of Violation, or any part thereof, at any time before an action under paragraph (b) of this section.

**§ 820.26 Enforcement adjudication.**

If a respondent files a request for an on-the-record adjudication, an enforcement adjudication is initiated and the Docketing Clerk shall notify the Secretary who shall appoint an Administrative Law Judge to be the Presiding Officer.

**§ 820.27 Answer.**

(a) *General*. If a respondent files a request for an on-the-record adjudication pursuant to § 820.25, a written answer to the Final Notice of Violation shall be filed at the same time the request is filed.

(b) *Contents of the answer*. The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the Final Notice of Violation with regard to which respondent has any knowledge, information or belief. Where respondent has no knowledge, information or belief of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state the circumstance or argument that is alleged to constitute the grounds of defense and the facts that respondent intends to place at issue.

(c) *Failure to admit, deny, or explain*. Failure of respondent to admit, deny, or explain any material factual allegation contained in the Final Notice of

Violation constitutes an admission of the allegation.

(d) *Amendment of the answer*. The respondent may amend the answer to the Final Notice of Violation upon motion granted by the Presiding Officer.

**§ 820.28 Prehearing actions.**

(a) *General*. The Presiding Officer shall establish a schedule for the adjudication and take such other actions as he determines appropriate to conduct the adjudication in a fair and expeditious manner.

(b) *Prehearing conference*. The Presiding Officer, at any time before a hearing begins, may direct the parties and their counsel, or other representatives, to appear at a conference before him to consider, as appropriate:

(1) The settlement of the case;

(2) The simplification of issues and stipulation of facts not in dispute;

(3) The necessity or desirability of amendments to pleadings;

(4) The exchange of exhibits;

(5) The limitation of the number of expert or other witnesses;

(6) Setting a time and place for the hearing; and

(7) Any other matters that may expedite the disposition of the proceeding.

(c) *Exchange of witness lists and documents*. Unless otherwise ordered by the Presiding Officer, at least five (5) days before any prehearing conference, each party shall make available to all other parties, as appropriate, the names of the expert and other witnesses it intends to call, together with a brief narrative summary of their expected testimony, and copies of all documents and exhibits that each party intends to introduce into evidence. Documents and exhibits shall be marked for identification as ordered by the Presiding Officer. Documents that have not been exchanged and witnesses whose names have not been exchanged shall not be introduced into evidence or allowed to testify without permission of the Presiding Officer. The Presiding Officer shall allow the parties reasonable opportunity to review new evidence.

(d) *Prehearing conference order*. The Presiding Officer shall prepare an order incorporating any action taken at the conference. The summary shall incorporate any written stipulations or agreements of the parties and all rulings and appropriate orders containing directions to the parties.

(e) *Alternative to prehearing conference*. If a prehearing conference is unnecessary or impracticable, the Presiding Officer, on motion or *sua sponte*, may direct the parties to make appropriate filings with him to accomplish any of the objectives set forth in this section.

(f) *Other discovery*. (1) Except as provided by paragraph (c) of this section, further discovery under this section shall be permitted only upon determination by the Presiding Officer:

(i) That such discovery will not in any way unreasonably delay the proceeding;

(ii) That the information to be obtained is not otherwise obtainable; and

(iii) That such information has significant probative value.

(2) The Presiding Officer shall order depositions upon oral questions only upon a showing of good cause and upon a finding that:

(i) The information sought cannot be obtained by alternative methods; or

(ii) There is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(3) Any party to the proceeding desiring an order to take further discovery shall make a motion therefor. Such a motion shall set forth:

(i) The circumstances warranting the taking of the discovery;

(ii) The nature of the information expected to be discovered; and

(iii) The proposed time and place where it will be taken. If the Presiding Officer determines that the motion should be granted, he shall issue an order for the taking of such discovery together with the conditions and terms thereof.

(4) When the information sought to be obtained is within the control of one of the parties, failure to comply with an order issued pursuant to this paragraph may lead to the inference that the information to be discovered would be adverse to the party from whom the information was sought, or the issuance of a default order under 820.38.

**§ 820.29 Hearing.**

(a) *General*. Except as otherwise provided by this part or the Presiding Officer, a hearing shall be conducted in accordance with the Federal Rules of Evidence. The Presiding Officer shall have the discretion to admit all evidence that is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value, if he believes the evidence might facilitate the fair and expeditious resolution of the proceeding. But such evidence may be reasonably limited by the Presiding Officer in scope and length in order to permit prompt resolution of the proceeding. In the presentation, admission, disposition, and use of evidence, the Presiding Officer shall preserve the confidentiality of trade secrets and other commercial and financial information, and shall protect classified and unclassified controlled nuclear information, as well as any other information protected from public disclosure pursuant to law or regulation. The confidential, trade secret, or classified or otherwise protected status of any information shall not, however, preclude its being introduced into evidence. The Presiding Officer may make such orders as may be necessary to consider such evidence in camera, including the preparation of a supplemental initial decision to address questions of law, fact, or discretion that arise out of that portion of the evidence that is confidential, includes trade secrets, is classified, or is otherwise protected.

(b) *Subpoenas*. The attendance of witnesses or the production of documentary evidence may be required by subpoena.

(c) *Examination of witnesses*. There shall be no direct oral testimony by witnesses, except as permitted by the Presiding Officer. In lieu of oral testimony, the Presiding Officer shall admit into the record as evidence verified written statements of fact or opinion prepared by a witness. The admissibility of the evidence contained in the statement shall be subject to the same rules as if the testimony were produced under oral examination. Before any such statement is read or admitted into evidence, the witness shall have delivered a copy of the statement to the Presiding Officer and the opposing counsel not less than 10 days prior to the date the witness is scheduled to testify. The witness presenting the statement shall swear or affirm that the statement is true and accurate to the best of his knowledge, information, and belief and shall be subject to appropriate oral cross-examination upon the contents thereof provided such cross-examination is not unduly repetitious.

(d) *Burden of presentation; burden of persuasion*. The Director has the burden of going forward with and of proving that the violation occurred as set forth in the Notice of Violation and that the proposed civil penalty is appropriate. Following the establishment of a *prima facie* case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the Notice of Violation. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

**§ 820.30 Post-hearing filings.**

Within fifteen days after the filing of the transcript of the hearing, or within such longer time as may be fixed by the Presiding Officer, any party may file for the consideration of the Presiding Officer, proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. Reply briefs may be filed within ten days of the filing of briefs. All filings shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

**§ 820.31 Initial decision.**

(a) *Initial Decision*. The Presiding Officer shall file an Initial Decision as soon as practicable after the period for filing reply briefs under 820.30 has expired. The Initial Decision shall contain findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, any remedy and a proposed Final Order. A party may file comments on an Initial Decision within fifteen days of its filing.

(b) *Amount of civil penalty*. If the Presiding Officer determines that a violation has occurred and that a civil penalty is appropriate, the Initial Decision

shall set forth the dollar amount of the civil penalty. If the Presiding Officer decides to assess a penalty different in amount from the penalty assessed in the Final Notice of Violation, the Initial Decision shall set forth the specific reasons for the increase or decrease.

### § 820.32 Final order.

(a) *Effect of Initial Decision*. The Initial Decision shall be deemed filed as a Final Order thirty days after the filing of the Initial Decision unless the Secretary files a Final Order that modifies the Initial Decision or the Secretary files a Notice of Review.

(b) *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 may, at his discretion, order additional procedures, remand the matter or modify the remedy, including an increase or decrease in the amount of the civil penalty from the amount recommended to be assessed in the Initial Decision.

(c) *Payment of a civil penalty*. The respondent shall pay the full amount of any civil penalty assessed in the Final Order within thirty (30) days after the Final Order is filed unless otherwise agreed by the parties.

### § 820.33 Default order.

(a) *Default*. The Presiding Officer, upon motion by a party or the filing of a Notice of Intent to issue a Default Order *sua sponte*, may find a party to be in default if the party fails to comply with the provisions of this part or an order of the Presiding Officer. The alleged defaulting party shall have ten days to answer the motion or the Notice of Intent. No finding of default shall be made against the respondent unless the Director presents sufficient evidence to the Presiding Officer to establish a *prima facie* case against the respondent. Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the Final Notice of Violation and a waiver of respondent's rights to an on-the-record adjudication of such factual allegations. Default by the Director shall result in an order to dismiss the Final Notice of Violation with prejudice.

(b) *Effect of default order*. When the Presiding Officer finds a default has occurred, he shall file a Default Order against the defaulting party. This order shall constitute an Initial Decision.

(c) *Contents of a default order*. A Default Order shall include findings of fact showing the grounds for the order, conclusions regarding all material issues of fact, law or discretion, and the remedy.

### § 820.34 Accelerated decision.

(a) *General*. The Presiding Officer, upon motion of any party or *sua sponte*, may at any time render an Accelerated Decision in favor of the Director or the respondent as to all or any part of the adjudication, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the adjudication. In addition, the Presiding Officer, upon motion of the respondent, may render at any time an Accelerated Decision to dismiss an action without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a *prima facie* case or other grounds that show no right to relief on the part of the Director.

(b) *Effect of Accelerated Decision*. (1) If an Accelerated Decision is rendered as to all the issues and claims in the adjudication, the decision constitutes an Initial Decision of the Presiding Officer, and shall be filed with the Docketing Clerk.

(2) If an Accelerated Decision is rendered on less than all issues or claims in the adjudication, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted in good faith. He shall thereupon file an interlocutory order specifying the facts that appear substantially uncontroverted, and the issues and claims upon which the adjudication will proceed.

### § 820.35 *Ex parte* discussions.

At no time after a respondent has requested an on-the-record adjudication of the assessment of a civil penalty

shall a DOE Official, or any person who is likely to advise a DOE Official in the decision on the case, discuss *ex parte* the merits of the proceeding with any interested person outside DOE, with any DOE staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any *ex parte* memorandum or other communication addressed to a DOE Official during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. Any oral communication shall be set forth in a written memorandum and served on all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

**§ 820.36 Filing, form, and service of documents.**

(a) *Filing in an enforcement proceeding.* The original and three copies of any document in an enforcement proceeding shall be filed with the Docketing Clerk commencing with the filing of a Preliminary Notice of Violation.

(b) *Form of documents in an enforcement proceeding.* (1) Except as provided herein, or by order of the DOE Official, there are no specific requirements as to the form of documents filed in an enforcement proceeding.

(2) The first page of every document shall contain a caption identifying the respondent and the docket number.

(3) The original of any document (other than exhibits) shall be signed by the person filing it or by his counsel or other representative. The signature constitutes a representation by the signer that he has read the pleading, letter or other document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.

(4) The initial document filed by any person shall contain his name, address and telephone number. Any changes in this information shall be communicated promptly to the Docketing Clerk and all participants to the proceeding. A person who fails to furnish such information and any changes thereto shall be deemed to have waived his right to notice and service under this part.

(5) The Docketing Clerk may refuse to file any document that does not comply with this section. Written notice of such refusal, stating the reasons therefor, shall be promptly given to the person submitting the document. Such person may amend and resubmit any document refused for filing.

**§ 820.37 Participation in an adjudication.**

(a) *Parties.* In an enforcement adjudication, the Director and the respondent shall be the only parties; provided that the Presiding Officer may permit a person to intervene as a party if the person demonstrates it could be liable in the event a civil penalty is assessed.

(b) *Appearances.* Any party to an enforcement adjudication may appear in person or by counsel or other representative. A partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation. Persons who appear as counsel or other representative must conform to the standards of conduct and ethics required of practitioners before the courts of the United States.

(c) *Amicus Curiae.* Persons not parties to an enforcement adjudication who wish to file briefs may so move. The motion shall identify the interest of the person and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer shall issue an order setting the time for filing such brief. An *amicus curiae* is eligible to participate in any briefing after his motion is granted, and shall be served with all briefs, reply briefs, motions, and orders relating to issues to be briefed.

**§ 820.38 Consolidation and severance.**

(a) *Consolidation.* The Presiding Officer may, by motion or *sua sponte*, consolidate any or all matters at issue in two or more enforcement adjudications under this part where there exists common parties or common questions of fact or law, consolidation would expedite and simplify consideration of the

issues, and consolidation would not adversely affect the rights of parties engaged in otherwise separate adjudications.

(b) *Severance.* The Presiding Officer may, by motion or *sua sponte,* for good cause shown order any enforcement adjudication severed with respect to any or all parties or issues.

### § 820.39 Motions.

(a) *General.* All motions in an enforcement adjudication except those made orally, shall be in writing, state the grounds therefor with particularity, set forth the relief or order sought, and be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon.

(b) *Answer to motions.* Except as otherwise specified by a particular provision of this part or by the Presiding Officer, a party shall have the right to file a written answer to the motion of another party within 10 days after the filing of such motion. The answer shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no answer is filed within the designated period, the party may be deemed to have waived any objection to the granting of the motion. The Presiding Officer may set a shorter or longer time for an answer, or make such other orders concerning the disposition of motions as he deems appropriate.

(c) *Decision.* The Presiding Officer shall rule on a motion as soon as practicable after the filing of the answer. The decision of the Presiding Officer on any motion shall not be subject to administrative appeal.

## Subpart C—Compliance Orders

### § 820.40 Purpose and scope.

This subpart provides for the issuance of Compliance Orders to prevent, rectify or penalize violations of the Act, a Nuclear Statute, or a DOE Nuclear Safety Requirement and to require action consistent with the Act, a Nuclear Statute, or a DOE Nuclear Safety Requirement.

### § 820.41 Compliance order.

The Secretary may issue to any person involved in a DOE nuclear activity a Compliance Order that:

(a) Identifies a situation that violates, potentially violates, or otherwise is inconsistent with the Act, a Nuclear Statute, or a DOE Nuclear Safety Requirement;

(b) Mandates a remedy or other action; and,

(c) States the reasons for the remedy or other action.

### § 820.42 Final order.

A Compliance Order is a Final Order that constitutes a DOE Nuclear Safety Requirement that is effective immediately unless the Order specifies a different effective date.

### § 820.43 Appeal.

Within fifteen days of the issuance of a Compliance Order, the recipient of the Order may request the Secretary to rescind or modify the Order. A request shall not stay the effectiveness of a Compliance Order unless the Secretary issues an order to that effect.

## Subpart D—Interpretations

### § 820.50 Purpose and scope.

This subpart provides for interpretations of the Act, Nuclear Statutes, and DOE Nuclear Safety Requirements. Any written or oral response to any written or oral question which is not provided pursuant to this subpart does not constitute an interpretation and does not provide any basis for action inconsistent with the Act, a Nuclear Statute, or a DOE Nuclear Safety Requirement.

### § 820.51 General Counsel.

The General Counsel shall be the DOE Official responsible for formulating and issuing any interpretation concerning the Act, a Nuclear Statute or a DOE Nuclear Safety Requirement.

### § 820.52 Procedures.

The General Counsel may utilize any procedure which he deems appropriate to comply with his responsibilities under this subpart. All interpretations issued under this subpart must be filed

with the Office of the Docketing Clerk which shall maintain a docket for interpretations.

## Subpart E—Exemption Relief

### § 820.60 Purpose and scope.

This subpart provides for exemption relief from provisions of DOE Nuclear Safety Requirements at nuclear facilities.

### § 820.61 Secretarial officer.

The Secretarial Officer who is primarily responsible for the activity to which a DOE Nuclear Safety Requirement relates may grant a temporary or permanent exemption from that requirement as requested by any person subject to its provisions; provided that, the Secretarial Officer responsible for environment, safety and health matters shall exercise this authority with respect to provisions relating to radiological protection of workers, the public and the environment. This authority may not be further delegated.

### § 820.62 Criteria.

The criteria for granting an exemption to a DOE Nuclear Safety Requirement are determinations that the exemption:

(a) Would be authorized by law;

(b) Would not present an undue risk to public health and safety, the environment, or facility workers;

(c) Would be consistent with the safe operation of a DOE nuclear facility; and

(d) Involves special circumstances, including the following:

(1) Application of the requirement in the particular circumstances conflicts with other requirements; or

(2) Application of the requirement in the particular circumstances would not serve or is not necessary to achieve its underlying purpose, or would result in resource impacts which are not justified by the safety improvements; or

(3) Application of the requirement would result in a situation significantly different than that contemplated when the requirement was adopted, or that is significantly different from that encountered by others similarly situated; or

(4) The exemption would result in benefit to human health and safety that compensates for any detriment that may result from the grant of the exemption; or

(5) Circumstances exist which would justify temporary relief from application of the requirement while taking good faith action to achieve compliance; or

(6) There is present any other material circumstance not considered when the requirement was adopted for which it would be in the public interest to grant an exemption.

### § 820.63 Procedures.

The Secretarial Officer shall utilize any procedures deemed necessary and appropriate to comply with his responsibilities under this subpart. All exemption decisions must set forth in writing the reasons for granting or denying the exemption, and if granted, the basis for the determination that the criteria in § 820.62 have been met and the terms of the exemption. All exemption decisions must be filed with the Office of the Docketing Clerk which shall maintain a docket for exemption decisions issued pursuant to this subpart.

### § 820.64 Terms and conditions.

An exemption may contain appropriate terms and conditions including, but not limited to, provisions that :

(a) Limit its duration;

(b) Require alternative action;

(c) Require partial compliance; or

(d) Establish a schedule for full or partial compliance.

### § 820.65 Implementation plan.

With respect to a DOE Nuclear Safety Requirement for which there is no regulatory provision for an implementation plan or schedule, an exemption may be granted to establish an implementation plan which reasonably demonstrates that full compliance with the requirement will be achieved within two years of the effective date of the requirement without a determination of special circumstances under § 820.62(d).

### § 820.66 Appeal.

Within fifteen (15) days of the filing of an exemption decision by a Secretarial Officer, the person requesting the exemption may file a Request to Review with the Secretary, or the Secretary may file, *sua sponte*, a Notice of Review. The Request to Review shall state specifically the respects in which the exemption determination is claimed to be erroneous, the grounds of the request, and the relief requested.

### § 820.67 Final order.

If no filing is made under § 820.66, an exemption decision becomes a Final Order fifteen (15) days after it is filed by a Secretarial Officer. If filing is made under § 820.66, an exemption decision becomes a Final Order 45 days after it is filed by a Secretarial Officer, unless the Secretary stays the effective date or issues a Final Order that modifies the decision.

## Subpart F—Criminal Penalties

### § 820.70 Purpose and scope.

This subpart provides for the identification of criminal violations of the Act or DOE Nuclear Safety Requirements and the referral of such violations to the Department of Justice.

### § 820.71 Standard.

If a person subject to the Act or the DOE Nuclear Safety Requirements has, by act or omission, knowingly and willfully violated, caused to be violated, attempted to violate, or conspired to violate any section of the Act or any applicable DOE Nuclear Safety Requirement, the person shall be subject to criminal sanctions under the Act.

### § 820.72 Referral to the Attorney General.

If there is reason to believe a criminal violation of the Act or the DOE Nuclear Safety Requirements has occurred, DOE may refer the matter to the Attorney General of the United States for investigation or prosecution.

## Subpart G—Civil Penalties

SOURCE: 62 FR 46184, Sept. 2, 1997, unless otherwise noted.

### § 820.80 Basis and purpose.

This subpart implements the Federal Civil Penalties Inflation Adjustment Act of 1990 (the Act) (Pub. L. 101–410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, section 31001) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74, section 701). 28 U.S.C. 2461 note. As amended, the Act requires each agency head to adjust by regulation each civil monetary penalty provided by law within the jurisdiction of the Federal agency by the inflation adjustment specified in 28 U.S.C. 2461 note. This subpart increases the civil penalty amount specified in 42 U.S.C. 2282a.

[62 FR 46184, Sept. 2, 1997, as amended at 81 FR 41794, June 28, 2016]

### § 820.81 Amount of penalty.

Any person subject to a penalty under 42 U.S.C. 2282a shall be subject to a civil penalty in an amount not to exceed $201,106 for each such violation. If any violation under 42 U.S.C. 2282a is a continuing one, each day of such violation shall constitute a separate violation for the purpose of computing the applicable civil penalty.

[62 FR 46184, Sept. 2, 1997, as amended at 74 FR 66033, Dec. 14, 2009; 79 FR 19, Jan. 2, 2014; 81 FR 41794, June 28, 2016; 81 FR 96352, Dec. 30, 2016]

## APPENDIX A TO PART 820—GENERAL STATEMENT OF ENFORCEMENT POLICY

### *I. Introduction*

(a) This policy statement sets forth the general framework through which the U.S. Department of Energy (DOE) will seek to ensure compliance with its enforceable nuclear safety regulations and orders (hereafter collectively referred to as DOE Nuclear Safety Requirements) and, in particular, exercise the civil penalty authority provided to DOE in the Price Anderson Amendments Act of 1988, 42 U.S.C. 2282a (PAAA). The policy set forth herein is applicable to violations of DOE Nuclear Safety Requirements by DOE contractors who are indemnified under the Price Anderson Act, 42 U.S.C. 2210(d), and their subcontractors and suppliers (hereafter collectively referred to as DOE contractors). This policy statement is not a regulation and is intended only to provide general guidance to those persons subject to DOE's Nuclear Safety Requirements as specified in the PAAA. It is not intended to establish a

''cookbook'' approach to the initiation and resolution of situations involving noncompliance with DOE Nuclear Safety Requirements. Rather, DOE intends to consider the particular facts of each noncompliance situation in determining whether enforcement sanctions are appropriate and, if so, the appropriate magnitude of those sanctions. DOE may well deviate from this policy statement when appropriate in the circumstances of particular cases. This policy statement is not applicable to activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval nuclear propulsion.

(b) Both the Department of Energy Organization Act, 42 U.S.C. 7101, and the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011, require DOE to protect the public health and safety, as well as the safety of workers at DOE facilities, in conducting its nuclear activities, and grant DOE broad authority to achieve this goal.

(c) The DOE goal in the compliance arena is to enhance and protect the radiological health and safety of the public and worker at DOE facilities by fostering a culture among both the DOE line organizations and the contractors that activity seeks to attain and sustain compliance with DOE Nuclear Safety Requirements. The enforcement program and policy have been developed with the express purpose of achieving safety inquisitiveness and voluntary compliance. DOE will establish effective administrative processes and positive incentives to the contractors for the open and prompt identification and reporting of noncompliances, and the initiation of comprehensive corrective actions to resolve both the noncompliance conditions and the program or process deficiencies that led to noncompliance.

(d) In the development of the DOE enforcement policy, DOE recognizes that the reasonable exercise of its enforcement authority can help to reduce the likelihood of serious incidents. This can be accomplished by providing greater emphasis on a culture of safety in existing DOE operations, and strong incentives for contractors to identify and correct noncompliance conditions and processes in order to protect human health and the environment. DOE wants to facilitate, encourage, and support contractor initiatives for the prompt identification and correction of problems. These initiatives and activities will be duly considered in exercising enforcement discretion.

(e) The PAAA provides DOE with the authority to compromise, modify, or remit civil penalties with or without conditions. In implementing the PAAA, DOE will carefully consider the facts of each case of noncompliance and will exercise appropriate discretion in taking any enforcement action. Part of the function of a sound enforcement program is to assure a proper and continuing level of safety vigilance. The reasonable exercise of enforcement authority will be facilitated by the appropriate application of safety requirements to nuclear facilities and by promoting and coordinating the proper contractor and DOE safety compliance attitude toward those requirements.

*II. Purpose*

The purpose of the DOE enforcement program is to promote and protect the radiological health and safety of the public and workers at DOE facilities by:

a. Ensuring compliance by DOE contractors with applicable DOE Nuclear Safety Requirements.

b. Providing positive incentives for a DOE contractor's:

(1) Timely self-identification of nuclear safety deficiencies,

(2) Prompt and complete reporting of such deficiencies to DOE,

(3) Root cause analyses of nuclear safety deficiencies,

(4) Prompt correction of nuclear safety deficiencies in a manner which precludes recurrence, and

(5) Identification of modifications in practices or facilities that can improve public or worker radiological health and safety.

c. Deterring future violations of DOE requirements by a DOE contractor.

d. Encouraging the continuous overall improvement of operations at DOE nuclear facilities.

*III. Statutory Authority*

Section 17 of the PAAA makes most DOE contractors covered by the DOE Price-Anderson indemnification system, and their subcontractors and suppliers, subject to civil penalties for violations of applicable DOE nuclear safety rules, regulations and orders. 42 U.S.C. 2282a. Furthermore, section 18 of the PAAA makes all employees of DOE contractors, and their subcontractors and suppliers, subject to criminal penalties, including monetary penalties and imprisonment, for knowing and willful violations of applicable DOE nuclear safety rules, regulations and orders. 42 U.S.C. 2273(c). Suspected, or alleged, criminal violations are referred to the Department of Justice for appropriate action. 42 U.S.C. 2271. Therefore, DOE's enforcement authority and policy will apply only to civil penalties since decisions on criminal violations are the responsibility of the Department of Justice. However, referral of a case to the Department of Justice does not preclude DOE from taking civil enforcement action in accordance with this policy statement. Such actions will be coordinated with the Department of Justice to the extent practicable.

*IV. Responsibilities*

(a) The Director, as the principal enforcement officer of DOE, has been delegated the authority to:

(1) Conduct enforcement inspections, investigations, and conferences;

(2) Issue Notices of Violations and proposed civil penalties, Enforcement Letters, Consent Orders, and subpoenas; and

(3) Issue orders to compel attendance and disclosure of information or documents obtained during an investigation or inspection.

(b) The NNSA Administrator, pursuant to section 3212 (b)(9) of Public Law 106–65 (codified at 50 U.S.C. 2402 (b)(9)), as amended, has authority over and responsibility for environment, safety and health operations within NNSA and is authorized to sign, issue and serve the following actions that direct NNSA contractors:

(1) Subpoenas;

(2) Orders to compel attendance;

(3) Disclosure of information or documents obtained during an investigation or inspection;

(4) Preliminary Notices of Violations; and

(5) Final Notices of Violations.

The NNSA Administrator acts after consideration of the Director's recommendation.

*V. Procedural Framework*

(a) 10 CFR part 820 sets forth the procedures DOE will use in exercising its enforcement authority, including the issuance of Notices of Violation and the resolution of contested enforcement actions in the event a DOE contractor elects to litigate contested issues before an Administrative Law Judge.

(b) Pursuant to 10 CFR 820.22, the Director initiates the civil penalty process by issuing a Preliminary Notice of Violation and Proposed Civil Penalty (PNOV). The DOE contractor is required to respond in writing to the PNOV, either admitting the violation and waiving its right to contest the proposed civil penalty and paying it, admitting the violation but asserting the existence of mitigating circumstances that warrant either the total or partial remission of the civil penalty, or denying that the violation has occurred and providing the basis for its belief that the PNOV is incorrect. After evaluation of the DOE contractor's response, the Director of Enforcement may determine that no violation has occurred, that the violation occurred as alleged in the PNOV but that the proposed civil penalty should be remitted in whole or in part, or that the violation occurred as alleged in the PNOV and that the proposed civil penalty is appropriate notwithstanding the asserted mitigating circumstances. In the latter two instances, the Director will issue a Final Notice of Violation (FNOV) or an FNOV and Proposed Civil Penalty.

(c) An opportunity to challenge a proposed civil penalty either before an Administrative Law Judge or in a United States District Court is provided in the PAAA, 42 U.S.C. 2282a(c), and 10 CFR part 820 sets forth the procedures associated with an administrative hearing, should the contractor opt for that method of challenging the proposed civil penalty. A formal administrative enforcement proceeding pursuant to section 554 of the Administrative Procedures Act is not initiated until the DOE contractor against which a civil penalty has been proposed requests an administrative hearing rather than waiving its right to contest the civil penalty and paying it. However, it should be emphasized that DOE encourages the voluntary resolution of a noncompliance situation at any time, either informally prior to the initiation of an administrative proceeding or by consent order after a formal proceeding has begun.

*VI. Severity of Violations*

(a) Violations of DOE Nuclear Safety Requirements have varying degrees of safety significance. Therefore, the relative importance of each violation must be identified as the first step in the enforcement process. Violations of DOE Nuclear Safety Requirements are categorized in three levels of severity to identify their relative safety significance, and Notices of Violation are issued for noncompliance which, when appropriate, propose civil penalties commensurate with the severity level of the violation(s) involved.

(b) Severity Level I has been assigned to violations that are the most significant and Severity Level III violations are the least significant. Severity Level I is reserved for violations of DOE Nuclear Safety Requirements which involve actual or high potential for adverse impact on the safety of the public or workers at DOE facilities. Severity level II violations represent a significant lack of attention or carelessness toward responsibilities of DOE contractors for the protection of public or worker safety which could, if uncorrected, potentially lead to an adverse impact on public or worker safety at DOE facilities. Severity Level III violations are less serious but are of more than minor concern: i.e., if left uncorrected, they could lead to a more serious concern. In some cases, violations may be evaluated in the aggregate and a single severity level assigned for a group of violations.

(c) Isolated minor violations of DOE Nuclear Safety Requirements will not be the subject of formal enforcement action through the issuance of a Notice of Violation. However, these minor violations will be identified as noncompliances and tracked to assure that appropriate corrective/remedial action is taken to prevent their recurrence,

and evaluated to determine if generic or specific problems exist. If circumstances demonstrate that a number of related minor noncompliances have occurred in the same time frame (e.g. all identified during the same assessment), or that related minor noncompliances have recurred despite prior notice to the DOE contractor and sufficient opportunity to correct the problem, DOE may choose in its discretion to consider the noncompliances in the aggregate as a more serious violation warranting a Severity Level III designation, a Notice of Violation and a possible civil penalty.

(d) The severity level of a violation will be dependent, in part, on the degree of culpability of the DOE contractor with regard to the violation. Thus, inadvertent or negligent violations will be viewed differently than those in which there is gross negligence, deception or wilfulness. In addition to the significance of the underlying violation and level of culpability involved, DOE will also consider the position, training and experience of the person involved in the violation. Thus, for example, a violation may be deemed to be more significant if a senior manager of an organization is involved rather than a foreman or non-supervisory employee. In this regard, while management involvement, direct or indirect, in a violation may lead to an increase in the severity level of a violation and proposed civil penalty, the lack of such involvement will not constitute grounds to reduce the severity level of a violation or mitigate a civil penalty. Allowance of mitigation in such circumstances could encourage lack of management involvement in DOE contractor activities and a decrease in protection of public and worker health and safety.

(e) Other factors which will be considered by DOE in determining the appropriate severity level of a violation are the duration of the violation, the past performance of the DOE contractor in the particular activity area involved, whether the DOE contractor had prior notice of a potential problem, and whether there are multiple examples of the violation in the same time frame rather than an isolated occurrence. The relative weight given to each of these factors in arriving at the appropriate severity level will be dependent on the circumstances of each case.

(f) DOE expects contractors to provide full, complete, timely, and accurate information and reports. Accordingly, the severity level of a violation involving either failure to make a required report or notification to the DOE or an untimely report or notification, will be based upon the significance of, and the circumstances surrounding, the matter that should have been reported. A contractor will not normally be cited for a failure to report a condition or event unless the contractor was actually aware, or should have been aware of the condition or event which it failed to report.

*VII. Enforcement Conferences*

(a) Should DOE determine, after completion of all assessment and investigation activities associated with a potential or alleged violation of DOE Nuclear Safety Requirements, that there is a reasonable basis to believe that a violation has actually occurred, and the violation may warrant a civil penalty or issuance of an enforcement order, DOE will normally hold an enforcement conference with the DOE contractor involved prior to taking enforcement action. DOE may also elect to hold an enforcement conference for potential violations which would not ordinarily warrant a civil penalty or enforcement order but which could, if repeated, lead to such action. The purpose of the enforcement conference is to assure the accuracy of the facts upon which the preliminary determination to consider enforcement action is based, discuss the potential or alleged violations, their significance and causes, and the nature of and schedule for the DOE contractor's corrective actions, determine whether there are any aggravating or mitigating circumstances, and obtain other information which will help determine the appropriate enforcement action.

(b) DOE contractors will be informed prior to a meeting when that meeting is considered to be an enforcement conference. Such conferences are informal mechanisms for candid pre-decisional discussions regarding potential or alleged violations and will not normally be open to the public. In circumstances for which immediate enforcement action is necessary in the interest of public or worker health and safety, such action will be taken prior to the enforcement conference, which may still be held after the necessary DOE action has been taken.

*VIII. Enforcement Letter*

(a) In cases where DOE has decided not to conduct an investigation or inspection or issue a Preliminary Notice of Violation (PNOV), DOE may send an Enforcement Letter to the contractor, signed by the Director. Enforcement Letters issued to NNSA contractors will be coordinated with the Principal Deputy Administrator of the NNSA prior to issuance. The Enforcement Letter is intended to communicate the basis of the decision not to pursue enforcement action for a noncompliance. The Enforcement Letter is intended to inform contractors of the desired level of nuclear safety performance. It may be used when DOE concludes the specific noncompliance at issue is not of the level of significance warranted to conduct an investigation or inspection or for issuance of a PNOV. Even where a noncompliance may be

significant, the Enforcement Letter recognizes that the contractor's actions may have attenuated the need for enforcement action. The Enforcement Letter will typically recognize how the contractor handled the circumstances surrounding the noncompliance, address additional areas requiring the contractor's attention, and address DOE's expectations for corrective action.

(b) In general, Enforcement Letters communicate DOE's expectations with respect to any aspect of the requirements contained in the Department's nuclear safety rules, including identification and reporting of issues, corrective actions, and implementation of the contractor's nuclear safety program. DOE might, for example, wish to recognize some action of the contractor that is of particular benefit to nuclear safety performance that is a candidate for emulation by other contractors. On the other hand, DOE may wish to bring a program shortcoming to the attention of the contractor that, but for the lack of nuclear safety significance of the immediate issue, might have resulted in the issuance of a PNOV. An Enforcement Letter is not an enforcement action.

(c) With respect to many noncompliances, DOE may decide not to send an Enforcement Letter. When DOE decides that a contractor has appropriately corrected a noncompliance or that the significance of the noncompliance is sufficiently low, it may close out its review simply through an annotation in the DOE Noncompliance Tracking System (NTS). A closeout of a noncompliance with or without an Enforcement Letter may only take place after DOE has confirmed that corrective actions have been completed. Closeout of any NNSA contractor noncompliance will be coordinated with NNSA prior to closeout.

*IX. Enforcement Actions*

a. This section describes the enforcement sanctions available to DOE and specifies the conditions under which each may be used. The basic sanctions are Notices of Violation and civil penalties. In determining whether to impose enforcement sanctions, DOE will consider enforcement actions taken by other Federal or State regulatory bodies having concurrent jurisdiction, e.g., instances which involve NRC licensed entities which are also DOE contractors, and in which the NRC exercises its own enforcement authority.

b. The nature and extent of the enforcement action is intended to reflect the seriousness of the violation involved. For the vast majority of violations for which DOE assigns severity levels as described previously, a Notice of Violation will be issued, requiring a formal response from the recipient describing the nature of and schedule for corrective actions it intends to take regarding the violation. Administrative actions, such as determination of award fees where DOE contracts provide for such determinations, will be considered separately from any civil penalties that may be imposed under this Enforcement Policy. Likewise, imposition of a civil penalty will be based on the circumstances of each case, unaffected by any award fee determination.

1. Notice of Violation

a. A Notice of Violation (either a Preliminary or Final Notice) is a document setting forth the conclusion of the DOE Office of Nuclear Safety and Environment that one or more violations of DOE Nuclear Safety Requirements has occurred. Such a notice normally requires the recipient to provide a written response which may take one of several positions described in Section V of this policy statement. In the event that the recipient concedes the occurrence of the violation, it is required to describe corrective steps which have been taken and the results achieved; remedial actions which will be taken to prevent recurrence; and the date by which full compliance will be achieved.

b. DOE will use the Notice of Violation as the standard method for formalizing the existence of a violation and, in appropriate cases as described in this section, the notice of violation will be issued in conjunction with the proposed imposition of a civil penalty. In certain limited instances, as described in this section, DOE may refrain from the issuance of an otherwise appropriate Notice of Violation. However, a Notice of Violation will virtually always be issued for willful violations, if past corrective actions for similar violations have not been sufficient to prevent recurrence and there are no other mitigating circumstances, or if the circumstances otherwise warrant increasing Severity Level III violations to a higher severity level.

c. DOE contractors are not ordinarily cited for violations resulting from matters not within their control, such as equipment failures that were not avoidable by reasonable quality assurance measures, proper maintenance, or management controls. With regard to the issue of funding, however, DOE does not consider an asserted lack of funding to be a justification for noncompliance with DOE Nuclear Safety Requirements.

Should a contractor believe that a shortage of funding precludes it from achieving compliance with one or more DOE Nuclear Safety Requirements, it must pursue one of two alternative courses of action. First, it may request, in writing, an exemption from the requirement(s) in question from the appropriate Secretarial Officer (SO), explicitly addressing the criteria for exemptions set forth in 10 CFR 820.62. A justification for continued operation for the period during which the exemption request is being considered

should also be submitted. In such a case, the SO must grant or deny the request in writing, explaining the rationale for the decision. Second, if the criteria for approval of an exemption cannot be demonstrated, the contractor, in conjunction with the SO, must take appropriate steps to modify, curtail, suspend or cease the activities which cannot be conducted in compliance with the DOE Nuclear Safety Requirement(s) in question.

d. DOE expects the contractors which operate its facilities to have the proper management and supervisory systems in place to assure that all activities at DOE facilities, regardless of who performs them, are carried out in compliance with all DOE Nuclear Safety Requirements. Therefore, contractors are normally held responsible for the acts of their employees and subcontractor employees in the conduct of activities at DOE facilities. Accordingly, this policy should not be construed to excuse personnel errors.

e. Finally, certain contractors are explicitly exempted from the imposition of civil penalties pursuant to the provisions of the PAAA, 42 U.S.C. 2282a(d), for activities conducted at specified facilities. See 10 CFR 820.20(c). In addition, in fairness to non-profit educational institutions, the Department has determined that they should be likewise exempted. See 10 CFR 820.20(d). However, compliance with DOE Nuclear Safety Requirements is no less important for these facilities than for other facilities in the DOE complex which work with, store or dispose of radioactive materials. Indeed, the exempted contractors conduct some of the most important nuclear-related research and development activities performed for the Department. Therefore, in order to serve the purposes of this enforcement policy and to emphasize the importance the Department places on compliance with all of its nuclear safety requirements, DOE intends to issue Notices of Violation to the exempted contractors and non-profit educational institutions when appropriate under this policy statement, notwithstanding the statutory and regulatory exemptions from the imposition of civil penalties.

2. Civil Penalty

a. A civil penalty is a monetary penalty that may be imposed for violations of applicable DOE Nuclear Safety Requirements, including Compliance Orders. See 10 CFR 820.20(b). Civil penalties are designed to emphasize the need for lasting remedial action, deter future violations, and underscore the importance of DOE contractor self-identification, reporting and correction of violations of DOE Nuclear Safety Requirements.

b. Absent mitigating circumstances as described below, or circumstances otherwise warranting the exercise of enforcement discretion by DOE as described in this section, civil penalties will be proposed for Severity Level I and II violations. Civil penalties will be proposed for Severity Level III violations which are similar to previous violations for which the contractor did not take effective corrective action. ''Similar'' violations are those which could reasonably have been expected to have been prevented by corrective action for the previous violation. DOE normally considers civil penalties only for similar Severity Level III violations that occur over a reasonable period of time to be determined at the discretion of DOE.

c. DOE will impose different base level civil penalties considering the severity level of the violation(s) by Price-Anderson indemnified contractors. Table 1 shows the daily base civil penalties for the various categories of severity levels. However, as described above in Section IV, the imposition of civil penalties will also take into account the gravity, circumstances, and extent of the violation or violations and, with respect to the violator, any history of prior similar violations and the degree of culpability and knowledge.

d. Regarding the factor of ability of DOE contractors to pay the civil penalties, it is not DOE's intention that the economic impact of a civil penalty be such that it puts a DOE contractor out of business. Contract termination, rather than civil penalties, is used when the intent is to terminate these activities. The deterrent effect of civil penalties is best served when the amount of such penalties takes this factor into account. However, DOE will evaluate the relationship of affiliated entities to the contractor (such as parent corporations) when it asserts that it cannot pay the proposed penalty.

e. DOE will review each case involving a proposed civil penalty on its own merits and adjust the base civil penalty values upward or downward appropriately. As indicated above, Table 1 identifies the daily base civil penalty values for different severity levels. After considering all relevant circumstances, civil penalties may be escalated or mitigated based upon the adjustment factors described below in this section. In no instance will a civil penalty for any one violation exceed the statutory limit, as periodically adjusted for inflation as required by law. However, it should be emphasized that if the DOE contractor is or should have been aware of a violation and has not reported it to DOE and taken corrective action despite an opportunity to do so, each day the condition existed may be considered as a separate violation and, as such, subject to a separate civil penalty. Further, as described in this section, the duration of a violation will be taken into account in determining the appropriate severity level of the base civil penalty.

TABLE 1—SEVERITY LEVEL BASE CIVIL PENALTIES

| Severity level | Base civil penalty amount (percentage of maximum civil penalty per violation per day) |
|---|---|
| I | 100 |
| II | 50 |
| III | 10 |

3. Adjustment Factors

a. DOE's enforcement program is not an end in itself, but a means to achieve compliance with DOE Nuclear Safety Requirements, and civil penalties are not collected to swell the coffers of the United States Treasury, but to emphasize the importance of compliance and to deter future violations. The single most important goal of the DOE enforcement program is to encourage early identification and reporting of nuclear safety deficiencies and violations of DOE Nuclear Safety Requirements by the DOE contractors themselves rather than by DOE, and the prompt correction of any deficiencies and violations so identified. DOE believes that DOE contractors are in the best position to identify and promptly correct noncompliance with DOE Nuclear Safety Requirements. DOE expects that these contractors should have in place internal compliance programs which will ensure the detection, reporting and prompt correction of nuclear safety-related problems that may constitute, or lead to, violations of DOE Nuclear Safety Requirements before, rather than after, DOE has identified such violations. Thus, DOE contractors will almost always be aware of nuclear safety problems before they are discovered by DOE. Obviously, public and worker health and safety is enhanced if deficiencies are discovered (and promptly corrected) by the DOE contractor, rather than by DOE, which may not otherwise become aware of a deficiency until later on, during the course of an inspection, performance assessment, or following an incident at the facility. Early identification of nuclear safety-related problems by DOE contractors has the added benefit of allowing information which could prevent such problems at other facilities in the DOE complex to be shared with all appropriate DOE contractors.

b. Pursuant to this enforcement philosophy, DOE will provide substantial incentive for the early self-identification, reporting and prompt correction of problems which constitute, or could lead to, violations of DOE Nuclear Safety Requirements. Thus, application of the adjustment factors set forth below may result in no civil penalty being assessed for violations that are identified, reported, and promptly and effectively corrected by the DOE contractor.

c. On the other hand, ineffective programs for problem identification and correction are unacceptable. Thus, for example, where a contractor fails to disclose and promptly correct violations of which it was aware or should have been aware, substantial civil penalties are warranted and may be sought, including the assessment of civil penalties for continuing violations on a per day basis.

d. Further, in cases involving willfulness, flagrant DOE-identified violations, repeated poor performance in an area of concern, or serious breakdown in management controls, DOE intends to apply its full statutory enforcement authority where such action is warranted.

4. Identification and Reporting

Reduction of up to 50% of the base civil penalty shown in Table 1 may be given when a DOE contractor identifies the violation and promptly reports the violation to the DOE. In weighing this factor, consideration will be given to, among other things, the opportunity available to discover the violation, the ease of discovery and the promptness and completeness of any required report. No consideration will be given to a reduction in penalty if the DOE contractor does not take prompt action to report the problem to DOE upon discovery, or if the immediate actions necessary to restore compliance with DOE Nuclear Safety Requirements or place the facility or operation in a safe configuration are not taken.

5. Self-Identification and Tracking Systems

a. DOE strongly encourages contractors to self-identify noncompliances with DOE Nuclear Safety Requirements before the noncompliances lead to a string of similar and potentially more significant events or consequences. When a contractor identifies a noncompliance through its own self-monitoring activity, DOE will normally allow a reduction in the amount of civil penalties, regardless of whether prior opportunities existed for contractors to identify the noncompliance. DOE will normally not allow a reduction in civil penalties for self-identification if significant DOE intervention was required to induce the contractor to report a noncompliance.

b. Self-identification of a noncompliance is possibly the single most important factor in considering a reduction in the civil penalty amount. Consideration of self-identification is linked to, among other things, whether prior opportunities existed to discover the violation, and if so, the age and number of such opportunities; the extent to which proper contractor controls should have identified or prevented the violation; whether discovery of the violation resulted from a contractor's self-monitoring activity; the extent

of DOE involvement in discovering the violation or in prompting the contractor to identify the violation; and the promptness and completeness of any required report. Self-identification is also considered by DOE in deciding whether to pursue an investigation.

c. DOE has established a voluntary Noncompliance Tracking System (NTS) which allows contractors to elect to report noncompliances. In the guidance document supporting the NTS (DOE-HDBK-1089-95), DOE has established reporting thresholds for reporting items of noncompliance of potentially greater safety significance into the NTS. Contractors may, however, use their own self-tracking systems to track noncompliances below the reporting threshold. This self-tracking is considered to be acceptable self-reporting as long as DOE has access to the contractor's system and the contractor's system notes the item as a noncompliance with a DOE Nuclear Safety Requirement. For noncompliances that are below the reportability thresholds, DOE will credit contractor self-tracking as representing self-reporting. If an item is not reported in NTS but only tracked in the contractor's system and DOE subsequently finds the facts and their safety significance have been significantly mischaracterized, DOE will not credit the internal tracking as representing appropriate self-reporting.

6. Self-Disclosing Events

a. DOE expects contractors to demonstrate acceptance of responsibility for safety of the public, workers, and the environment and to proactively identify noncompliance conditions in their programs and processes. In deciding whether to reduce any civil penalty proposed for violations revealed by the occurrence of a self-disclosing event, DOE will consider the ease with which a contractor could have discovered the noncompliance and the prior opportunities that existed to discover the noncompliance. When the occurrence of an event discloses noncompliances that the contractor could have or should have identified before the event, DOE will not generally allow a reduction in civil penalties for self-identification, even if the underlying noncompliances were reported to DOE. If a contractor simply reacts to events that disclose potentially significant consequences or downplays noncompliances which did not result in significant consequences to workers, the public, and the environment, such contractor actions do not lead to the improvement in nuclear safety contemplated by the Act.

b. The key test is whether the contractor reasonably could have detected any of the underlying noncompliances that contributed to the event. Examples of events that provide opportunities to identify noncompliances include, but are not limited to:

(1) prior notifications of potential problems such as those from DOE operational experience publications or vendor equipment deficiency reports;

(2) normal surveillance, quality assurance assessments, and post-maintenance testing;

(3) readily observable parameter trends; and

(4) contractor employee or DOE observations of potential safety problems. Failure to utilize these types of events and activities to address noncompliances may result in higher civil penalty assessments or a DOE decision not to reduce civil penalty amounts.

c. For example, a critique of the event might find that one of the root causes was a lack of clarity in a Radiation Work Permit (RWP) which led to improper use of anti-contamination clothing and resulting uptake of contamination by the individual. DOE could subsequently conclude that no reduction in civil penalties for self-identification should be allowed since the event itself disclosed the inadequate RWP and the contractor could have, through proper independent assessment or by fostering a questioning attitude by its workers and supervisors, identified the inadequate RWP before the event.

d. Alternatively, if, following a self-disclosing event, DOE found that the contractor's processes and procedures were adequate and the contractor's personnel generally behaved in a manner consistent with the contractor's processes and procedures, DOE could conclude that the contractor could not have been reasonably expected to find the single procedural noncompliance that led to the event and thus, might allow a reduction in civil penalties.

7. Corrective Action To Prevent Recurrence

The promptness (or lack thereof) and extent to which the DOE contractor takes corrective action, including actions to identify root cause and prevent recurrence, may result in up to a 50% increase or decrease in the base civil penalty shown in Table 1. For example, very extensive corrective action may result in reducing the proposed civil penalty as much as 50% of the base value shown in Table 1. On the other hand, the civil penalty may be increased as much as 50% of the base value if initiation or corrective action is not prompt or if the corrective action is only minimally acceptable. In weighing this factor, consideration will be given to, among other things, the appropriateness, timeliness and degree of initiative associated with the corrective action. The comprehensiveness of the corrective action will also be considered, taking into account factors such as whether the action is focused narrowly to the specific violation or broadly to the general area of concern.

8. DOE's Contribution to a Violation

There may be circumstances in which a violation of a DOE Nuclear Safety Requirement results, in part or entirely, from a direction given by DOE personnel to a DOE contractor to either take, or forbear from taking an action at a DOE facility. In such cases, DOE may refrain from issuing an NOV, and may mitigate, either partially or entirely, any proposed civil penalty, provided that the direction upon which the DOE contractor relied is documented in writing, contemporaneously with the direction. It should be emphasized, however, that pursuant to 10 CFR 820.50, no interpretation of a DOE Nuclear Safety Requirement is binding upon DOE unless issued in writing by the General Counsel. Further, as discussed in this section of this policy statement, lack of funding by itself will not be considered as a mitigating factor in enforcement actions.

9. Exercise of Discretion

Because DOE wants to encourage and support DOE contractor initiative for prompt self-identification, reporting and correction of problems, DOE may exercise discretion as follows:

a. In accordance with the previous discussion, DOE may refrain from issuing a civil penalty for a violation which meets all of the following criteria:

(1) The violation is promptly identified and reported to DOE before DOE learns of it.

(2) The violation is not willful or a violation that could reasonably be expected to have been prevented by the DOE contractor's corrective action for a previous violation.

(3) The DOE contractor, upon discovery of the violation, has taken or begun to take prompt and appropriate action to correct the violation.

(4) The DOE contractor has taken, or has agreed to take, remedial action satisfactory to DOE to preclude recurrence of the violation and the underlying conditions which caused it.

b. DOE may refrain from proposing a civil penalty for a violation involving a past problem, such as in engineering design or installation, that meets all of the following criteria:

(1) It was identified by a DOE contractor as a result of a formal effort such as a Safety System Functional Inspection, Design Reconstitution program, or other program that has a defined scope and timetable which is being aggressively implemented and reported;

(2) Comprehensive corrective action has been taken or is well underway within a reasonable time following identification; and

(3) It was not likely to be identified by routine contractor efforts such as normal surveillance or quality assurance activities.

c. DOE will not issue a Notice of Violation for cases in which the violation discovered by the DOE contractor cannot reasonably be linked to the conduct of that contractor in the design, construction or operation of the DOE facility involved, provided that prompt and appropriate action is taken by the DOE contractor upon identification of the past violation to report to DOE and remedy the problem.

d. DOE may refrain from issuing a Notice of Violation for an item of noncompliance that meets all of the following criteria:

(1) It was promptly identified by the DOE nuclear entity;

(2) It is normally classified at a Severity Level III;

(3) It was promptly reported to DOE;

(4) Prompt and appropriate corrective action will be taken, including measures to prevent recurrence; and

(5) It was not a willful violation or a violation that could reasonably be expected to have been prevented by the DOE contractor's corrective action for a previous violation.

e. DOE may refrain from issuing a Notice of Violation for an item of noncompliance that meets all of the following criteria:

(1) It was an isolated Severity Level III violation identified during a Tiger Team inspection conducted by the Office of Health, Safety and Security during an inspection or integrated performance assessment conducted by the Office of Nuclear Safety and Environment, or during some other DOE assessment activity.

(2) The identified noncompliance was properly reported by the contractor upon discovery.

(3) The contractor initiated or completed appropriate assessment and corrective actions within a reasonable period, usually before the termination of the onsite inspection or integrated performance assessment.

(4) The violation is not willful or one which could reasonably be expected to have been prevented by the DOE contractor's corrective action for a previous violation.

f. In situations where corrective actions have been completed before termination of an inspection or assessment, a formal response from the contractor is not required and the inspection or integrated performance assessment report serves to document the violation and the corrective action. However, in all instances, the contractor is required to report the noncompliance through established reporting mechanisms so the noncompliance issue and any corrective actions can be properly tracked and monitored.

g. If DOE initiates an enforcement action for a violation at a Severity Level II or III and, as part of the corrective action for that violation, the DOE contractor identifies other examples of the violation with the same root cause, DOE may refrain from initiating an additional enforcement action. In

determining whether to exercise this discretion, DOE will consider whether the DOE contractor acted reasonably and in a timely manner appropriate to the safety significance of the initial violation, the comprehensiveness of the corrective action, whether the matter was reported, and whether the additional violation(s) substantially change the safety significance or character of the concern arising out of the initial violation.

h. It should be emphasized that the preceding paragraphs are solely intended to be examples indicating when enforcement discretion may be exercised to forego the issuance of a civil penalty or, in some cases, the initiation of any enforcement action at all. However, notwithstanding these examples, a civil penalty may be proposed or Notice of Violation issued when, in DOE's judgment, such action is warranted on the basis of the circumstances of an individual case.

*X. Procurement of Products or Services and the Reporting of Defects*

(a) DOE's enforcement policy is also applicable to subcontractors and suppliers to DOE Price-Anderson indemnified contractors. Through procurement contracts with these DOE contractors, subcontractors and suppliers are generally required to have quality assurance programs that meet applicable DOE Nuclear Safety Requirements. Suppliers of products or services provided in support of or for use in DOE facilities operated by Price-Anderson indemnified contractors are subject to certain requirements designed to ensure the high quality of the products or services supplied to DOE facilities that could, if deficient, adversely affect public or worker safety. DOE regulations require that DOE be notified whenever a DOE contractor obtains information reasonably indicating that a DOE facility (including its structures, systems and components) which conducts activities subject to the provisions of the Atomic Energy Act of 1954, as amended or DOE Nuclear Safety Requirements either fails to comply with any provision of the Atomic Energy Act or any applicable DOE Nuclear Safety Requirement, or contains a defect or has been supplied with a product or service which could create or result in a substantial safety hazard.

(b) DOE will conduct audits and assessments of its contractors to determine whether they are ensuring that subcontractors and suppliers are meeting their contractual obligations with regard to quality of products or services that could have an adverse effect on public or worker radiological safety, and ensure that DOE contractors have in place adequate programs to determine whether products or services supplied to them for DOE facilities meet applicable DOE requirements and that substandard products or services are not used by Price-Anderson indemnified contractors at the facilities they operate for DOE. As part of the effort of ensuring that contractual and regulatory requirements are met, DOE may also audit or assess subcontractors and suppliers. These assessments could include examination of the quality assurance programs and their implementation by the subcontractors and suppliers through examination of product quality.

(c) When audits or assessments determine that subcontractors or suppliers have failed to comply with applicable DOE Nuclear Safety Requirements or to fulfill contractual commitments designed to ensure the quality of a safety significant product or service, enforcement action will be taken. Notices of Violations and civil penalties will be issued, as appropriate, for DOE contractor failures to ensure that their subcontractors and suppliers provide products and services that meet applicable DOE requirements. Notices of Violations and civil penalties will also be issued to subcontractors and suppliers of DOE contractors which fail to comply with the reporting requirements set forth in any other applicable DOE Nuclear Safety Requirements.

*XI. Inaccurate and Incomplete Information*

(a) A violation of DOE Nuclear Safety Requirements for failure to provide complete and accurate information to DOE, 10 CFR 820.11, can result in the full range of enforcement sanctions, depending upon the circumstances of the particular case and consideration of the factors discussed in this section. Violations involving inaccurate or incomplete information or the failure to provide significant information identified by a DOE contractor normally will be categorized based on the guidance in section VI, ''Severity of Violations''.

(b) DOE recognizes that oral information may in some situations be inherently less reliable than written submittals because of the absence of an opportunity for reflection and management review. However, DOE must be able to rely on oral communications from officials of DOE contractors concerning significant information. In determining whether to take enforcement action for an oral statement, consideration will be given to such factors as

(b)(1) The degree of knowledge that the communicator should have had regarding the matter in view of his or her position, training, and experience;

(b)(2) The opportunity and time available prior to the communication to assure the accuracy or completeness of the information;

(b)(3) The degree of intent or negligence, if any, involved;

(b)(4) The formality of the communication;

(b)(5) The reasonableness of DOE reliance on the information;

(b)(6) The importance of the information that was wrong or not provided; and

(b)(7) The reasonableness of the explanation for not providing complete and accurate information.

(c) Absent gross negligence or willfulness, an incomplete or inaccurate oral statement normally will not be subject to enforcement action unless it involves significant information provided by an official of a DOE contractor. However, enforcement action may be taken for an unintentionally incomplete or inaccurate oral statement provided to DOE by an official of a DOE contractor or others on behalf of the DOE contractor, if a record was made of the oral information and provided to the DOE contractor thereby permitting an opportunity to correct the oral information, such as if a transcript of the communication or meeting summary containing the error was made available to the DOE contractor and was not subsequently corrected in a timely manner.

(d) When a DOE contractor has corrected inaccurate or incomplete information, the decision to issue a citation for the initial inaccurate or incomplete information normally will be dependent on the circumstances, including the ease of detection of the error, the timeliness of the correction, whether DOE or the DOE contractor identified the problem with the communication, and whether DOE relied on the information prior to the correction. Generally, if the matter was promptly identified and corrected by the DOE contractor prior to reliance by DOE, or before DOE raised a question about the information, no enforcement action will be taken for the initial inaccurate or incomplete information. On the other hand, if the misinformation is identified after DOE relies on it, or after some question is raised regarding the accuracy of the information, then some enforcement action normally will be taken even if it is in fact corrected.

(e) If the initial submission was accurate when made but later turns out to be erroneous because of newly discovered information or advance in technology, a citation normally would not be appropriate if, when the new information became available, the initial submission was corrected.

(f) The failure to correct inaccurate or incomplete information that the DOE contractor does not identify as significant normally will not constitute a separate violation. However, the circumstances surrounding the failure to correct may be considered relevant to the determination of enforcement action for the initial inaccurate or incomplete statement. For example, an unintentionally inaccurate or incomplete submission may be treated as a more severe matter if a DOE contractor later determines that the initial submission was in error and does not correct it or if there were clear opportunities to identify the error.

*XII. Secretarial Notification and Consultation*

The Secretary will be provided written notification of all enforcement actions involving proposed civil penalties. The Secretary will be consulted prior to taking action in the following situations:

a. Proposals to impose civil penalties in an amount equal to or greater than the statutory limit, as periodically adjusted for inflation as required by law;

b. Any proposed enforcement action that involves a Severity Level I violation;

c. Any action the Director believes warrants the Secretary's involvement; or

d. Any proposed enforcement action on which the Secretary asks to be consulted.

*XIII. Whistleblower Enforcement Policy*

a. DOE contractors may not retaliate against any employee because the employee has disclosed information, participated in activities or refused to participate in activities listed in 10 CFR 708.5 (a)–(c) as provided by 10 CFR 708.43. DOE contractor employees may seek remedial relief for allegations of retaliation from the DOE Office of Hearings and Appeals (OHA) under 10 CFR part 708 (Part 708) or from the Department of Labor (DOL) under sec. 211 of the Energy Reorganization Act (sec. 211), implemented in 29 CFR part 24.

b. An act of retaliation by a DOE contractor, proscribed under 10 CFR 708.43, that results from a DOE contractor employee's involvement in an activity listed in 10 CFR 708.5(a)–(c) concerning nuclear safety in connection with a DOE nuclear activity, may constitute a violation of a DOE Nuclear Safety Requirement under 10 CFR part 820 (Part 820). The retaliation may be subject to the investigatory and adjudicatory procedures of both Part 820 and Part 708. The same facts that support remedial relief to employees under Part 708 may be used by the Director of the Office of Enforcement (Director) to support issuance of a Preliminary Notice of Violation (PNOV), a Final Notice of Violation (FNOV), and assessment of civil penalties. 10 CFR 820.24–820.25.

c. When an employee files a complaint with DOL under sec. 211 and DOL collects information relating to allegations of DOE contractor retaliation against a contractor employee for actions taken concerning nuclear safety, the Director may use this information as a basis for initiating enforcement action by issuing a PNOV. 10 CFR 820.24. DOE may consider information collected in the DOL proceedings to determine whether the retaliation may be related to a contractor employee's action concerning a DOE nuclear activity.

d. The Director may also use DOL information to support the determination that a contractor has violated or is continuing to violate the nuclear safety requirements against contractor retaliation and to issue civil penalties or other appropriate remedy in a FNOV. 10 CFR 820.25.

e. The Director will have discretion to give appropriate weight to information collected in DOL and OHA investigations and proceedings. In deciding whether additional investigation or information is needed, the Director will consider the extent to which the facts in the proceedings have been adjudicated as well as any information presented by the contractor. In general, the Director may initiate an enforcement action without additional investigation or information.

f. Normally, the Director will await the completion of a Part 708 proceeding before OHA or a sec. 211 proceeding at DOL before deciding whether to take any action, including an investigation under Part 820 with respect to alleged retaliation. A Part 708 or sec. 211 proceeding would be considered completed when there is either a final decision or a settlement of the retaliation complaint, or no additional administrative action is available.

g. DOE encourages its contractors to cooperate in resolving whistleblower complaints raised by contractor employees in a prompt and equitable manner. Accordingly, in deciding whether to initiate an enforcement action, the Director will take into account the extent to which a contractor cooperated in a Part 708 or sec. 211 proceeding, and, in particular, whether the contractor resolved the matter promptly without the need for an adjudication hearing.

h. In considering whether to initiate an enforcement action and, if so, what remedy is appropriate, the Director will also consider the egregiousness of the particular case including the level of management involved in the alleged retaliation and the specificity of the acts of retaliation.

i. In egregious cases, the Director has the discretion to proceed with an enforcement action, including an investigation with respect to alleged retaliation irrespective of the completion status of the Part 708 or sec. 211 proceeding. Egregious cases would include: (1) Cases involving credible allegations for willful or intentional violations of DOE rules, regulations, orders or Federal statutes which, if proven, would warrant criminal referrals to the U.S. Department of Justice for prosecutorial review; and (2) cases where an alleged retaliation suggests widespread, high-level managerial involvement and raises significant public health and safety concerns.

j. When the Director undertakes an investigation of an allegation of DOE contractor retaliation against an employee under Part 820, the Director will apprise persons interviewed and interested parties that the investigative activity is being taken pursuant to the nuclear safety procedures of Part 820 and not pursuant to the procedures of Part 708.

k. At any time, the Director may begin an investigation of a noncompliance of the substantive nuclear safety rules based on the underlying nuclear safety concerns raised by the employee regardless of the status of completion of any related whistleblower retaliation proceedings. The nuclear safety rules include: 10 CFR part 830 (nuclear safety management); 10 CFR part 835 (occupational radiation protection); and 10 CFR part 820.11 (information accuracy requirements).

[58 FR 43692, Aug. 17, 1993, as amended at 62 FR 52481, Oct. 8, 1997; 65 FR 15220, Mar. 22, 2000; 71 FR 68732, Nov. 28, 2006; 72 FR 31921, June 8, 2007; 81 FR 41794, June 28, 2016]

EFFECTIVE DATE NOTE: At 81 FR 94914, Dec. 27, 2016, appendix A to part 820 was amended by revising section XIII, effective Jan. 26, 2017. For the convenience of the user, the revised text is set forth as follows:

## APPENDIX A TO PART 820—GENERAL STATEMENT OF ENFORCEMENT POLICY

* * * * *

### XIII. WHISTLEBLOWER ENFORCEMENT POLICY

a. DOE contractors may not retaliate against any employee because the employee has taken any actions listed in 10 CFR 708.5(a) through(c), including disclosing information, participating in proceedings, or refusing to participate in certain activities. DOE contractor employees may seek relief for allegations of retaliation through one of several mechanisms, including filing a complaint with DOE pursuant to 10 CFR part 708 (part 708), the Department of Labor (DOL) under sec. 211 of the Energy Reorganization Act (sec. 211), implemented in 29 CFR part 24, or the DOE Inspector General (IG).

b. An act of retaliation by a DOE contractor, prohibited by 10 CFR 708.43, that results from a DOE contractor employee's involvement in an activity listed in 10 CFR 708.5(a) through (c), may constitute a violation of a DOE Nuclear Safety Requirement under 10 CFR part 820 if it concerns nuclear safety. To avoid the potential for inconsistency with one of the mechanisms available to an aggrieved DOE contractor employee alleging retaliation referenced in section XIII.a, the Director will not take any action under this part with respect to an alleged violation of 10 CFR 708.43 until a request for relief under one of these mechanisms, if any, has been fully adjudicated, including appeals. With respect to an alleged retaliation, the Director will generally only take action that is consistent with the findings of a final

decision of an agency or court. If a final decision finds that retaliation occurred, the Department will consider whether that retaliation constitutes a violation of §708.43, and if so, whether to take action under part 820. If a final decision finds that no retaliation occurred, the Director will generally not take any action under part 820 with respect to the alleged retaliation absent significant new information that was not available in the prior proceeding. If a final decision dismisses a complaint on procedural grounds without explicitly finding that retaliation did not occur, the Director may take further action under part 820 that is not inconsistent with the final decision.

c. DOE encourages its contractors to cooperate in resolving whistleblower complaints raised by contractor employees in a prompt and equitable manner. Accordingly, in considering what remedy is appropriate for an act of retaliation concerning nuclear safety, the Director will take into account the extent to which a contractor cooperated in proceedings for remedial relief.

d. In considering what remedy is appropriate for an act of retaliation concerning nuclear safety, the Director will also consider the egregiousness of the particular case including the level of management involved in the alleged retaliation and the specificity of the acts of retaliation.

e. When the Director undertakes an investigation of an allegation of DOE contractor retaliation against an employee under part 820, the Director will apprise persons interviewed and interested parties that the investigative activity is being taken pursuant to the nuclear safety procedures of part 820 and not pursuant to the procedures of part 708.

# PART 824—PROCEDURAL RULES FOR THE ASSESSMENT OF CIVIL PENALTIES FOR CLASSIFIED INFORMATION SECURITY VIOLATIONS

Sec.

824.1 Purpose and scope.
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APPENDIX A TO PART 824—GENERAL STATEMENT OF ENFORCEMENT POLICY

AUTHORITY: 42 U.S.C. 2201, 2282b, 7101 *et seq.*, 50 U.S.C. 2401 *et seq.*; 28 U.S.C. 2461 note.

SOURCE: 70 FR 3607, Jan. 26, 2005, unless otherwise noted.

## § 824.1 Purpose and scope.

This part implements subsections a., c., and d. of section 234B. of the Atomic Energy Act of 1954 (the Act), 42 U.S.C. 2282b. Subsection a. provides that any person who has entered into a contract or agreement with the Department of Energy, or a subcontract or subagreement thereto, and who violates (or whose employee violates) any applicable rule, regulation or order under the Act relating to the security or safeguarding of Restricted Data or other classified information, shall be subject to a civil penalty not to exceed $143,715 for each violation. Subsections c. and d. specify certain additional authorities and limitations respecting the assessment of such penalties.

[70 FR 3607, Jan. 26, 2005, as amended at 74 FR 66033, Dec. 14, 2009; 79 FR 19, Jan. 2, 2014; 81 FR 41795, June 28, 2016; 81 FR 96352, Dec. 30, 2016]

## § 824.2 Applicability.

(a) *General.* These regulations apply to any person that has entered into a contract or agreement with DOE, or a subcontract or sub-agreement thereto.

(b) *Limitations.* DOE may not assess any civil penalty against any entity (including subcontractors and suppliers thereto) specified at subsection d. of section 234A of the Act until the entity enters, after October 5, 1999, into a new contract with DOE or an extension of a current contract with DOE, and the total amount of civil penalties may not exceed the total amount of fees paid by the DOE to that entity in that fiscal year.

(c) *Individual employees.* No civil penalty may be assessed against an individual employee of a contractor or any other entity which enters into an agreement with DOE.

[70 FR 3607, Jan. 26, 2005, as amended at 70 FR 8716, Feb. 23, 2005]

## § 824.3 Definitions.

As used in this part:

*Act* means the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*).

*Administrator* means the Administrator of the National Nuclear Security Administration.

*Classified information* means Restricted Data and Formerly Restricted Data protected against unauthorized disclosure pursuant to the Act and National Security Information that has been determined pursuant to Executive Order 12958, as amended March 25, 2003, or any predecessor or successor executive order to require protection against unauthorized disclosure and that is marked to indicate its classified status when in documentary form.

*DOE* means the United States Department of Energy, including the National Nuclear Security Administration.

*Director* means the DOE Official, or his or her designee, to whom the Secretary has assigned responsibility for enforcement of this part.

*Person* means any person as defined in section 11.s. of the Act, 42 U.S.C. 2014, and includes any affiliate or parent corporation thereof, who enters into a contract or agreement with DOE, or is a party to a contract or subcontract under a contract or agreement with DOE.

*Secretary* means the Secretary of Energy.

### § 824.4 Civil penalties.

(a) Any person who violates a classified information protection requirement of any of the following is subject to a civil penalty under this part:

(1) 10 CFR part 1016—Safeguarding of Restricted Data;

(2) 10 CFR part 1045—Nuclear Classification and Declassification; or

(3) Any other DOE regulation or rule (including any DOE order or manual enforceable against the contractor or subcontractor under a contractual provision in that contractor's or subcontractor's contract) related to the safeguarding or security of classified information if the regulation or rule provides that violation of its provisions may result in a civil penalty pursuant to subsection a. of section 234B. of the Act.

(b) If, without violating a classified information protection requirement of any regulation or rule under paragraph (a) of this section, a person by an act or omission causes, or creates a risk of, the loss, compromise or unauthorized disclosure of classified information, 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) The Director may propose imposition of a civil penalty for violation of a requirement of a regulation or rule under paragraph (a) of this section or a compliance order issued under paragraph (b) of this section, not to exceed $143,715 for each violation.

(d) If any violation is a continuing one, each day of such violation shall constitute a separate violation for the purpose of computing the applicable civil penalty.

(e) 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 classified information protection requirements.

[70 FR 3607, Jan. 26, 2005, as amended at 74 FR 66033, Dec. 14, 2009; 79 FR 19, Jan. 2, 2014; 81 FR 41795, June 28, 2016; 81 FR 96352, Dec. 30, 2016]

### § 824.5 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 § 824.4(a) and (b) 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.

### § 824.6 Preliminary notice of violation.

(a) 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:

(1) The date, facts, and nature of each act or omission constituting the alleged violation;

(2) The particular provision of the regulation, rule or compliance order involved in each alleged violation;

(3) The proposed remedy for each alleged violation, including the amount of any civil penalty proposed; and,

(4) 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.

(b) A reply to a preliminary notice of violation must contain a statement of all relevant facts pertaining to an alleged violation. The reply must:

(1) State any facts, explanations and arguments which support a denial of the alleged violation;

(2) Demonstrate any extenuating circumstances or other reason why a proposed remedy should not be imposed or should be mitigated;

(3) Discuss the relevant authorities which support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE;

(4) Furnish full and complete answers to any questions set forth in the preliminary notice; and

(5) Include copies of all relevant documents.

(c) If a person fails to submit a written reply within 30 calendar days of receipt of a preliminary notice of violation:

(1) The person relinquishes any right to appeal any matter in the preliminary notice; and

(2) The preliminary notice, including any remedies therein, constitutes a final order.

(d) 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.

### § 824.7 Final notice of violation.

(a) 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 a classified information security requirement.

(b) Based on a determination by the Director that a person has violated or is continuing to violate a classified information 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 § 824.8 or, in the alternative, to elect the procedures specified in section 234A.c.(3) of the Act, 42 U.S.C. 2282a.c.(3).

(c) 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.

(d) Subject to paragraphs (h) and (i) of this section, the effect of final notice shall be:

(1) 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.

(2) 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:

(i) A waiver of further proceedings;

(ii) A request for an on-the-record hearing under § 824.8; or

(iii) A notice of intent to proceed under section 234A.c.(3) of the Act, 42 U.S.C. 2282a.(c)(3).

(e) 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.

(f) If a person files a request for an on-the-record hearing, then the hearing process commences.

(g) If the person files a notice of intent to proceed under section 234A.c.(3) of the Act, 42 U.S.C. 2282a.(c)(3), the Director, by order, shall assess the civil penalty set forth in the Notice of Violation.

(h) The Director may amend the final notice of violation at any time before

the time periods specified in paragraphs (d)(1) or (d)(2) expire. An amendment shall add fifteen days to the time period under paragraph (d) of this section.

(i) The Director may withdraw the final notice of violation, or any part thereof, at any time before the time periods specified in paragraphs (d)(1) or (d)(2) expire.

### § 824.8 Hearing.

(a) Any person who receives a final notice of violation under § 824.7 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.

(b) Upon receipt from a person of a written request for a hearing, the Director shall:

(1) Appoint a Hearing Counsel; and

(2) Select an administrative law judge appointed under section 3105 of Title 5, U.S.C., to serve as Hearing Officer.

### § 824.9 Hearing Counsel.

The Hearing Counsel:

(a) Represents DOE;

(b) Consults with the person or the person's counsel prior to the hearing;

(c) Examines and cross-examines witnesses during the hearing; and

(d) 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.

### § 824.10 Hearing Officer.

The Hearing Officer:

(a) Is responsible for the administrative preparations for the hearing;

(b) Convenes the hearing as soon as is reasonable;

(c) Administers oaths and affirmations;

(d) Issues subpoenas, at the request of either party or on the Hearing Officer's motion;

(e) Rules on offers of proof and receives relevant evidence;

(f) Takes depositions or has depositions taken when the ends of justice would be served;

(g) Conducts the hearing in a manner which is fair and impartial;

(h) Holds conferences for the settlement or simplification of the issues by consent of the parties;

(i) Disposes of procedural requests or similar matters;

(j) Requires production of documents; and

(k) Makes an initial decision under § 824.13.

### § 824.11 Rights of the person at the hearing.

The person may:

(a) Testify or present evidence through witnesses or by documents;

(b) Cross-examine witnesses and rebut records or other physical evidence, except as provided in § 824.12(d);

(c) Be present during the entire hearing, except as provided in § 824.12(d); and

(d) Be accompanied, represented and advised by counsel of the person's choosing.

### § 824.12 Conduct of the hearing.

(a) DOE shall make a transcript of the hearing;

(b) Except as provided in paragraph (d) of this section, the Hearing Officer may receive any oral or documentary evidence, but shall exclude irrelevant, immaterial or unduly repetitious evidence;

(c) Witnesses shall testify under oath and are subject to cross-examination, except as provided in paragraph (d) of this section;

(d) The Hearing Officer must use procedures appropriate to safeguard and prevent unauthorized disclosure of classified information or any other information protected from public disclosure by law or regulation, with minimum impairment of rights and obligations under this part. The classified or otherwise protected status of any information shall not, however, preclude its 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 classified or otherwise protected.

(e) 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.

### § 824.13 Initial decision.

(a) 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:

(1) The nature, circumstances, extent, and gravity of the violation or violations;

(2) The violator's ability to pay;

(3) The effect of the civil penalty on the person's ability to do business;

(4) Any history of prior violations;

(5) The degree of culpability; and

(6) Such other matters as justice may require.

(b) 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 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 thirty days (30) unless otherwise agreed by the Director.

### § 824.14 Special procedures.

A person receiving a final notice of violation under § 824.7 may elect in writing, within 30 days of receipt of such notice, the application of special procedures regarding payment of the penalty set forth in section 234A.c.(3) of the Act, 42 U.S.C. 2282a(c)(3). The Director shall promptly assess a civil penalty, by order, after the date of such election. If the civil penalty has not been paid within sixty calendar days after the assessment has been issued, the DOE shall institute an action in the appropriate District Court of the United States for an order affirming the assessment of the civil penalty.

### § 824.15 Collection of civil penalties.

If any person fails to pay an assessment of a civil penalty after it has become a final order or after the appropriate District Court has entered final judgment for DOE under § 824.14, DOE shall institute an action to recover the amount of such penalty in an appropriate District Court of the United States.

### § 824.16 Direction to NNSA contractors.

(a) 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 contractors or subcontractors.

(1) Subpoenas;

(2) Orders to compel attendance;

(3) Disclosures of information or documents obtained during an investigation or inspection;

(4) Preliminary notices of violation; and

(5) Final notices of violations.

(b) 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.

## APPENDIX A TO PART 824—GENERAL STATEMENT OF ENFORCEMENT POLICY

### I. INTRODUCTION

a. This policy statement sets forth the general framework through which DOE will seek to ensure compliance with its classified information security regulations and rules and classified information security-related compliance orders (hereafter collectively referred to as classified information security requirements).

The policy set forth herein is applicable to violations of classified information security requirements by DOE contractors and their subcontractors (hereafter collectively referred to as DOE contractors). This policy statement is not a regulation and is intended only to provide general guidance to those persons subject to the classified information security requirements. It is not intended to establish a formulaic approach to the initiation and resolution of situations involving noncompliance with these requirements. Rather, DOE intends to consider the particular facts of each noncompliance situation in determining whether enforcement penalties are appropriate and, if so, the appropriate magnitude of those penalties. DOE reserves the option to deviate from this policy statement when appropriate in the circumstances of particular cases.

b. Both the Department of Energy Organization Act, 42 U.S.C. 7101, and the Atomic Energy Act of 1954 (the Act), 42 U.S.C. 2011, require DOE to protect and provide for the common defense and security of the United States in conducting its nuclear activities, and grant DOE broad authority to achieve this goal.

c. The DOE goal in the compliance arena is to enhance and protect the common defense and security at DOE facilities by fostering a culture among both DOE line organizations and contractors that actively seeks to attain and sustain compliance with classified information security requirements. The enforcement program and policy have been developed with the express purpose of achieving a culture of active commitment to security and voluntary compliance. DOE will establish effective administrative processes and incentives for contractors to identify and report noncompliances promptly and openly and to initiate comprehensive corrective actions to resolve both the noncompliances themselves and the program or process deficiencies that led to noncompliance.

d. In the development of the DOE enforcement policy, DOE believes that the reasonable exercise of its enforcement authority can help to reduce the likelihood of serious security incidents. This can be accomplished by providing greater emphasis on a culture of security awareness in existing DOE operations and strong incentives for contractors to identify and correct noncompliance conditions and processes in order to protect classified information of vital significance to this nation. DOE wants to facilitate, encourage, and support contractor initiatives for the prompt identification and correction of problems. These initiatives and activities will be duly considered in exercising enforcement discretion.

e. Section 234B of the Act provides DOE with the authority to impose civil penalties and also with the authority to compromise, modify, or remit civil penalties with or without conditions. In implementing section 234B, DOE will carefully consider the facts of each case of noncompliance and will exercise appropriate judgment in taking any enforcement action. Part of the function of a sound enforcement program is to assure a proper and continuing level of security vigilance. The reasonable exercise of enforcement authority will be facilitated by the appropriate application of security requirements to nuclear facilities and by promoting and coordinating the proper contractor attitude toward complying with those requirements.

### II. PURPOSE

The purpose of the DOE enforcement program is to promote and protect the common defense and security of the United States by:

a. Ensuring compliance by DOE contractors with applicable classified information security requirements.

b. Providing positive incentives for a DOE contractor's:

(1) Timely self-identification of security deficiencies,

(2) Prompt and complete reporting of such deficiencies to DOE,

(3) Root cause analyses of security deficiencies,

(4) Prompt correction of security deficiencies in a manner which precludes recurrence, and

(5) Identification of modifications in practices or facilities that can improve security.

c. Deterring future violations of DOE requirements by a DOE contractor.

d. Encouraging the continuous overall improvement of operations at DOE facilities.

### III. STATUTORY AUTHORITY

Section 234B of the Act subjects contractors, and their subcontractors and suppliers, to civil penalties for violations of DOE regulations, rules and orders regarding the safeguarding and security of Restricted Data and other classified information.

### IV. PROCEDURAL FRAMEWORK

a. 10 CFR part 824 sets forth the procedures DOE will use in exercising its enforcement authority, including the issuance of notices of violation and the resolution of contested

enforcement actions in the event a DOE contractor elects to adjudicate contested issues before an administrative law judge.

b. Pursuant to §824.6, the Director initiates the civil penalty process by issuing a preliminary notice of violation that specifies a proposed civil penalty. The DOE contractor is required to respond in writing to the preliminary notice of violation, either admitting the violation and waiving its right to contest the proposed civil penalty and paying it; admitting the violation, but asserting the existence of mitigating circumstances that warrant either the total or partial remission of the civil penalty; or denying that the violation has occurred and providing the basis for its belief that the preliminary notice of violation is incorrect. After evaluation of the DOE's contractor response, the Director may determine that no violation has occurred; that the violation occurred as alleged in the preliminary notice of violation, but that the proposed civil penalty should be remitted in whole or in part; or that the violation occurred as alleged in the preliminary notice of violation and that the proposed civil penalty is appropriate notwithstanding the asserted mitigating circumstances. In the latter two instances, the Director will issue a final notice of violation or a final notice of violation with proposed civil penalty.

c. An opportunity to challenge a proposed civil penalty either before an administrative law judge or in a United States District Court is provided in 42 U.S.C. 2282a(c). Part 824 sets forth the procedures associated with an administrative hearing, should the contractor opt for that method of challenging the proposed civil penalty.

V. SEVERITY OF VIOLATIONS

a. Violations of classified information security requirements have varying degrees of security significance. Therefore, the relative importance of each violation must be identified as the first step in the enforcement process. Violations of classified information security requirements are categorized in three levels of severity to identify their relative security significance. Notices of violation are issued for noncompliance and propose civil penalties commensurate with the severity level of the violation(s) involved.

b. Severity Level I has been assigned to violations that are the most significant and Severity Level III violations are the least significant. Severity Level I is reserved for violations of classified information security requirements which involve actual or high potential for adverse impact on the national security. Severity Level II violations represent a significant lack of attention or carelessness toward responsibilities of DOE contractors for the protection of classified information which could, if uncorrected, potentially lead to an adverse impact on the national security. Severity Level III violations are less serious, but are of more than minor concern: *i.e.*, if left uncorrected, they could lead to a more serious concern. In some cases, violations may be evaluated in the aggregate and a single severity level assigned for a group of violations.

c. Isolated minor violations of classified information security requirements will not be the subject of formal enforcement action through the issuance of a notice of violation. However, these minor violations will be identified as noncompliances and tracked to assure that appropriate corrective/remedial action is taken to prevent their recurrence, and evaluated to determine if generic or specific problems exist. If circumstances demonstrate that a number of related minor noncompliances have occurred in the same time frame (*e.g.*, all identified during the same assessment), or that related minor noncompliances have recurred despite prior notice to the DOE contractor and sufficient opportunity to correct the problem, DOE may choose in its discretion to consider the noncompliances in the aggregate as a more serious violation warranting a Severity Level III designation, a notice of violation and a possible civil penalty.

d. The severity level of a violation will depend, in part, on the degree of culpability of the DOE contractor with regard to the violation. Thus, inadvertent or negligent violations will be viewed differently from those in which there is gross negligence, deception or willfulness. In addition to the significance of the underlying violation and level of culpability involved, DOE will also consider the position, training and experience of the person involved in the violation. Thus, for example, a violation may be deemed to be more significant if a senior manager of an organization is involved rather than a foreman or non-supervisory employee. In this regard, while management involvement, direct or indirect, in a violation may lead to an increase in the severity level of a violation and proposed civil penalty, the lack of such involvement will not constitute grounds to reduce the severity level of a violation or mitigate a civil penalty. Allowance of mitigation in such circumstances could encourage lack of management involvement in DOE contractor activities and a decrease in protection of classified information.

e. Other factors which will be considered by DOE in determining the appropriate severity level of a violation are the duration of the violation, the past performance of the DOE contractor in the particular activity area involved, whether the DOE contractor had prior notice of a potential problem, and whether there are multiple examples of the violation in the same time frame rather than an isolated occurrence. The relative weight given to each of these factors in arriving at

the appropriate severity level will depend on the circumstances of each case.

f. DOE expects contractors to provide full, complete, timely, and accurate information and reports. Accordingly, the severity level of a violation involving either failure to make a required report or notification to DOE or an untimely report or notification will be based upon the significance of, and the circumstances surrounding, the matter that should have been reported. A contractor will not normally be cited for a failure to report a condition or event unless the contractor was actually aware or should have been aware of the condition or event which it failed to report.

VI. ENFORCEMENT CONFERENCES

a. Should DOE determine, after completion of all assessment and investigation activities associated with a potential or alleged violation of classified information security requirements, that there is a reasonable basis to believe that a violation has actually occurred, and the violation may warrant a civil penalty, DOE will normally hold an enforcement conference with the DOE contractor involved prior to taking enforcement action. DOE may also elect to hold an enforcement conference for potential violations which would not ordinarily warrant a civil penalty but which could, if repeated, lead to such action. The purpose of the enforcement conference is to assure the accuracy of the facts upon which the preliminary determination to consider enforcement action is based, discuss the potential or alleged violations, their significance and causes, and the nature of and schedule for the DOE contractor's corrective actions, determine whether there are any aggravating or mitigating circumstances, and obtain other information which will help determine the appropriate enforcement action.

b. DOE contractors will be informed prior to a meeting when that meeting is considered to be an enforcement conference. Such conferences are informal mechanisms for candid pre-decisional discussions regarding potential or alleged violations and will not normally be open to the public. In circumstances for which immediate enforcement action is necessary in the interest of the national security, such action will be taken prior to the enforcement conference, which may still be held after the necessary DOE action has been taken.

VII. ENFORCEMENT LETTER

a. In cases where DOE has decided not to issue a notice of violation, DOE may send an enforcement letter to the contractor signed by the Director. The enforcement letter is intended to communicate the basis of the decision not to pursue further enforcement action for a noncompliance. The enforcement letter is intended to point contractors to the desired level of security performance. It may be used when the Director concludes the specific noncompliance at issue is not of the level of significance warranted for issuance of a notice of violation. The enforcement letter will typically describe how the contractor handled the circumstances surrounding the noncompliance and address additional areas requiring the contractor's attention and DOE's expectations for corrective action. The enforcement letter notifies the contractor that, when verification is received that corrective actions have been implemented, DOE will close the enforcement action. In the case of NNSA contractors or subcontractors, the enforcement letter will take the form of advising the contractor or subcontractor that the Director has consulted with the NNSA Administrator who agrees that further enforcement action should not be pursued if verification is received that corrective actions have been implemented by the contractor or subcontractor.

b. In many investigations, an enforcement letter may not be required. When DOE decides that a contractor has appropriately corrected a noncompliance or that the significance of the noncompliance is sufficiently low, it may close out an investigation without such enforcement letter. A closeout of a noncompliance with or without an enforcement letter may only take place after the Director has issued a letter confirming that corrective actions have been completed. In the case of NNSA contractors or subcontractors, the Director's letter will take the form of confirming that corrective actions have been completed and advising that the Director has consulted with the NNSA Administrator who agrees that no enforcement action should be pursued.

VIII. ENFORCEMENT ACTIONS

The nature and extent of the enforcement action is intended to reflect the seriousness of the violation involved. For the vast majority of violations for which DOE assigns severity levels as described previously, a notice of violation will be issued, requiring a formal response from the recipient describing the nature of and schedule for corrective actions it intends to take regarding the violation.

*1. Notice of Violation*

a. A Notice of Violation (preliminary or final) is a document setting forth the conclusion that one or more violations of classified information security requirements have occurred. Such a notice normally requires the recipient to provide a written response which may take one of several positions described in Section IV of this policy statement. In the

event that the recipient concedes the occurrence of the violation, it is required to describe corrective steps which have been taken and the results achieved; remedial actions which will be taken to prevent recurrence; and the date by which full compliance will be achieved.

b. DOE will use the notice of violation as the standard method for formalizing the existence of a possible violation and the notice of violation will be issued in conjunction with the proposed imposition of a civil penalty. In certain limited instances, as described in this section, DOE may refrain from the issuance of an otherwise appropriate notice of violation. However, a notice of violation normally will be issued for willful violations, for violations where past corrective actions for similar violations have not been sufficient to prevent recurrence and there are no other mitigating circumstances.

c. DOE contractors are not ordinarily cited for violations resulting from matters not within their control, such as equipment failures that were not avoidable by reasonable quality assurance measures, proper maintenance, or management controls. With regard to the issue of funding, however, DOE does not consider an asserted lack of funding to be a justification for noncompliance with classified information security requirements. Should a contractor believe that a shortage of funding precludes it from achieving compliance with one or more of these requirements, it may request, in writing, an exemption from the requirement(s) in question from the appropriate Secretarial Officer (SO). If no exemption is granted, the contractor, in conjunction with the SO, must take appropriate steps to modify, curtail, suspend or cease the activities which cannot be conducted in compliance with the classified information security requirement(s) in question.

d. DOE expects the contractors which operate its facilities to have the proper management and supervisory systems in place to assure that all activities at DOE facilities, regardless of who performs them, are carried out in compliance with all classified information security requirements. Therefore, contractors normally will be held responsible for the acts or omissions of their employees and subcontractor employees in the conduct of activities at DOE facilities.

*2. Civil Penalty*

a. A civil penalty is a monetary penalty that may be imposed for violations of applicable classified information security requirements, including compliance orders. Civil penalties are designed to emphasize the need for lasting remedial action, deter future violations, and underscore the importance of DOE contractor self-identification, reporting and correction of violations.

b. Absent mitigating circumstances as described below, or circumstances otherwise warranting the exercise of enforcement discretion by DOE as described in this section, civil penalties will be proposed for Severity Level I and II violations. Civil penalties also will be proposed for Severity Level III violations which are similar to previous violations for which the contractor did not take effective corrective action. ''Similar'' violations are those which could reasonably have been expected to have been prevented by corrective action for the previous violation. DOE normally considers civil penalties only for similar Severity Level III violations that occur over an extended period of time.

c. DOE will impose different base level civil penalties considering the severity level of the violation(s). Table 1 shows the daily base civil penalties for the various categories of severity levels. However, as described in Section V, the imposition of civil penalties will also take into account the gravity, circumstances, and extent of the violation or violations and, with respect to the violator, any history of prior similar violations and the degree of culpability and knowledge.

d. Regarding the factor of ability of DOE contractors to pay the civil penalties, it is not DOE's intention that the economic impact of a civil penalty is such that it puts a DOE contractor out of business. Contract termination, rather than civil penalties, is used when the intent is to terminate a contractor's management of a DOE facility. The deterrent effect of civil penalties is best served when the amount of such penalties takes this factor into account. However, DOE will evaluate the relationship of entities affiliated with the contractor (such as parent corporations) when it asserts that it cannot pay the proposed penalty.

e. DOE will review each case involving a proposed civil penalty on its own merit and adjust the base civil penalty values upward or downward appropriately. As indicated in paragraph 2.c of this section, Table 1 identifies the daily base civil penalty values for different severity levels. After considering all relevant circumstances, civil penalties may be escalated or mitigated based upon the adjustment factors described below in this section. In no instance will a civil penalty for any one violation exceed the statutory limit, as periodically adjusted for inflation as required by law, per violation. However, it should be noted that if a violation is a continuing one, under the statute, each day the violation continued constitutes a separate violation for purposes of computing the civil penalty. Thus, the per violation cap will not shield a DOE contractor that is or should have been aware of an ongoing violation and has not reported it to DOE and taken corrective action despite an opportunity to do so from liability significantly

exceeding the limit. Further, as described in this section, the duration of a violation will be taken into account in determining the appropriate severity level of the base civil penalty.

TABLE 1—SEVERITY LEVEL BASE CIVIL PENALTIES

| Severity level | Base civil penalty amount (percentage of maximum civil penalty per violation per day) |
|---|---|
| I | 100 |
| II | 50 |
| III | 10 |

*3. Adjustment Factors*

a. DOE's enforcement program is not an end in itself, but a means to achieve compliance with classified information security requirements, and civil penalties are not assessed for revenue purposes, but rather to emphasize the importance of compliance and to deter future violations. The single most important goal of the DOE enforcement program is to encourage early identification and reporting of security deficiencies and violations of classified information security requirements by the DOE contractors themselves rather than by DOE, and the prompt correction of any deficiencies and violations so identified. With respect to their own practices and those of their subcontractors, DOE believes that DOE contractors are in the best position to identify and promptly correct noncompliance with classified information security requirements. DOE expects that these contractors should have in place internal compliance programs which will ensure the detection, reporting and prompt correction of security-related problems that may constitute, or lead to, violations of classified information security requirements before, rather than after, DOE has identified such violations. Thus, DOE contractors are expected to be aware of and to address security problems before they are discovered by DOE. Obviously, protection of classified information is enhanced if deficiencies are discovered (and promptly corrected) by the DOE contractor, rather than by DOE, which may not otherwise become aware of a deficiency until later on, during the course of an inspection, performance assessment, or following an incident at the facility. Early identification of classified information security-related problems by DOE contractors can also have the added benefit of allowing information which could prevent such problems at other facilities in the DOE complex to be shared with other appropriate DOE contractors.

b. Pursuant to this enforcement philosophy, DOE will provide substantial incentive for the early self-identification, reporting and prompt correction of problems which constitute, or could lead to, violations of classified information security requirements. Thus, application of the adjustment factors set forth below may result in no civil penalty being assessed for violations that are identified, reported, and promptly and effectively corrected by the DOE contractor.

c. On the other hand, ineffective programs for problem identification and correction are unacceptable. Thus, for example, where a contractor fails to disclose and promptly correct violations of which it was aware or should have been aware, substantial civil penalties are warranted and may be sought, including the assessment of civil penalties for continuing violations on a per day basis.

d. Further, in cases involving factors of willfulness, repeated violations, patterns of systematic violations, flagrant DOE-identified violations or serious breakdown in management controls, DOE intends to apply its full statutory enforcement authority where such action is warranted. Based on the degree of such factors, DOE may escalate the amount of civil penalties up to the statutory maximum, as periodically adjusted for inflation as required by law, per violation per day for continuing violations.

*4. Identification and Reporting*

Reduction of up to 50% of the base civil penalty shown in Table 1 may be given when a DOE contractor identifies the violation and promptly reports the violation to the DOE. In weighing this factor, consideration will be given to, among other things, the opportunity available to discover the violation, the ease of discovery and the promptness and completeness of any required report. No consideration will be given to a reduction in penalty if the DOE contractor does not take prompt action to report the problem to DOE upon discovery, or if the immediate actions necessary to restore compliance with classified information security requirements or place the facility or operation in a safe configuration are not taken.

*5. Self-Identification and Tracking Systems*

a. DOE strongly encourages contractors to self-identify noncompliances with classified information security requirements before the noncompliances lead to a string of similar and potentially more significant events or consequences. When a contractor identifies a noncompliance through its own self-monitoring activity, DOE will normally allow a reduction in the amount of civil penalties, regardless of whether prior opportunities existed for contractors to identify the noncompliance. DOE normally will not allow a reduction in civil penalties for self-identification if DOE intervention was required to induce the contractor to report a noncompliance.

b. Self-identification of a noncompliance is possibly the single most important factor in considering a reduction in the civil penalty amount. Consideration of self-identification is linked to, among other things, whether prior opportunities existed to discover the violation, and if so, the age and number of such opportunities; the extent to which proper contractor controls should have identified or prevented the violation; whether discovery of the violation resulted from a contractor's self-monitoring activity; the extent of DOE involvement in discovering the violation or in prompting the contractor to identify the violation; and the promptness and completeness of any required report. Self-identification is also considered by DOE in deciding whether to pursue an investigation.

*6. Self-Disclosing Events*

a. DOE expects contractors to demonstrate acceptance of responsibility for security of classified information and to pro-actively identify noncompliance conditions in their programs and processes. In deciding whether to reduce any civil penalty proposed for violations revealed by the occurrence of a self-disclosing event (*e.g.* belated discovery of the disappearance of classified information or material subject to accountability rules), DOE will consider the ease with which a contractor could have discovered the noncompliance, *i.e.* failure to comply with classified information accountability rules, that contributed to the event and the prior opportunities that existed to discover the noncompliance. When the occurrence of an event discloses noncompliances that the contractor could have or should have identified before the event, DOE will not generally allow a reduction in civil penalties for self-identification. If a contractor simply reacts to events that disclose potentially significant consequences or downplays noncompliances which did not result in significant consequences, such contractor actions do not lead to the improvement in protection of classified information contemplated by the Act.

b. The key test is whether the contractor reasonably could have detected any of the underlying noncompliances that contributed to the event. Failure to utilize events and activities to address noncompliances may result in higher civil penalty assessments or a DOE decision not to reduce civil penalty amounts.

*7. Corrective Action To Prevent Recurrence*

The promptness (or lack thereof) and extent to which the DOE contractor takes corrective action, including actions to identify root causes and prevent recurrence, may result in up to a 50% increase or decrease in the base civil penalty shown in Table 1. For example, very extensive corrective action may result in reducing the proposed civil penalty as much as 50% of the base value shown in Table 1. On the other hand, the civil penalty may be increased as much as 50% of the base value if initiation or corrective action is not prompt or if the corrective action is only minimally acceptable. In weighing this factor, consideration will be given to, among other things, the appropriateness, timeliness and degree of initiative associated with the corrective action. The comprehensiveness of the corrective action will also be considered, taking into account factors such as whether the action is focused narrowly to the specific violation or broadly to the general area of concern.

*8. DOE's Contribution to a Violation*

There may be circumstances in which a violation of a classified information security requirement results, in part or entirely, from a direction given by DOE personnel to a DOE contractor to either take, or forbear from taking an action at a DOE facility. In such cases, DOE may refrain from issuing a notice of violation, and may mitigate, either partially or entirely, any proposed civil penalty, provided that the direction upon which the DOE contractor relied is documented in writing, contemporaneously with the direction. It should be emphasized, however, that no interpretation of a classified information security requirement is binding upon DOE unless issued in writing by the General Counsel. Further, as discussed in this section of this policy statement, lack of funding by itself will not be considered as a mitigating factor in enforcement actions.

*9. Exercise of Discretion*

Because DOE wants to encourage and support DOE contractor initiative for prompt self-identification, reporting and correction of problems, DOE may exercise discretion as follows:

a. In accordance with the previous discussion, DOE may refrain from issuing a civil penalty for a violation which meets all of the following criteria:

(1) The violation is promptly identified and reported to DOE before DOE learns of it;

(2) The violation is not willful or a violation that could reasonably be expected to have been prevented by the DOE contractor's corrective action for a previous violation;

(3) The DOE contractor, upon discovery of the violation, has taken or begun to take prompt and appropriate action to correct the violation; and

(4) The DOE contractor has taken, or has agreed to take, remedial action satisfactory to DOE to preclude recurrence of the violation and the underlying conditions which caused it.

b. DOE may refrain from proposing a civil penalty for a violation involving a past problem that meets all of the following criteria:

(1) It was identified by a DOE contractor as a result of a formal effort such as an annual self assessment that has a defined scope and timetable which is being aggressively implemented and reported;

(2) Comprehensive corrective action has been taken or is well underway within a reasonable time following identification; and

(3) It was not likely to be identified by routine contractor efforts such as normal surveillance or quality assurance activities.

c. DOE will not issue a notice of violation for cases in which the violation discovered by the DOE contractor cannot reasonably be linked to the conduct of that contractor, provided that prompt and appropriate action is taken by the DOE contractor upon identification of the past violation to report to DOE and remedy the problem.

d. DOE may refrain from issuing a notice of violation for an act or omission constituting noncompliance that meets all of the following criteria:

(1) It was promptly identified by the contractor;

(2) It is normally classified at a Severity Level III;

(3) It was promptly reported to DOE;

(4) Prompt and appropriate corrective action will be taken, including measures to prevent recurrence; and

(5) It was not a willful violation or a violation that could reasonably be expected to have been prevented by the DOE contractor's corrective action for a previous violation.

e. DOE may refrain from issuing a notice of violation for an act or omission constituting noncompliance that meets all of the following criteria:

(1) It was an isolated Severity Level III violation identified during an inspection or evaluation conducted by the Office of Independent Oversight, or a DOE security survey, or during some other DOE assessment activity;

(2) The identified noncompliance was properly reported by the contractor upon discovery;

(3) The contractor initiated or completed appropriate assessment and corrective actions within a reasonable period, usually before the termination of the onsite inspection or integrated performance assessment; and

(4) The violation was not willful or one which could reasonably be expected to have been prevented by the DOE contractor's corrective action for a previous violation.

f. In situations where corrective actions have been completed before termination of an inspection or assessment, a formal response from the contractor is not required and the inspection or integrated performance assessment report serves to document the violation and the corrective action. However, in all instances, the contractor is required to report the noncompliance through established reporting mechanisms so the noncompliance issue and any corrective actions can be properly tracked and monitored.

g. If DOE initiates an enforcement action for a violation at a Severity Level II or III and, as part of the corrective action for that violation, the DOE contractor identifies other examples of the violation with the same root cause, DOE may refrain from initiating an additional enforcement action. In determining whether to exercise this discretion, DOE will consider whether the DOE contractor acted reasonably and in a timely manner appropriate to the security significance of the initial violation, the comprehensiveness of the corrective action, whether the matter was reported, and whether the additional violation(s) substantially change the security significance or character of the concern arising out of the initial violation.

h. The preceding paragraphs are solely intended to be examples indicating when enforcement discretion may be exercised to forego the issuance of a civil penalty or, in some cases, the initiation of any enforcement action at all. However, notwithstanding these examples, a civil penalty may be proposed or notice of violation issued when, in DOE's judgment, such action is warranted on the basis of the circumstances of an individual case.

[70 FR 3607, Jan. 26, 2005, as amended at 71 FR 68733, Nov. 28, 2006; 74 FR 66033, Dec. 14, 2009; 79 FR 19, Jan. 2, 2014; 81 FR 41795, June 28, 2016]

# PART 830—NUCLEAR SAFETY MANAGEMENT

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APPENDIX A TO SUBPART B OF PART 830—GENERAL STATEMENT OF SAFETY BASIS POLICY

AUTHORITY: 42 U.S.C. 2201; 42 U.S.C. 7101 *et seq.;* and 50 U.S.C. 2401 *et seq.*

SOURCE: 66 FR 1818, Jan. 10, 2001, unless otherwise noted.

### § 830.1 Scope.

This part governs the conduct of DOE contractors, DOE personnel, and other persons conducting activities (including providing items and services) that affect, or may affect, the safety of DOE nuclear facilities.

### § 830.2 Exclusions.

This part does not apply to:

(a) Activities that are regulated through a license by the Nuclear Regulatory Commission (NRC) or a State under an Agreement with the NRC, including activities certified by the NRC under section 1701 of the Atomic Energy Act (Act);

(b) Activities conducted under the authority of the Director, Naval Nuclear Propulsion, pursuant to Executive Order 12344, as set forth in Public Law 106–65;

(c) Transportation activities which are regulated by the Department of Transportation;

(d) Activities conducted under the Nuclear Waste Policy Act of 1982, as amended, and any facility identified under section 202(5) of the Energy Reorganization Act of 1974, as amended; and

(e) Activities related to the launch approval and actual launch of nuclear energy systems into space.

### § 830.3 Definitions.

(a) The following definitions apply to this part:

*Administrative controls* means the provisions relating to organization and management, procedures, recordkeeping, assessment, and reporting necessary to ensure safe operation of a facility.

*Bases appendix* means an appendix that describes the basis of the limits and other requirements in technical safety requirements.

*Critical assembly* means special nuclear devices designed and used to sustain nuclear reactions, which may be subject to frequent core and lattice configuration change and which frequently may be used as mockups of reactor configurations.

*Criticality* means the condition in which a nuclear fission chain reaction becomes self-sustaining.

*Design features* means the design features of a nuclear facility specified in the technical safety requirements that, if altered or modified, would have a significant effect on safe operation.

*Document* means recorded information that describes, specifies, reports, certifies, requires, or provides data or results.

*Documented safety analysis* means a documented analysis of the extent to which a nuclear facility can be operated safely with respect to workers, the public, and the environment, including a description of the conditions, safe boundaries, and hazard controls that provide the basis for ensuring safety.

*Environmental restoration activities* means the process(es) by which contaminated sites and facilities are identified and characterized and by which contamination is contained, treated, or removed and disposed.

*Existing DOE nuclear facility* means a DOE nuclear facility in operation before April 9, 2001.

*Fissionable materials* means a nuclide capable of sustaining a neutron-induced chain reaction (*e.g.*, uranium-233, uranium-235, plutonium-238, plutonium-239, plutonium-241, neptunium-237, americium-241, and curium-244).

*Graded approach* means the process of ensuring that the level of analysis, documentation, and actions used to comply with a requirement in this part are commensurate with:

(1) The relative importance to safety, safeguards, and security;

(2) The magnitude of any hazard involved;

(3) The life cycle stage of a facility;

(4) The programmatic mission of a facility;

(5) The particular characteristics of a facility;

(6) The relative importance of radiological and nonradiological hazards; and

(7) Any other relevant factor.

*Hazard* means a source of danger (*i.e.*, material, energy source, or operation) with the potential to cause illness, injury, or death to a person or damage to a facility or to the environment (without regard to the likelihood or credibility of accident scenarios or consequence mitigation).

*Hazard controls* means measures to eliminate, limit, or mitigate hazards to workers, the public, or the environment, including

(1) Physical, design, structural, and engineering features;

(2) Safety structures, systems, and components;

(3) Safety management programs;

(4) Technical safety requirements; and

(5) Other controls necessary to provide adequate protection from hazards.

*Item* is an all-inclusive term used in place of any of the following: appurtenance, assembly, component, equipment, material, module, part, product, structure, subassembly, subsystem, system, unit, or support systems.

*Limiting conditions for operation* means the limits that represent the lowest functional capability or performance level of safety structures, systems, and components required for safe operations.

*Limiting control settings* means the settings on safety systems that control process variables to prevent exceeding a safety limit.

*Low-level residual fixed radioactivity* means the remaining radioactivity following reasonable efforts to remove radioactive systems, components, and stored materials. The remaining radioactivity is composed of surface contamination that is fixed following chemical cleaning or some similar process; a component of surface contamination that can be picked up by smears; or activated materials within structures. The radioactivity can be characterized as low-level if the smearable radioactivity is less than the values defined for removable contamination by 10 CFR Part 835, Appendix D, Surface Contamination Values, and the hazard analysis results show that no credible accident scenario or work practices would release the remaining fixed radioactivity or activation components at levels that would prudently require the use of active safety systems, structures, or components to prevent or mitigate a release of radioactive materials.

*Major modification* means a modification to a DOE nuclear facility that is completed on or after April 9, 2001 that substantially changes the existing safety basis for the facility.

*New DOE nuclear facility* means a DOE nuclear facility that begins operation on or after April 9, 2001.

*Nonreactor nuclear facility* means those facilities, activities or operations that involve, or will involve, radioactive and/or fissionable materials in such form and quantity that a nuclear or a nuclear explosive hazard potentially exists to workers, the public, or the environment, but does not include accelerators and their operations and does not include activities involving only incidental use and generation of radioactive materials or radiation such as check and calibration sources, use of radioactive sources in research and experimental and analytical laboratory activities, electron microscopes, and X-ray machines.

*Nuclear facility* means a reactor or a nonreactor nuclear facility where an activity is conducted for or on behalf of DOE and includes any related area, structure, facility, or activity to the extent necessary to ensure proper implementation of the requirements established by this Part.

*Operating limits* means those limits required to ensure the safe operation of a nuclear facility, including limiting control settings and limiting conditions for operation.

*Preliminary documented safety analysis* means documentation prepared in connection with the design and construction of a new DOE nuclear facility or a major modification to a DOE nuclear facility that provides a reasonable basis for the preliminary conclusion that the nuclear facility can be operated safely through the consideration of factors such as

(1) The nuclear safety design criteria to be satisfied;

(2) A safety analysis that derives aspects of design that are necessary to satisfy the nuclear safety design criteria; and

(3) An initial listing of the safety management programs that must be developed to address operational safety considerations.

*Process* means a series of actions that achieves an end or result.

*Quality* means the condition achieved when an item, service, or process meets or exceeds the user's requirements and expectations.

*Quality assurance* means all those actions that provide confidence that quality is achieved.

*Quality Assurance Program (QAP)* means the overall program or management system established to assign responsibilities and authorities, define policies and requirements, and provide for the performance and assessment of work.

*Reactor* means any apparatus that is designed or used to sustain nuclear chain reactions in a controlled manner such as research, test, and power reactors, and critical and pulsed assemblies and any assembly that is designed to perform subcritical experiments that could potentially reach criticality; and, unless modified by words such as containment, vessel, or core, refers to the entire facility, including the housing, equipment and associated areas devoted to the operation and maintenance of one or more reactor cores.

*Record* means a completed document or other media that provides objective evidence of an item, service, or process.

*Safety basis* means the documented safety analysis and hazard controls that provide reasonable assurance that a DOE nuclear facility can be operated safely in a manner that adequately protects workers, the public, and the environment.

*Safety class structures, systems, and components* means the structures, systems, or components, including portions of process systems, whose preventive or mitigative function is necessary to limit radioactive hazardous material exposure to the public, as determined from safety analyses.

*Safety evaluation report* means the report prepared by DOE to document

(1) The sufficiency of the documented safety analysis for a hazard category 1, 2, or 3 DOE nuclear facility;

(2) The extent to which a contractor has satisfied the requirements of Subpart B of this part; and

(3) The basis for approval by DOE of the safety basis for the facility, including any conditions for approval.

*Safety limits* means the limits on process variables associated with those safety class physical barriers, generally passive, that are necessary for the intended facility function and that are required to guard against the uncontrolled release of radioactive materials.

*Safety management program* means a program designed to ensure a facility is operated in a manner that adequately protects workers, the public, and the environment by covering a topic such as: quality assurance; maintenance of safety systems; personnel training; conduct of operations; inadvertent criticality protection; emergency preparedness; fire protection; waste management; or radiological protection of workers, the public, and the environment.

*Safety management system* means an integrated safety management system established consistent with 48 CFR 970.5223–1.

*Safety significant structures, systems, and components* means the structures, systems, and components which are not designated as safety class structures, systems, and components, but whose preventive or mitigative function is a major contributor to defense in depth and/or worker safety as determined from safety analyses.

*Safety structures, systems, and components* means both safety class structures, systems, and components and safety significant structures, systems, and components.

*Service* means the performance of work, such as design, manufacturing, construction, fabrication, assembly, decontamination, environmental restoration, waste management, laboratory sample analyses, inspection, nondestructive examination/testing, environmental qualification, equipment qualification, repair, installation, or the like.

*Surveillance requirements* means requirements relating to test, calibration, or inspection to ensure that the necessary operability and quality of

safety structures, systems, and components and their support systems required for safe operations are maintained, that facility operation is within safety limits, and that limiting control settings and limiting conditions for operation are met.

*Technical safety requirements (TSRs)* means the limits, controls, and related actions that establish the specific parameters and requisite actions for the safe operation of a nuclear facility and include, as appropriate for the work and the hazards identified in the documented safety analysis for the facility: Safety limits, operating limits, surveillance requirements, administrative and management controls, use and application provisions, and design features, as well as a bases appendix.

*Unreviewed Safety Question (USQ)* means a situation where

(1) The probability of the occurrence or the consequences of an accident or the malfunction of equipment important to safety previously evaluated in the documented safety analysis could be increased;

(2) The possibility of an accident or malfunction of a different type than any evaluated previously in the documented safety analysis could be created;

(3) A margin of safety could be reduced; or

(4) The documented safety analysis may not be bounding or may be otherwise inadequate.

*Unreviewed Safety Question process* means the mechanism for keeping a safety basis current by reviewing potential unreviewed safety questions, reporting unreviewed safety questions to DOE, and obtaining approval from DOE prior to taking any action that involves an unreviewed safety question.

*Use and application provisions* means the basic instructions for applying technical safety requirements.

(b) Terms defined in the Act or in 10 CFR part 820 and not defined in this section of the rule are to be used consistent with the meanings given in the Act or in 10 CFR part 820.

### § 830.4 General requirements.

(a) No person may take or cause to be taken any action inconsistent with the requirements of this part.

(b) A contractor responsible for a nuclear facility must ensure implementation of, and compliance with, the requirements of this part.

(c) The requirements of this part must be implemented in a manner that provides reasonable assurance of adequate protection of workers, the public, and the environment from adverse consequences, taking into account the work to be performed and the associated hazards.

(d) If there is no contractor for a DOE nuclear facility, DOE must ensure implementation of, and compliance with, the requirements of this part.

### § 830.5 Enforcement.

The requirements in this part are DOE Nuclear Safety Requirements and are subject to enforcement by all appropriate means, including the imposition of civil and criminal penalties in accordance with the provisions of 10 CFR part 820.

### § 830.6 Recordkeeping.

A contractor must maintain complete and accurate records as necessary to substantiate compliance with the requirements of this part.

### § 830.7 Graded approach.

Where appropriate, a contractor must use a graded approach to implement the requirements of this part, document the basis of the graded approach used, and submit that documentation to DOE. The graded approach may not be used in implementing the unreviewed safety question (USQ) process or in implementing technical safety requirements.

## Subpart A—Quality Assurance Requirements

### § 830.120 Scope.

This subpart establishes quality assurance requirements for contractors conducting activities, including providing items or services, that affect, or may affect, nuclear safety of DOE nuclear facilities.

**§ 830.121 Quality Assurance Program (QAP).**

(a) Contractors conducting activities, including providing items or services, that affect, or may affect, the nuclear safety of DOE nuclear facilities must conduct work in accordance with the Quality Assurance criteria in § 830.122.

(b) The contractor responsible for a DOE nuclear facility must:

(1) Submit a QAP to DOE for approval and regard the QAP as approved 90 days after submittal, unless it is approved or rejected by DOE at an earlier date.

(2) Modify the QAP as directed by DOE.

(3) Annually submit any changes to the DOE-approved QAP to DOE for approval. Justify in the submittal why the changes continue to satisfy the quality assurance requirements.

(4) Conduct work in accordance with the QAP.

(c) The QAP must:

(1) Describe how the quality assurance criteria of § 830.122 are satisfied.

(2) Integrate the quality assurance criteria with the Safety Management System, or describe how the quality assurance criteria apply to the Safety Management System.

(3) Use voluntary consensus standards in its development and implementation, where practicable and consistent with contractual and regulatory requirements, and identify the standards used.

(4) Describe how the contractor responsible for the nuclear facility ensures that subcontractors and suppliers satisfy the criteria of § 830.122.

**§ 830.122 Quality assurance criteria.**

The QAP must address the following management, performance, and assessment criteria:

(a) Criterion 1—Management/Program.

(1) Establish an organizational structure, functional responsibilities, levels of authority, and interfaces for those managing, performing, and assessing the work.

(2) Establish management processes, including planning, scheduling, and providing resources for the work.

(b) Criterion 2—Management/Personnel Training and Qualification.

(1) Train and qualify personnel to be capable of performing their assigned work.

(2) Provide continuing training to personnel to maintain their job proficiency.

(c) Criterion 3—Management/Quality Improvement.

(1) Establish and implement processes to detect and prevent quality problems.

(2) Identify, control, and correct items, services, and processes that do not meet established requirements.

(3) Identify the causes of problems and work to prevent recurrence as a part of correcting the problem.

(4) Review item characteristics, process implementation, and other quality-related information to identify items, services, and processes needing improvement.

(d) Criterion 4—Management/Documents and Records.

(1) Prepare, review, approve, issue, use, and revise documents to prescribe processes, specify requirements, or establish design.

(2) Specify, prepare, review, approve, and maintain records.

(e) Criterion 5—Performance/Work Processes.

(1) Perform work consistent with technical standards, administrative controls, and other hazard controls adopted to meet regulatory or contract requirements, using approved instructions, procedures, or other appropriate means.

(2) Identify and control items to ensure their proper use.

(3) Maintain items to prevent their damage, loss, or deterioration.

(4) Calibrate and maintain equipment used for process monitoring or data collection.

(f) Criterion 6—Performance/Design.

(1) Design items and processes using sound engineering/scientific principles and appropriate standards.

(2) Incorporate applicable requirements and design bases in design work and design changes.

(3) Identify and control design interfaces.

(4) Verify or validate the adequacy of design products using individuals or groups other than those who performed the work.

(5) Verify or validate work before approval and implementation of the design.

(g) Criterion 7—Performance/Procurement.

(1) Procure items and services that meet established requirements and perform as specified.

(2) Evaluate and select prospective suppliers on the basis of specified criteria.

(3) Establish and implement processes to ensure that approved suppliers continue to provide acceptable items and services.

(h) Criterion 8—Performance/Inspection and Acceptance Testing.

(1) Inspect and test specified items, services, and processes using established acceptance and performance criteria.

(2) Calibrate and maintain equipment used for inspections and tests.

(i) Criterion 9—Assessment/Management Assessment. Ensure managers assess their management processes and identify and correct problems that hinder the organization from achieving its objectives.

(j) Criterion 10—Assessment/Independent Assessment.

(1) Plan and conduct independent assessments to measure item and service quality, to measure the adequacy of work performance, and to promote improvement.

(2) Establish sufficient authority, and freedom from line management, for the group performing independent assessments.

(3) Ensure persons who perform independent assessments are technically qualified and knowledgeable in the areas to be assessed.

## Subpart B—Safety Basis Requirements

### § 830.200 Scope.

This Subpart establishes safety basis requirements for hazard category 1, 2, and 3 DOE nuclear facilities.

### § 830.201 Performance of work.

A contractor must perform work in accordance with the safety basis for a hazard category 1, 2, or 3 DOE nuclear facility and, in particular, with the hazard controls that ensure adequate protection of workers, the public, and the environment.

### § 830.202 Safety basis.

(a) The contractor responsible for a hazard category 1, 2, or 3 DOE nuclear facility must establish and maintain the safety basis for the facility.

(b) In establishing the safety basis for a hazard category 1, 2, or 3 DOE nuclear facility, the contractor responsible for the facility must:

(1) Define the scope of the work to be performed;

(2) Identify and analyze the hazards associated with the work;

(3) Categorize the facility consistent with DOE-STD-1027-92 (''Hazard Categorization and Accident Analysis Techniques for compliance with DOE Order 5480.23, Nuclear Safety Analysis Reports,'' Change Notice 1, September 1997);

(4) Prepare a documented safety analysis for the facility; and (5) Establish the hazard controls upon which the contractor will rely to ensure adequate protection of workers, the public, and the environment.

(c) In maintaining the safety basis for a hazard category 1, 2, or 3 DOE nuclear facility, the contractor responsible for the facility must:

(1) Update the safety basis to keep it current and to reflect changes in the facility, the work and the hazards as they are analyzed in the documented safety analysis;

(2) Annually submit to DOE either the updated documented safety analysis for approval or a letter stating that there have been no changes in the documented safety analysis since the prior submission; and

(3) Incorporate in the safety basis any changes, conditions, or hazard controls directed by DOE.

### § 830.203 Unreviewed safety question process.

(a) The contractor responsible for a hazard category 1, 2, or 3 DOE nuclear facility must establish, implement, and take actions consistent with a USQ process that meets the requirements of this section.

(b) The contractor responsible for a hazard category 1, 2, or 3 DOE existing nuclear facility must submit for DOE

approval a procedure for its USQ process by April 10, 2001. Pending DOE approval of the USQ procedure, the contractor must continue to use its existing USQ procedure. If the existing procedure already meets the requirements of this section, the contractor must notify DOE by April 10, 2001 and request that DOE issue an approval of the existing procedure.

(c) The contractor responsible for a hazard category 1, 2, or 3 DOE new nuclear facility must submit for DOE approval a procedure for its USQ process on a schedule that allows DOE approval in a safety evaluation report issued pursuant to section 207(d) of this Part.

(d) The contractor responsible for a hazard category 1, 2, or 3 DOE nuclear facility must implement the DOE-approved USQ procedure in situations where there is a:

(1) Temporary or permanent change in the facility as described in the existing documented safety analysis;

(2) Temporary or permanent change in the procedures as described in the existing documented safety analysis;

(3) Test or experiment not described in the existing documented safety analysis; or (4) Potential inadequacy of the documented safety analysis because the analysis potentially may not be bounding or may be otherwise inadequate.

(e) A contractor responsible for a hazard category 1, 2, or 3 DOE nuclear facility must obtain DOE approval prior to taking any action determined to involve a USQ.

(f) The contractor responsible for a hazard category 1, 2, or 3 DOE nuclear facility must annually submit to DOE a summary of the USQ determinations performed since the prior submission.

(g) If a contractor responsible for a hazard category 1, 2, or 3 DOE nuclear facility discovers or is made aware of a potential inadequacy of the documented safety analysis, it must:

(1) Take action, as appropriate, to place or maintain the facility in a safe condition until an evaluation of the safety of the situation is completed;

(2) Notify DOE of the situation;

(3) Perform a USQ determination and notify DOE promptly of the results; and (4) Submit the evaluation of the safety of the situation to DOE prior to removing any operational restrictions initiated to meet paragraph (g)(1) of this section.

**§ 830.204 Documented safety analysis.**

(a) The contractor responsible for a hazard category 1, 2, or 3 DOE nuclear facility must obtain approval from DOE for the methodology used to prepare the documented safety analysis for the facility unless the contractor uses a methodology set forth in Table 2 of appendix A to this part.

(b) The documented safety analysis for a hazard category 1, 2, or 3 DOE nuclear facility must, as appropriate for the complexities and hazards associated with the facility:

(1) Describe the facility (including the design of safety structures, systems and components) and the work to be performed;

(2) Provide a systematic identification of both natural and man-made hazards associated with the facility;

(3) Evaluate normal, abnormal, and accident conditions, including consideration of natural and man-made external events, identification of energy sources or processes that might contribute to the generation or uncontrolled release of radioactive and other hazardous materials, and consideration of the need for analysis of accidents which may be beyond the design basis of the facility;

(4) Derive the hazard controls necessary to ensure adequate protection of workers, the public, and the environment, demonstrate the adequacy of these controls to eliminate, limit, or mitigate identified hazards, and define the process for maintaining the hazard controls current at all times and controlling their use;

(5) Define the characteristics of the safety management programs necessary to ensure the safe operation of the facility, including (where applicable) quality assurance, procedures, maintenance, personnel training, conduct of operations, emergency preparedness, fire protection, waste management, and radiation protection; and

(6) With respect to a nonreactor nuclear facility with fissionable material in a form and amount sufficient to pose

a potential for criticality, define a criticality safety program that:

(i) Ensures that operations with fissionable material remain subcritical under all normal and credible abnormal conditions,

(ii) Identifies applicable nuclear criticality safety standards, and

(iii) Describes how the program meets applicable nuclear criticality safety standards.

**§ 830.205 Technical safety requirements.**

(a) A contractor responsible for a hazard category 1, 2, or 3 DOE nuclear facility must:

(1) Develop technical safety requirements that are derived from the documented safety analysis;

(2) Prior to use, obtain DOE approval of technical safety requirements and any change to technical safety requirements; and

(3) Notify DOE of any violation of a technical safety requirement.

(b) A contractor may take emergency actions that depart from an approved technical safety requirement when no actions consistent with the technical safety requirement are immediately apparent, and when these actions are needed to protect workers, the public or the environment from imminent and significant harm. Such actions must be approved by a certified operator for a reactor or by a person in authority as designated in the technical safety requirements for nonreactor nuclear facilities. The contractor must report the emergency actions to DOE as soon as practicable.

(c) A contractor for an environmental restoration activity may follow the provisions of 29 CFR 1910.120 or 1926.65 to develop the appropriate hazard controls (rather than the provisions for technical safety requirements in paragraph (a) of this section), provided the activity involves either:

(1) Work not done within a permanent structure, or

(2) The decommissioning of a facility with only low-level residual fixed radioactivity.

**§ 830.206 Preliminary documented safety analysis.**

If construction begins after December 11, 2000, the contractor responsible for a hazard category 1, 2, or 3 new DOE nuclear facility or a major modification to a hazard category 1, 2, or 3 DOE nuclear facility must:

(a) Prepare a preliminary documented safety analysis for the facility, and

(b) Obtain DOE approval of:

(1) The nuclear safety design criteria to be used in preparing the preliminary documented safety analysis unless the contractor uses the design criteria in DOE Order 420.1, Facility Safety; and

(2) The preliminary documented safety analysis before the contractor can procure materials or components or begin construction; provided that DOE may authorize the contractor to perform limited procurement and construction activities without approval of a preliminary documented safety analysis if DOE determines that the activities are not detrimental to public health and safety and are in the best interests of DOE.

**§ 830.207 DOE approval of safety basis.**

(a) By April 10, 2003, a contractor responsible for a hazard category 1, 2, or 3 existing DOE nuclear facility must submit for DOE approval a safety basis that meets the requirements of this Subpart.

(b) Pending issuance of a safety evaluation report in which DOE approves a safety basis for a hazard category 1, 2, or 3 existing DOE nuclear facility, the contractor responsible for the facility must continue to perform work in accordance with the safety basis for the facility in effect on October 10, 2000, or as approved by DOE at a later date, and maintain the existing safety basis consistent with the requirements of this Subpart.

(c) If the safety basis for a hazard category 1, 2, or 3 existing DOE nuclear facility already meets the requirements of this Subpart and reflects the current work and hazards associated with the facility, the contractor responsible for the facility must, by April 9, 2001, notify DOE, document the adequacy of the existing safety basis

and request DOE to issue a safety evaluation report that approves the existing safety basis. If DOE does not issue a safety evaluation report by October 10, 2001, the contractor must submit a safety basis pursuant to paragraph (a) of this section.

(d) With respect to a hazard category 1, 2, or 3 new DOE nuclear facility or a major modification to a hazard category 1, 2, or 3 DOE nuclear facility, a contractor may not begin operation of the facility or modification prior to the issuance of a safety evaluation report in which DOE approves the safety basis for the facility or modification.

## APPENDIX A TO SUBPART B OF PART 830—GENERAL STATEMENT OF SAFETY BASIS POLICY

### A. INTRODUCTION

This appendix describes DOE's expectations for the safety basis requirements of 10 CFR Part 830, acceptable methods for implementing these requirements, and criteria DOE will use to evaluate compliance with these requirements. This Appendix does not create any new requirements and should be used consistently with DOE Policy 450.2A, ''Identifying, Implementing and Complying with Environment, Safety and Health Requirements'' (May 15, 1996).

### B. PURPOSE

1. The safety basis requirements of Part 830 require the contractor responsible for a DOE nuclear facility to analyze the facility, the work to be performed, and the associated hazards and to identify the conditions, safe boundaries, and hazard controls necessary to protect workers, the public and the environment from adverse consequences. These analyses and hazard controls constitute the safety basis upon which the contractor and DOE rely to conclude that the facility can be operated safely. Performing work consistent with the safety basis provides reasonable assurance of adequate protection of workers, the public, and the environment.

2. The safety basis requirements are intended to further the objective of making safety an integral part of how work is performed throughout the DOE complex. Developing a thorough understanding of a nuclear facility, the work to be performed, the associated hazards and the needed hazard controls is essential to integrating safety into management and work at all levels. Performing work in accordance with the safety basis for a nuclear facility is the realization of that objective.

### C. SCOPE

1. A contractor must establish and maintain a safety basis for a hazard category 1, 2, or 3 DOE nuclear facility because these facilities have the potential for significant radiological consequences. DOE-STD-1027-92 (''Hazard Categorization and Accident Analysis Techniques for compliance with DOE Order 5480.23, Nuclear Safety Analysis Reports,'' Change Notice 1, September 1997) sets forth the methodology for categorizing a DOE nuclear facility (see Table 1). The hazard categorization must be based on an inventory of all radioactive materials within a nuclear facility.

2. Unlike the quality assurance requirements of Part 830 that apply to all DOE nuclear facilities (including radiological facilities), the safety basis requirements only apply to hazard category 1, 2, and 3 nuclear facilities and do not apply to nuclear facilities below hazard category 3.

TABLE 1

| A DOE nuclear facility categorized as * * * | Has the potential for * * * |
|---|---|
| Hazard category 1 | Significant off-site consequences. |
| Hazard category 2 | Significant on-site consequences beyond localized consequences. |
| Hazard category 3 | Only local significant consequences. |
| Below category 3 | Only consequences less than those that provide a basis for categorization as a hazard category 1, 2, or 3 nuclear facility. |

### D. INTEGRATED SAFETY MANAGEMENT

1. The safety basis requirements are consistent with integrated safety management. DOE expects that, if a contractor complies with the Department of Energy Acquisition Regulation (DEAR) clause on integration of environment, safety, and health into work planning and execution (48 CFR 970.5223–1, Integration of Environment, Safety and Health into Work Planning and Execution) and the DEAR clause on laws, regulations, and DOE directives (48 CFR 970.5204–2, Laws, Regulations and DOE Directives), the contractor will have established the foundation to meet the safety basis requirements.

2. The processes embedded in a safety management system should lead to a contractor

establishing adequate safety bases and safety management programs that will meet the safety basis requirements of this Subpart. Consequently, the DOE expects if a contractor has adequately implemented integrated safety management, few additional requirements will stem from this Subpart and, in such cases, the existing safety basis prepared in accordance with integrated safety management provisions, including existing DOE safety requirements in contracts, should meet the requirements of this Subpart.

3. DOE does not expect there to be any conflict between contractual requirements and regulatory requirements. In fact, DOE expects that contract provisions will be used to provide more detail on implementation of safety basis requirements such as preparing a documented safety analysis, developing technical safety requirements, and implementing a USQ process.

E. ENFORCEMENT OF SAFETY BASIS REQUIREMENTS

1. Enforcement of the safety basis requirements will be performance oriented. That is, DOE will focus its enforcement efforts on whether a contractor operates a nuclear facility consistent with the safety basis for the facility and, in particular, whether work is performed in accordance with the safety basis.

2. As part of the approval process, DOE will review the content and quality of the safety basis documentation. DOE intends to use the approval process to assess the adequacy of a safety basis developed by a contractor to ensure that workers, the public, and the environment are provided reasonable assurance of adequate protection from identified hazards. Once approved by DOE, the safety basis documentation will not be subject to regulatory enforcement actions unless DOE determines that the information which supports the documentation is not complete and accurate in all material respects, as required by 10 CFR 820.11. This is consistent with the DOE enforcement provisions and policy in 10 CFR Part 820.

3. DOE does not intend the adoption of the safety basis requirements to affect the existing quality assurance requirements or the existing obligation of contractors to comply with the quality assurance requirements. In particular, in conjunction with the adoption of the safety basis requirements, DOE revised the language in 10 CFR 830.122(e)(1) to make clear that hazard controls are part of the work processes to which a contractor and other persons must adhere when performing work. This obligation to perform work consistent with hazard controls adopted to meet regulatory or contract requirements existed prior to the adoption of the safety basis requirements and is both consistent with and independent of the safety basis requirements.

4. A documented safety analysis must address all hazards (that is, both radiological and nonradiological hazards) and the controls necessary to provide adequate protection to the public, workers, and the environment from these hazards. Section 234A of the Atomic Energy Act, however, only authorizes DOE to issue civil penalties for violations of requirements related to nuclear safety. Therefore, DOE will impose civil penalties for violations of the safety basis requirements (including hazard controls) only if they are related to nuclear safety.

F. DOCUMENTED SAFETY ANALYSIS

1. A documented safety analysis must demonstrate the extent to which a nuclear facility can be operated safely with respect to workers, the public, and the environment.

2. DOE expects a contractor to use a graded approach to develop a documented safety analysis and describe how the graded approach was applied. The level of detail, analysis, and documentation will reflect the complexity and hazard associated with a particular facility. Thus, the documented safety analysis for a simple, low hazard facility may be relatively short and qualitative in nature, while the documented safety analysis for a complex, high hazard facility may be quite elaborate and more quantitative. DOE will work with its contractors to ensure a documented safety analysis is appropriate for the facility for which it is being developed.

3. Because DOE has ultimate responsibility for the safety of its facilities, DOE will review each documented safety analysis to determine whether the rigor and detail of the documented safety analysis are appropriate for the complexity and hazards expected at the nuclear facility. In particular, DOE will evaluate the documented safety analysis by considering the extent to which the documented safety analysis (1) satisfies the provisions of the methodology used to prepare the documented safety analysis and (2) adequately addresses the criteria set forth in 10 CFR 830.204(b). DOE will prepare a Safety Evaluation Report to document the results of its review of the documented safety analysis. A documented safety analysis must contain any conditions or changes required by DOE.

4. In most cases, the contract will provide the framework for specifying the methodology and schedule for developing a documented safety analysis. Table 2 sets forth acceptable methodologies for preparing a documented safety analysis.

TABLE 2

| The contractor responsible for * * * | May prepare its documented safety analyses by * * * |
|---|---|
| (1) A DOE reactor | Using the method in U.S. Nuclear Regulatory Commission Regulatory Guide 1.70, Standard Format and Content of Safety Analysis Reports for Nuclear Power Plants, or successor document. |
| (2) A DOE nonreactor nuclear facility | Using the method in DOE-STD-3009, Change Notice No. 1, January 2000, Preparation Guide for U.S. Department of Energy Nonreactor Nuclear Facility Safety Analysis Reports, July 1994, or successor document. |
| (3) A DOE nuclear facility with a limited operational life | Using the method in either:<br>(1) DOE-STD–3009-, Change Notice No. 1, January 2000, or successor document, or<br>(2) DOE-STD–3011–94, Guidance for Preparation of DOE 5480.22 (TSR) and DOE 5480.23 (SAR) Implementation Plans, November 1994, or successor document. |
| (4) The deactivation or the transition surveillance and maintenance of a DOE nuclear facility. | Using the method in either:<br>(1) DOE-STD–3009, Change Notice No. 1, January 2000, or successor document, or<br>(2) DOE-STD–3011–94 or successor document. |
| (5) The decommissioning of a DOE nuclear facility | (1) Using the method in DOE-STD–1120–98, Integration of Environment, Safety, and Health into Facility Disposition Activities, May 1998, or successor document;<br>(2) Using the provisions in 29 CFR 1910.120 (or 29 CFR 1926.65 for construction activities) for developing Safety and Health Programs, Work Plans, Health and Safety Plans, and Emergency Response Plans to address public safety, as well as worker safety; and<br>(3) Deriving hazard controls based on the Safety and Health Programs, the Work Plans, the Health and Safety Plans, and the Emergency Response Plans. |
| (6) A DOE environmental restoration activity that involves either work not done within a permanent structure or the decommissioning of a facility with only low-level residual fixed radioactivity. | (1) Using the method in DOE-STD–1120–98 or successor document, and<br>(2) Using the provisions in 29 CFR 1910.120 (or 29 CFR 1926.65 for construction activities) for developing a Safety and Health Program and a site-specific Health and Safety Plan (including elements for Emergency Response Plans, conduct of operations, training and qualifications, and maintenance management). |
| (7) A DOE nuclear explosive facility and the nuclear explosive operations conducted therein. | Developing its documented safety analysis in two pieces:<br>(1) A Safety Analysis Report for the nuclear facility that considers the generic nuclear explosive operations and is prepared in accordance with DOE-STD–3009, Change Notice No. 1, January 2000, or successor document, and<br>(2) A Hazard Analysis Report for the specific nuclear explosive operations prepared in accordance with DOE-STD–3016–99, Hazards Analysis Reports for Nuclear Explosive Operations, February 1999, or successor document. |
| (8) A DOE hazard category 3 nonreactor nuclear facility | Using the methods in Chapters 2, 3, 4, and 5 of DOE-STD–3009, Change Notice No. 1, January 2000, or successor document to address in a simplified fashion:<br>(1) The basic description of the facility/activity and its operations, including safety structures, systems, and components;<br>(2) A qualitative hazards analysis; and<br>(3) The hazard controls (consisting primarily of inventory limits and safety management programs) and their bases. |
| (9) Transportation activities | (1) Preparing a Safety Analysis Report for Packaging in accordance with DOE-O–460.1A, Packaging and Transportation Safety, October 2, 1996, or successor document and<br>(2) Preparing a Transportation Safety Document in accordance with DOE-G–460.1–1, Implementation Guide for Use with DOE O 460.1A, Packaging and Transportation Safety, June 5, 1997, or successor document. |
| (10) Transportation and onsite transfer of nuclear explosives, nuclear components, Navel nuclear fuel elements, Category I and Category II special nuclear materials, special assemblies, and other materials of national security. | (1) Preparing a Safety Analysis Report for Packaging in accordance with DOE-O–461.1, Packaging and Transportation of Materials of National Security Interest, September 29, 2000, or successor document and<br>(2) Preparing a Transportation Safety Document in accordance with DOE-M–461.1–1, Packaging and Transfer of Materials of National Security Interest Manual, September 29, 2000, or successor document. |

5. Table 2 refers to specific types of nuclear facilities. These references are not intended to constitute an exhaustive list of the specific types of nuclear facilities. Part 830 defines nuclear facility broadly to include all those facilities, activities, or operations that involve, or will involve, radioactive and/or fissionable materials in such form and quantity that a nuclear or a nuclear explosive hazard potentially exists to the employees or the general public, and to include any related area, structure, facility, or activity to the extent necessary to ensure proper implementation of the requirements established by Part 830. The only exceptions are those facilities specifically excluded such as accelerators. Table 3 defines the specific nuclear facilities referenced in Table 2 that are not defined in 10 CFR 830.3

TABLE 3

| For purposes of Table 2, * * * | means * * * |
|---|---|
| (1) Deactivation | The process of placing a facility in a stable and known condition, including the removal of hazardous and radioactive materials |
| (2) Decontamination | The removal or reduction of residual radioactive and hazardous materials by mechanical, chemical, or other techniques to achieve a stated objective or end condition |
| (3) Decommissioning | Those actions taking place after deactivation of a nuclear facility to retire it from service and includes surveillance and maintenance, decontamination, and/or dismantlement. |
| (4) Environmental restoration activities | The process by which contaminated sites and facilities are identified and characterized and by which existing contamination is contained, or removed and disposed |
| (5) Generic nuclear explosive operation | A characterization that considers the collective attributes (such as special facility system requirements, physical weapon characteristics, or quantities and chemical/physical forms of hazardous materials) for all projected nuclear explosive operations to be conducted at a facility |
| (6) Nuclear explosive facility | A nuclear facility at which nuclear operations and activities involving a nuclear explosive may be conducted |
| (7) Nuclear explosive operation | Any activity involving a nuclear explosive, including activities in which main-charge, high-explosive parts and pits are collocated. |
| (8) Nuclear facility with a limited operational life | A nuclear facility for which there is a short remaining operational period before ending the facility's mission and initiating deactivation and decommissioning and for which there are no intended additional missions other than cleanup |
| (9) Specific nuclear explosive operation | A specific nuclear explosive subjected to the stipulated steps of an individual operation, such as assembly or disassembly |
| (10) Transition surveillance and maintenance activities | Activities conducted when a facility is not operating or during deactivation, decontamination, and decommissioning operations when surveillance and maintenance are the predominant activities being conducted at the facility. These activities are necessary for satisfactory containment of hazardous materials and protection of workers, the public, and the environment. These activities include providing periodic inspections, maintenance of structures, systems, and components, and actions to prevent the alteration of hazardous materials to an unsafe state |

6. If construction begins after December 11, 2000, the contractor responsible for the design and construction of a new DOE nuclear facility or a major modification to an existing DOE nuclear facility must prepare a preliminary documented safety analysis. A preliminary documented safety analysis can ensure that substantial costs and time are not wasted in constructing a nuclear facility that will not be acceptable to DOE. If a contractor is required to prepare a preliminary documented safety analysis, the contractor must obtain DOE approval of the preliminary documented safety analysis prior to procuring materials or components or beginning construction. DOE, however, may authorize the contractor to perform limited procurement and construction activities without approval of a preliminary documented safety analysis if DOE determines that the activities are not detrimental to public health and safety and are in the best interests of DOE. DOE Order 420.1, Facility Safety, sets forth acceptable nuclear safety design criteria for use in preparing a preliminary documented safety analysis. As a general matter, DOE does not expect preliminary documented safety analyses to be needed for activities that do not involve significant construction such as environmental restoration activities, decontamination and decommissioning activities, specific nuclear

explosive operations, or transition surveillance and maintenance activities.

G. HAZARD CONTROLS

1. Hazard controls are measures to eliminate, limit, or mitigate hazards to workers, the public, or the environment. They include (1) physical, design, structural, and engineering features; (2) safety structures, systems, and components; (3) safety management programs; (4) technical safety requirements; and (5) other controls necessary to provide adequate protection from hazards.

2. The types and specific characteristics of the safety management programs necessary for a DOE nuclear facility will be dependent on the complexity and hazards associated with the nuclear facility and the work being performed. In most cases, however, a contractor should consider safety management programs covering topics such as quality assurance, procedures, maintenance, personnel training, conduct of operations, criticality safety, emergency preparedness, fire protection, waste management, and radiation protection. In general, DOE Orders set forth DOE's expectations concerning specific topics. For example, DOE Order 420.1 provides DOE's expectations with respect to fire protection and criticality safety.

3. Safety structures, systems, and components require formal definition of minimum acceptable performance in the documented safety analysis. This is accomplished by first defining a safety function, then describing the structure, systems, and components, placing functional requirements on those portions of the structures, systems, and components required for the safety function, and identifying performance criteria that will ensure functional requirements are met. Technical safety requirements are developed to ensure the operability of the safety structures, systems, and components and define actions to be taken if a safety structure, system, or component is not operable.

4. Technical safety requirements establish limits, controls, and related actions necessary for the safe operation of a nuclear facility. The exact form and contents of technical safety requirements will depend on the circumstances of a particular nuclear facility as defined in the documented safety analysis for the nuclear facility. As appropriate, technical safety requirements may have sections on (1) safety limits, (2) operating limits, (3) surveillance requirements, (4) administrative controls, (5) use and application, and (6) design features. It may also have an appendix on the bases for the limits and requirements. DOE Guide 423.X, Implementation Guide for Use in Developing Technical Safety Requirements (TSRs) provides a complete description of what technical safety requirements should contain and how they should be developed and maintained.

5. DOE will examine and approve the technical safety requirements as part of preparing the safety evaluation report and reviewing updates to the safety basis. As with all hazard controls, technical safety requirements must be kept current and reflect changes in the facility, the work and the hazards as they are analyzed in the documented safety analysis. In addition, DOE expects a contractor to maintain technical safety requirements, and other hazard controls as appropriate, as controlled documents with an authorized users list.

6. Table 4 sets forth DOE's expectations concerning acceptable technical safety requirements.

TABLE 4

| As appropriate for a particular DOE nuclear facility, the section of the technical safety requirements on * * * | Will provide information on * * * |
|---|---|
| (1) Safety limits | The limits on process variables associated with those safety class physical barriers, generally passive, that are necessary for the intended facility function and that are required to guard against the uncontrolled release of radioactive materials. The safety limit section describes, as precisely as possible, the parameters being limited, states the limit in measurable units (pressure, temperature, flow, etc.), and indicates the applicability of the limit. The safety limit section also describes the actions to be taken in the event that the safety limit is exceeded. These actions should first place the facility in the safe, stable condition attainable, including total shutdown (except where such action might reduce the margin of safety) or should verify that the facility already is safe and stable and will remain so. The technical safety requirement should state that the contractor must obtain DOE authorization to restart the nuclear facility following a violation of a safety limit. The safety limit section also establishes the steps and time limits to correct the out-of-specification condition. |
| (2) Operating limits | Those limits which are required to ensure the safe operation of a nuclear facility. The operating limits section may include subsections on limiting control settings and limiting conditions for operation. |

TABLE 4—Continued

| As appropriate for a particular DOE nuclear facility, the section of the technical safety requirements on * * * | Will provide information on * * * |
|---|---|
| (3) Limiting control settings | The settings on safety systems that control process variables to prevent exceeding a safety limit. The limited control settings section normally contains the settings for automatic alarms and for the automatic or nonautomatic initiation of protective actions related to those variables associated with the function of safety class structures, systems, or components if the safety analysis shows that they are relied upon to mitigate or prevent an accident. The limited control settings section also identifies the protective actions to be taken at the specific settings chosen in order to correct a situation automatically or manually such that the related safety limit is not exceeded. Protective actions may include maintaining the variables within the requirements and repairing the automatic device promptly or shutting down the affected part of the process and, if required, the entire facility. |
| (4) Limiting conditions for operations | The limits that represent the lowest functional capability or performance level of safety structures, systems, and components required to perform an activity safely. The limiting conditions for operation section describes, as precisely as possible, the lowest functional capability or performance level of equipment required for continued safe operation of the facility. The limiting conditions for operation section also states the action to be taken to address a condition not meeting the limiting conditions for operation section. Normally this simply provides for the adverse condition being corrected in a certain time frame and for further action if this is impossible. |
| (5) Surveillance requirements | Requirements relating to test, calibration, or inspection to assure that the necessary operability and quality of safety structures, systems, and components is maintained; that facility operation is within safety limits; and that limiting control settings and limiting conditions for operation are met. If a required surveillance is not successfully completed, the contractor is expected to assume the systems or components involved are inoperable and take the actions defined by the technical safety requirement until the systems or components can be shown to be operable. If, however, a required surveillance is not performed within its required frequency, the contractor is allowed to perform the surveillance within 24 hours or the original frequency, whichever is smaller, and confirm operability. |
| (6) Administrative controls | Organization and management, procedures, recordkeeping, assessment, and reporting necessary to ensure safe operation of a facility consistent with the technical safety requirement. In general, the administrative controls section addresses (1) the requirements associated with administrative controls, (including those for reporting violations of the technical safety requirement); (2) the staffing requirements for facility positions important to safe conduct of the facility; and (3) the commitments to the safety management programs identified in the documented safety analysis as necessary components of the safety basis for the facility. |
| (7) Use and application provisions | The basic instructions for applying the safety restrictions contained in a technical safety requirement. The use and application section includes definitions of terms, operating modes, logical connectors, completion times, and frequency notations. |
| (8) Design features | Design features of the facility that, if altered or modified, would have a significant effect on safe operation. |
| (9) Bases appendix | The reasons for the safety limits, operating limits, and associated surveillance requirements in the technical safety requirements. The statements for each limit or requirement shows how the numeric value, the condition, or the surveillance fulfills the purpose derived from the safety documentation. The primary purpose for describing the basis of each limit or requirement is to ensure that any future changes to the limit or requirement is done with full knowledge of the original intent or purpose of the limit or requirement. |

H. UNREVIEWED SAFETY QUESTIONS

1. The USQ process is an important tool to evaluate whether changes affect the safety basis. A contractor must use the USQ process to ensure that the safety basis for a DOE nuclear facility is not undermined by changes in the facility, the work performed, the associated hazards, or other factors that support the adequacy of the safety basis.

2. The USQ process permits a contractor to make physical and procedural changes to a nuclear facility and to conduct tests and experiments without prior approval, provided these changes do not cause a USQ. The USQ process provides a contractor with the flexibility needed to conduct day-to-day operations by requiring only those changes and tests with a potential to impact the safety basis (and therefore the safety of the nuclear facility) be approved by DOE. This allows DOE to focus its review on those changes significant to safety. The USQ process helps keep the safety basis current by ensuring appropriate review of and response to situations that might adversely affect the safety basis.

3. DOE Guide 424.X, Implementation Guide for Addressing Unreviewed Safety Question (USQ) Requirements, provides DOE's expectations for a USQ process. The contractor must obtain DOE approval of its procedure used to implement the USQ process.

I. FUNCTIONS AND RESPONSIBILITIES

1. The DOE Management Official for a DOE nuclear facility (that is, the Assistant Secretary, the Assistant Administrator, or the Office Director who is primarily responsible for the management of the facility) has primary responsibility within DOE for ensuring that the safety basis for the facility is adequate and complies with the safety basis requirements of Part 830. The DOE Management Official is responsible for ensuring the timely and proper (1) review of all safety basis documents submitted to DOE and (2) preparation of a safety evaluation report concerning the safety basis for a facility.

2. DOE will maintain a public list on the internet that provides the status of the safety basis for each hazard category 1, 2, or 3 DOE nuclear facility and, to the extent practicable, provides information on how to obtain a copy of the safety basis and related documents for a facility.

# PART 835—OCCUPATIONAL RADIATION PROTECTION

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APPENDIX E TO PART 835—VALUES FOR ESTABLISHING SEALED RADIOACTIVE SOURCE ACCOUNTABILITY AND RADIOACTIVE MATERIAL POSTING AND LABELING REQUIREMENTS

AUTHORITY: 42 U.S.C. 2201, 7191; 50 U.S.C. 2410.

SOURCE: 58 FR 65485, Dec. 14, 1993, unless otherwise noted.

## Subpart A—General Provisions

### § 835.1 Scope.

(a) *General*. The rules in this part establish radiation protection standards, limits, and program requirements for protecting individuals from ionizing radiation resulting from the conduct of DOE activities.

(b) *Exclusion*. Except as provided in paragraph (c) of this section, the requirements in this part do not apply to:

(1) Activities that are regulated through a license by the Nuclear Regulatory Commission or a State under an Agreement with the Nuclear Regulatory commission, including activities certified by the Nuclear Regulatory Commission under section 1701 of the Atomic Energy Act;

(2) Activities conducted under the authority of the Deputy Administrator for Naval Reactors, as described in Pub. L. 98–525 and 106–65;

(3) Activities conducted under the Nuclear Explosives and Weapons Surety Program relating to the prevention of accidental or unauthorized nuclear detonations;

(4) DOE activities conducted outside the United States on territory under the jurisdiction of a foreign government to the extent governed by occupational radiation protection requirements agreed to between the United States and the cognizant government;

(5) Background radiation, radiation doses received as a patient for the purposes of medical diagnosis or therapy, or radiation doses received from participation as a subject in medical research programs; or

(6) Radioactive material on or within material, equipment, and real property which is approved for release when the radiological conditions of the material, equipment, and real property have been documented to comply with the criteria for release set forth in a DOE authorized limit which has been approved by a Secretarial Officer in consultation with the Associate Under Secretary for Environment, Health, Safety and Security.

(7) Radioactive material transportation not performed by DOE or a DOE contractor.

(c) Occupational doses received as a result of excluded activities and radioactive material transportation listed in paragraphs (b)(1) through (b)(4) and (b)(7) of this section, shall be included to the extent practicable when determining compliance with the occupational dose limits at §§ 835.202 and 835.207, and with the limits for the embryo/fetus at § 835.206. Occupational doses resulting from authorized emergency exposures and planned special exposures shall not be considered when determining compliance with the dose limits at §§ 835.202 and 835.207.

(d) The requirements in subparts F and G of this part do not apply to radioactive material transportation by DOE or a DOE contractor conducted:

(1) Under the continuous observation and control of an individual who is knowledgeable of and implements required exposure control measures, or

(2) In accordance with Department of Transportation regulations or DOE orders that govern such movements.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59679, Nov. 4, 1998; 71 FR 68733, Nov. 28, 2006; 72 FR 31922, June 8, 2007; 80 FR 5008, Jan. 30, 2015]

### § 835.2 Definitions.

(a) As used in this part:

*Accountable sealed radioactive source* means a sealed radioactive source having a half-life equal to or greater than 30 days and an isotopic activity equal to or greater than the corresponding value provided in appendix E of this part.

*Activity Median Aerodynamic Diameter (AMAD)* means a particle size in an aerosol where fifty percent of the activity in the aerosol is associated with particles of aerodynamic diameter greater than the AMAD.

*Airborne radioactive material or airborne radioactivity* means radioactive material dispersed in the air in the form of dusts, fumes, particulates, mists, vapors, or gases.

*Airborne radioactivity area* means any area, accessible to individuals, where:

(1) The concentration of airborne radioactivity, above natural background, exceeds or is likely to exceed the derived air concentration (DAC) values listed in appendix A or appendix C of this part; or

(2) An individual present in the area without respiratory protection could receive an intake exceeding 12 DAC-hours in a week.

*ALARA* means ''As Low As is Reasonably Achievable,'' which is the approach to radiation protection to manage and control exposures (both individual and collective) to the work force and to the general public to as low as is reasonable, taking into account social, technical, economic, practical, and public policy considerations. As used in this part, ALARA is not a dose limit but a process which has the objective of attaining doses as far below the applicable limits of this part as is reasonably achievable.

*Annual limit on intake (ALI)* means the derived limit for the amount of radioactive material taken into the body of an adult worker by inhalation or ingestion in a year. ALI is the smaller value of intake of a given radionuclide in a year by the reference man (ICRP Publication 23) that would result in a committed effective dose of 5 rems (0.05 sieverts (Sv)) (1 rem = 0.01 Sv) or a committed equivalent dose of 50 rems (0.5 Sv) to any individual organ or tissue. ALI values for intake by ingestion and inhalation of selected radionuclides are based on International Commission on Radiological Protection Publication 68, *Dose Coefficients for Intakes of Radionuclides by Workers*, published July, 1994 (ISBN 0 08 042651 4). This document is available from Elsevier Science Inc., Tarrytown, NY.

*Authorized limit* means a limit on the concentration of residual radioactive material on the surfaces or within the property that has been derived consistent with DOE directives including the as low as is reasonably achievable (ALARA) process requirements, given the anticipated use of the property and has been authorized by DOE to permit the release of the property from DOE radiological control.

*Background* means radiation from:

(1) Naturally occurring radioactive materials which have not been technologically enhanced;

(2) Cosmic sources;

(3) Global fallout as it exists in the environment (such as from the testing of nuclear explosive devices);

(4) Radon and its progeny in concentrations or levels existing in buildings or the environment which have not been elevated as a result of current or prior activities; and

(5) Consumer products containing nominal amounts of radioactive material or producing nominal amounts of radiation.

*Bioassay* means the determination of kinds, quantities, or concentrations, and, in some cases, locations of radioactive material in the human body, whether by direct measurement or by analysis and evaluation of radioactive materials excreted or removed from the human body.

*Calibration* means to adjust and/or determine either:

(1) The response or reading of an instrument relative to a standard (*e.g.*, primary, secondary, or tertiary) or to a series of conventionally true values; or

(2) The strength of a radiation source relative to a standard (*e.g.*, primary, secondary, or tertiary) or conventionally true value.

*Contamination area* means any area, accessible to individuals, where removable surface contamination levels exceed or are likely to exceed the removable surface contamination values specified in appendix D of this part, but do not exceed 100 times those values.

*Controlled area* means any area to which access is managed by or for DOE to protect individuals from exposure to radiation and/or radioactive material.

*Declared pregnant worker* means a woman who has voluntarily declared to

her employer, in writing, her pregnancy for the purpose of being subject to the occupational dose limits to the embryo/fetus as provided in § 835.206. This declaration may be revoked, in writing, at any time by the declared pregnant worker.

*Derived air concentration (DAC)* means, for the radionuclides listed in appendix A of this part, the airborne concentration that equals the ALI divided by the volume of air breathed by an average worker for a working year of 2000 hours (assuming a breathing volume of 2400 $m^3$). For the radionuclides listed in appendix C of this part, the air immersion DACs were calculated for a continuous, non-shielded exposure via immersion in a semi-infinite cloud of radioactive material. Except as noted in the footnotes to appendix A of this part, the values are based on dose coefficients from International Commission on Radiological Protection Publication 68, *Dose Coefficients for Intakes of Radionuclides by Workers*, published July, 1994 (ISBN 0 08 042651 4) and the associated ICRP computer program, *The ICRP Database of Dose Coefficients: Workers and Members of the Public*, (ISBN 0 08 043 8768). These materials are available from Elsevier Science Inc., Tarrytown, NY.

*Derived air concentration-hour (DAC-hour)* means the product of the concentration of radioactive material in air (expressed as a fraction or multiple of the DAC for each radionuclide) and the time of exposure to that radionuclide, in hours.

*Deterministic effects* means effects due to radiation exposure for which the severity varies with the dose and for which a threshold normally exists (*e.g.*, radiation-induced opacities within the lens of the eye).

*DOE* means the United States Department of Energy.

*DOE activity* means an activity taken for or by DOE in a DOE operation or facility that has the potential to result in the occupational exposure of an individual to radiation or radioactive material. The activity may be, but is not limited to, design, construction, operation, or decommissioning. To the extent appropriate, the activity may involve a single DOE facility or operation or a combination of facilities and operations, possibly including an entire site or multiple DOE sites.

*Entrance or access point* means any location through which an individual could gain access to areas controlled for the purpose of radiation protection. This includes entry or exit portals of sufficient size to permit human entry, irrespective of their intended use.

*General employee* means an individual who is either a DOE or DOE contractor employee; an employee of a subcontractor to a DOE contractor; or an individual who performs work for or in conjunction with DOE or utilizes DOE facilities.

*High contamination area* means any area, accessible to individuals, where removable surface contamination levels exceed or are likely to exceed 100 times the removable surface contamination values specified in appendix D of this part.

*High radiation area* means any area, accessible to individuals, in which radiation levels could result in an individual receiving an equivalent dose to the whole body in excess of 0.1 rems (0.001 Sv) in 1 hour at 30 centimeters from the radiation source or from any surface that the radiation penetrates.

*Individual* means any human being.

*Member of the public* means an individual who is not a general employee. An individual is not a ''member of the public'' during any period in which the individual receives an occupational dose.

*Minor* means an individual less than 18 years of age.

*Monitoring* means the measurement of radiation levels, airborne radioactivity concentrations, radioactive contamination levels, quantities of radioactive material, or individual doses and the use of the results of these measurements to evaluate radiological hazards or potential and actual doses resulting from exposures to ionizing radiation.

*Occupational dose* means an individual's ionizing radiation dose (external and internal) as a result of that individual's work assignment. Occupational dose does not include doses received as a medical patient or doses resulting from background radiation or participation as a subject in medical research programs.

*Person* means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency, any State or political subdivision of, or any political entity within a State, any foreign government or nation or other entity, and any legal successor, representative, agent or agency of the foregoing; provided that person does not include DOE or the United States Nuclear Regulatory Commission.

*Radiation* means ionizing radiation: alpha particles, beta particles, gamma rays, X-rays, neutrons, high-speed electrons, high-speed protons, and other particles capable of producing ions. Radiation, as used in this part, does not include non-ionizing radiation, such as radio waves or microwaves, or visible, infrared, or ultraviolet light.

*Radiation area* means any area, accessible to individuals, in which radiation levels could result in an individual receiving an equivalent dose to the whole body in excess of 0.005 rem (0.05 mSv) in 1 hour at 30 centimeters from the source or from any surface that the radiation penetrates.

*Radioactive material area* means any area within a controlled area, accessible to individuals, in which items or containers of radioactive material exist and the total activity of radioactive material exceeds the applicable values provided in appendix E of this part.

*Radioactive material transportation* means the movement of radioactive material by aircraft, rail, vessel, or highway vehicle. Radioactive material transportation does not include preparation of material or packagings for transportation, storage of material awaiting transportation, or application of markings and labels required for transportation.

*Radiological area* means any area within a controlled area defined in this section as a ''radiation area,'' ''high radiation area,'' ''very high radiation area,'' ''contamination area,'' ''high contamination area,'' or ''airborne radioactivity area.''

*Radiological worker* means a general employee whose job assignment involves operation of radiation producing devices or working with radioactive materials, or who is likely to be routinely occupationally exposed above 0.1 rem (0.001 Sv) per year total effective dose.

*Real property* means land and anything permanently affixed to the land such as buildings, fences and those things attached to the buildings, such as light fixtures, plumbing and heating fixtures.

*Real-time air monitoring* means measurement of the concentrations or quantities of airborne radioactive materials on a continuous basis.

*Respiratory protective device* means an apparatus, such as a respirator, worn by an individual for the purpose of reducing the individual's intake of airborne radioactive materials.

*Sealed radioactive source* means a radioactive source manufactured, obtained, or retained for the purpose of utilizing the emitted radiation. The sealed radioactive source consists of a known or estimated quantity of radioactive material contained within a sealed capsule, sealed between layer(s) of non-radioactive material, or firmly fixed to a non-radioactive surface by electroplating or other means intended to prevent leakage or escape of the radioactive material. Sealed radioactive sources do not include reactor fuel elements, nuclear explosive devices, and radioisotope thermoelectric generators.

*Source leak test* means a test to determine if a sealed radioactive source is leaking radioactive material.

*Special tritium compound (STC)* means any compound, except for $H_2O$, that contains tritium, either intentionally (*e.g.*, by synthesis) or inadvertently (*e.g.*, by contamination mechanisms).

*Stochastic effects* means malignant and hereditary diseases for which the probability of an effect occurring, rather than its severity, is regarded as a function of dose without a threshold, for radiation protection purposes.

*Very high radiation area* means any area, accessible to individuals, in which radiation levels could result in an individual receiving an absorbed dose in excess of 500 rads (5 grays) in one hour at 1 meter from a radiation source or from any surface that the radiation penetrates.

*Week* means a period of seven consecutive days.

*Year* means the period of time beginning on or near January 1 and ending on or near December 31 of that same year used to determine compliance with the provisions of this part. The starting and ending date of the year used to determine compliance may be changed, provided that the change is made at the beginning of the year and that no day is omitted or duplicated in consecutive years.

(b) As used in this part to describe various aspects of radiation dose:

*Absorbed dose* (D) means the average energy imparted by ionizing radiation to the matter in a volume element per unit mass of irradiated material. The absorbed dose is expressed in units of rad (or gray) (1 rad = 0.01 gray).

*Committed effective dose* ($E_{50}$) means the sum of the committed equivalent doses to various tissues or organs in the body ($H_{T,50}$), each multiplied by the appropriate tissue weighting factor ($w_T$)—that is, $E_{50} = \Sigma w_T H_{T,50} + w_{Remainder} H_{Remainder,50}$. Where $w_{Remainder}$ is the tissue weighting factor assigned to the remainder organs and tissues and $H_{Remainder,50}$ is the committed equivalent dose to the remainder organs and tissues. Committed effective dose is expressed in units of rem (or Sv).

*Committed equivalent dose* ($H_{T,50}$) means the equivalent dose calculated to be received by a tissue or organ over a 50-year period after the intake of a radionuclide into the body. It does not include contributions from radiation sources external to the body. Committed equivalent dose is expressed in units of rem (or Sv).

*Cumulative total effective dose* means the sum of all total effective dose values recorded for an individual plus, for occupational exposures received before the implementation date of this amendment, the cumulative total effective dose equivalent (as defined in the November 4, 1998 amendment to this rule) values recorded for an individual, where available, for each year occupational dose was received, beginning January 1, 1989.

*Dose* is a general term for absorbed dose, equivalent dose, effective dose, committed equivalent dose, committed effective dose, or total effective dose as defined in this part.

*Effective dose* (E) means the summation of the products of the equivalent dose received by specified tissues or organs of the body ($H_T$) and the appropriate tissue weighting factor ($w_T$)—that is, $E = \Sigma w_T H_T$. It includes the dose from radiation sources internal and/or external to the body. For purposes of compliance with this part, equivalent dose to the whole body may be used as effective dose for external exposures. The effective dose is expressed in units of rem (or Sv).

*Equivalent dose* ($H_T$) means the product of average absorbed dose ($D_{T,R}$) in rad (or gray) in a tissue or organ (T) and a radiation (R) weighting factor ($w_R$). For external dose, the equivalent dose to the whole body is assessed at a depth of 1 cm in tissue; the equivalent dose to the lens of the eye is assessed at a depth of 0.3 cm in tissue, and the equivalent dose to the extremity and skin is assessed at a depth of 0.007 cm in tissue. Equivalent dose is expressed in units of rem (or Sv).

*External dose or exposure* means that portion of the equivalent dose received from radiation sources outside the body (*i.e.*, ''external sources'').

*Extremity* means hands and arms below the elbow or feet and legs below the knee.

*Internal dose or exposure* means that portion of the equivalent dose received from radioactive material taken into the body (*i.e.*, ''internal sources'').

*Radiation weighting factor* ($w_R$) means the modifying factor used to calculate the equivalent dose from the average tissue or organ absorbed dose; the absorbed dose (expressed in rad or gray) is multiplied by the appropriate radiation weighting factor. The radiation weighting factors to be used for determining equivalent dose in rem are as follows:

RADIATION WEIGHTING FACTORS [1], $w_R$

| Type and energy range | Radiation weighting factor |
|---|---|
| Photons, electrons and muons, all energies | 1 |

RADIATION WEIGHTING FACTORS [1], $w_R$—Continued

| Type and energy range | Radiation weighting factor |
|---|---|
| Neutrons, energy <10 keV [2 3] | 5 |
| Neutrons, energy 10 keV to 100 keV [2 3] | 10 |
| Neutrons, energy >100 keV to 2 MeV [2 3] | 20 |
| Neutrons, energy >2 MeV to 20 MeV [2 3] | 10 |
| Neutrons, energy >20 MeV [2 3] | 5 |
| Protons, other than recoil protons, energy >2 MeV | 5 |
| Alpha particles, fission fragments, heavy nuclei | 20 |

[1] All values relate to the radiation incident on the body or, for internal sources, emitted from the source.
[2] When spectral data are insufficient to identify the energy of the neutrons, a radiation weighting factor of 20 shall be used.
[3] When spectral data are sufficient to identify the energy of the neutrons, the following equation may be used to determine a neutron radiation weighting factor value:

$$w_R = 5 + 17 \exp\left[\frac{-\left(\ln\left(2E_n\right)\right)^2}{6}\right] \text{Where } E_n \text{ is the neutron energy in MeV.}$$

*Tissue weighting factor* ($w_T$) means the fraction of the overall health risk, resulting from uniform, whole body irradiation, attributable to specific tissue (T). The equivalent dose to tissue, ($H_T$), is multiplied by the appropriate tissue weighting factor to obtain the effective dose (E) contribution from that tissue. The tissue weighting factors are as follows:

TISSUE WEIGHTING FACTORS FOR VARIOUS ORGANS AND TISSUES

| Organs or tissues, T | Tissue weighting factor, $w_T$ |
|---|---|
| Gonads | 0.20 |
| Red bone marrow | 0.12 |
| Colon | 0.12 |
| Lungs | 0.12 |
| Stomach | 0.12 |
| Bladder | 0.05 |
| Breast | 0.05 |
| Liver | 0.05 |
| Esophagus | 0.05 |
| Thyroid | 0.05 |
| Skin | 0.01 |
| Bone surfaces | 0.01 |
| Remainder [1] | 0.05 |
| Whole body [2] | 1.00 |

[1] "Remainder" means the following additional tissues and organs and their masses, in grams, following parenthetically: adrenals (14), brain (1400), extrathoracic airways (15), small intestine (640), kidneys (310), muscle (28,000), pancreas (100), spleen (180), thymus (20), and uterus (80). The equivalent dose to the remainder tissues ($H_{remainder}$), is normally calculated as the mass-weighted mean dose to the preceding ten organs and tissues. In those cases in which the most highly irradiated remainder tissue or organ receives the highest equivalent dose of all the organs, a weighting factor of 0.025 (half of remainder) is applied to that tissue or organ and 0.025 (half of remainder) to the mass-weighted equivalent dose in the rest of the remainder tissues and organs to give the remainder equivalent dose.

[2] For the case of uniform external irradiation of the whole body, a tissue weighting factor ($w_T$) equal to 1 may be used in determination of the effective dose.

*Total effective dose* (TED) means the sum of the effective dose (for external exposures) and the committed effective dose.

*Whole body* means, for the purposes of external exposure, head, trunk (including male gonads), arms above and including the elbow, or legs above and including the knee.

(c) Terms defined in the Atomic Energy Act of 1954 or in 10 CFR part 820 and not defined in this part are used consistent with their meanings given in the Atomic Energy Act of 1954 or in 10 CFR part 820.

[72 FR 31922, June 8, 2007, as amended at 74 FR 18116, Apr. 21, 2009]

## § 835.3 General rule.

(a) No person or DOE personnel shall take or cause to be taken any action inconsistent with the requirements of:

(1) This part; or

(2) Any program, plan, schedule, or other process established by this part.

(b) With respect to a particular DOE activity, contractor management shall be responsible for compliance with the requirements of this part.

(c) Where there is no contractor for a DOE activity, DOE shall ensure implementation of and compliance with the requirements of this part.

(d) Nothing in this part shall be construed as limiting actions that may be necessary to protect health and safety.

(e) For those activities that are required by §§ 835.102, 835.901(e), 835.1202 (a), and 835.1202(b), the time interval to conduct these activities may be extended by a period not to exceed 30 days to accommodate scheduling needs.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59682, Nov. 4, 1998]

### § 835.4 Radiological units.

Unless otherwise specified, the quantities used in the records required by this part shall be clearly indicated in special units of curie, rad, roentgen, or rem, including multiples and subdivisions of these units, or other conventional units, such as, dpm, dpm/100 $cm^2$ or mass units. The SI units, becquerel (Bq), gray (Gy), and sievert (Sv), may be provided parenthetically for reference with scientific standards.

[72 FR 31925, June 8, 2007]

## Subpart B—Management and Administrative Requirements

### § 835.101 Radiation protection programs.

(a) A DOE activity shall be conducted in compliance with a documented radiation protection program (RPP) as approved by the DOE.

(b) The DOE may direct or make modifications to a RPP.

(c) The content of each RPP shall be commensurate with the nature of the activities performed and shall include formal plans and measures for applying the as low as reasonably achievable (ALARA) process to occupational exposure.

(d) The RPP shall specify the existing and/or anticipated operational tasks that are intended to be within the scope of the RPP. Except as provided in § 835.101(h), any task outside the scope of a RPP shall not be initiated until an update of the RPP is approved by DOE.

(e) The content of the RPP shall address, but shall not necessarily be limited to, each requirement in this part.

(f) The RPP shall include plans, schedules, and other measures for achieving compliance with regulations of this part. Unless otherwise specified in this part, compliance with the amendments to this part published on June 8, 2007 shall be achieved no later than July 9, 2010.

(g) An update of the RPP shall be submitted to DOE:

(1) Whenever a change or an addition to the RPP is made;

(2) Prior to the initiation of a task not within the scope of the RPP; or

(3) Within 180 days of the effective date of any modifications to this part.

(h) Changes, additions, or updates to the RPP may become effective without prior Department approval only if the changes do not decrease the effectiveness of the RPP and the RPP, as changed, continues to meet the requirements of this part. Proposed changes that decrease the effectiveness of the RPP shall not be implemented without submittal to and approval by the Department.

(i) An initial RPP or an update shall be considered approved 180 days after its submission unless rejected by DOE at an earlier date.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59682, Nov. 4, 1998; 72 FR 31925, June 8, 2007]

### § 835.102 Internal audits.

Internal audits of the radiation protection program, including examination of program content and implementation, shall be conducted through a process that ensures that all functional elements are reviewed no less frequently than every 36 months.

[63 FR 59682, Nov. 4, 1998]

### § 835.103 Education, training and skills.

Individuals responsible for developing and implementing measures necessary for ensuring compliance with the requirements of this part shall have the appropriate education, training, and skills to discharge these responsibilities.

[63 FR 59682, Nov. 4, 1998]

### § 835.104 Written procedures.

Written procedures shall be developed and implemented as necessary to

ensure compliance with this part, commensurate with the radiological hazards created by the activity and consistent with the education, training, and skills of the individuals exposed to those hazards.

[63 FR 59682, Nov. 4, 1998]

## Subpart C—Standards for Internal and External Exposure

### § 835.201 [Reserved]

### § 835.202 Occupational dose limits for general employees.

(a) Except for planned special exposures conducted consistent with § 835.204 and emergency exposures authorized in accordance with § 835.1302, the occupational dose received by general employees shall be controlled such that the following limits are not exceeded in a year:

(1) A total effective dose of 5 rems (0.05 Sv);

(2) The sum of the equivalent dose to the whole body for external exposures and the committed equivalent dose to any organ or tissue other than the skin or the lens of the eye of 50 rems (0.5 Sv);

(3) An equivalent dose to the lens of the eye of 15 rems (0.15 Sv); and

(4) The sum of the equivalent dose to the skin or to any extremity for external exposures and the committed equivalent dose to the skin or to any extremity of 50 rems (0.5 Sv).

(b) All occupational doses received during the current year, except doses resulting from planned special exposures conducted in compliance with § 835.204 and emergency exposures authorized in accordance with § 835.1302, shall be included when demonstrating compliance with §§ 835.202(a) and 835.207.

(c) Doses from background, therapeutic and diagnostic medical radiation, and participation as a subject in medical research programs shall not be included in dose records or in the assessment of compliance with the occupational dose limits.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59682, Nov. 4, 1998; 72 FR 31926, June 8, 2007]

### § 835.203 Combining internal and external equivalent doses.

(a) The total effective dose during a year shall be determined by summing the effective dose from external exposures and the committed effective dose from intakes during the year.

(b) Determinations of the effective dose shall be made using the radiation and tissue weighting factor values provided in § 835.2.

[72 FR 31926, June 8, 2007]

### § 835.204 Planned special exposures.

(a) A planned special exposure may be authorized for a radiological worker to receive doses in addition to and accounted for separately from the doses received under the limits specified in § 835.202(a), provided that each of the following conditions is satisfied:

(1) The planned special exposure is considered only in an exceptional situation when alternatives that might prevent a radiological worker from exceeding the limits in § 835.202(a) are unavailable or impractical;

(2) The contractor management (and employer, if the employer is not the contractor) specifically requests the planned special exposure, in writing; and

(3) Joint written approval is received from the appropriate DOE Headquarters program office and the Secretarial Officer responsible for environment, safety and health matters.

(b) Prior to requesting an individual to participate in an authorized planned special exposure, the individual's dose from all previous planned special exposures and all doses in excess of the occupational dose limits shall be determined.

(c) An individual shall not receive a planned special exposure that, in addition to the doses determined in § 835.204(b), would result in a dose exceeding the following:

(1) In a year, the numerical values of the dose limits established at § 835.202(a); and

(2) Over the individual's lifetime, five times the numerical values of the dose limits established at § 835.202(a).

(d) Prior to a planned special exposure, written consent shall be obtained

from each individual involved. Each such written consent shall include:

(1) The purpose of the planned operations and procedures to be used;

(2) The estimated doses and associated potential risks and specific radiological conditions and other hazards which might be involved in performing the task; and

(3) Instructions on the measures to be taken to keep the dose ALARA considering other risks that may be present.

(e) Records of the conduct of a planned special exposure shall be maintained and a written report submitted within 30 days after the planned special exposure to the approving organizations identified in § 835.204(a)(3).

(f) The dose from planned special exposures is not to be considered in controlling future occupational dose of the individual under § 835.202(a), but is to be included in records and reports required under this part.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59682, Nov. 4, 1998]

### § 835.205 Determination of compliance for non-uniform exposure of the skin.

(a) Non-uniform exposures of the skin from X-rays, beta radiation, and/or radioactive material on the skin are to be assessed as specified in this section.

(b) For purposes of demonstrating compliance with § 835.202(a)(4), assessments shall be conducted as follows:

(1) *Area of skin irradiated is 100 cm² or more*. The non-uniform equivalent dose received during the year shall be averaged over the 100 cm² of the skin receiving the maximum dose, added to any uniform equivalent dose also received by the skin, and recorded as the equivalent dose to any extremity or skin for the year.

(2) *Area of skin irradiated is 10 cm² or more, but is less than 100 cm²*. The non-uniform equivalent dose (H) to the irradiated area received during the year shall be added to any uniform equivalent dose also received by the skin and recorded as the equivalent dose to any extremity or skin for the year. H is the equivalent dose averaged over the 1 cm² of skin receiving the maximum absorbed dose, D, reduced by the fraction f, which is the irradiated area in cm² divided by 100 cm² (*i.e.*, H = fD). In no case shall a value of f less than 0.1 be used.

(3) *Area of skin irradiated is less than 10 cm²*. The non-uniform equivalent dose shall be averaged over the 1 cm² of skin receiving the maximum dose. This equivalent dose shall:

(i) Be recorded in the individual's occupational exposure history as a special entry; and

(ii) Not be added to any other equivalent dose to any extremity or skin for the year.

[58 FR 65485, Dec. 14, 1993, as amended at 72 FR 31926, June 8, 2007]

### § 835.206 Limits for the embryo/fetus.

(a) The equivalent dose limit for the embryo/fetus from the period of conception to birth, as a result of occupational exposure of a declared pregnant worker, is 0.5 rem (0.005 Sv).

(b) Substantial variation above a uniform exposure rate that would satisfy the limits provided in § 835.206(a) shall be avoided.

(c) If the equivalent dose to the embryo/fetus is determined to have already exceeded 0.5 rem (0.005 Sv) by the time a worker declares her pregnancy, the declared pregnant worker shall not be assigned to tasks where additional occupational exposure is likely during the remaining gestation period.

[58 FR 65485, Dec. 14, 1993, as amended at 72 FR 31926, June 8, 2007]

### § 835.207 Occupational dose limits for minors.

The dose limits for minors occupationally exposed to radiation and/or radioactive materials at a DOE activity are 0.1 rem (0.001 Sv) total effective dose in a year and 10 percent of the occupational dose limits specified at § 835.202(a)(3) and (a)(4).

[72 FR 31926, June 8, 2007]

### § 835.208 Limits for members of the public entering a controlled area.

The total effective dose limit for members of the public exposed to radiation and/or radioactive material during access to a controlled area is 0.1 rem (0.001 Sv) in a year.

[72 FR 31926, June 8, 2007]

**§ 835.209 Concentrations of radioactive material in air.**

(a) The derived air concentration (DAC) values given in appendices A and C of this part shall be used in the control of occupational exposures to airborne radioactive material.

(b) The estimation of internal dose shall be based on bioassay data rather than air concentration values unless bioassay data are:

(1) Unavailable;

(2) Inadequate; or

(3) Internal dose estimates based on air concentration values are demonstrated to be as or more accurate.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59682, Nov. 4, 1998]

## Subpart D [Reserved]

## Subpart E—Monitoring of Individuals and Areas

**§ 835.401 General requirements.**

(a) Monitoring of individuals and areas shall be performed to:

(1) Demonstrate compliance with the regulations in this part;

(2) Document radiological conditions;

(3) Detect changes in radiological conditions;

(4) Detect the gradual buildup of radioactive material;

(5) Verify the effectiveness of engineered and administrative controls in containing radioactive material and reducing radiation exposure; and

(6) Identify and control potential sources of individual exposure to radiation and/or radioactive material.

(b) Instruments and equipment used for monitoring shall be:

(1) Periodically maintained and calibrated on an established frequency;

(2) Appropriate for the type(s), levels, and energies of the radiation(s) encountered;

(3) Appropriate for existing environmental conditions; and

(4) Routinely tested for operability.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59682, Nov. 4, 1998; 72 FR 31926, June 8, 2007]

**§ 835.402 Individual monitoring.**

(a) For the purpose of monitoring individual exposures to external radiation, personnel dosimeters shall be provided to and used by:

(1) Radiological workers who, under typical conditions, are likely to receive one or more of the following:

(i) An effective dose of 0.1 rem (0.001 Sv) or more in a year;

(ii) An equivalent dose to the skin or to any extremity of 5 rems (0.05 Sv) or more in a year;

(iii) An equivalent dose to the lens of the eye of 1.5 rems (0.015 Sv) or more in a year;

(2) Declared pregnant workers who are likely to receive from external sources an equivalent dose to the embryo/fetus in excess of 10 percent of the applicable limit at § 835.206(a);

(3) Occupationally exposed minors likely to receive a dose in excess of 50 percent of the applicable limits at § 835.207 in a year from external sources;

(4) Members of the public entering a controlled area likely to receive a dose in excess of 50 percent of the limit at § 835.208 in a year from external sources; and

(5) Individuals entering a high or very high radiation area.

(b) External dose monitoring programs implemented to demonstrate compliance with § 835.402(a) shall be adequate to demonstrate compliance with the dose limits established in subpart C of this part and shall be:

(1) Accredited, or excepted from accreditation, in accordance with the DOE Laboratory Accreditation Program for Personnel Dosimetry; or

(2) Determined by the Secretarial Officer responsible for environment, safety and health matters to have performance substantially equivalent to that of programs accredited under the DOE Laboratory Accreditation Program for Personnel Dosimetry.

(c) For the purpose of monitoring individual exposures to internal radiation, internal dosimetry programs (including routine bioassay programs) shall be conducted for:

(1) Radiological workers who, under typical conditions, are likely to receive a committed effective dose of 0.1 rem (0.001 Sv) or more from all occupational radionuclide intakes in a year;

(2) Declared pregnant workers likely to receive an intake or intakes resulting in an equivalent dose to the embryo/fetus in excess of 10 percent of the limit stated at § 835.206(a);

(3) Occupationally exposed minors who are likely to receive a dose in excess of 50 percent of the applicable limit stated at § 835.207 from all radionuclide intakes in a year; or

(4) Members of the public entering a controlled area likely to receive a dose in excess of 50 percent of the limit stated at § 835.208 from all radionuclide intakes in a year.

(d) Internal dose monitoring programs implemented to demonstrate compliance with § 835.402(c) shall be adequate to demonstrate compliance with the dose limits established in subpart C of this part and shall be:

(1) Accredited, or excepted from accreditation, in accordance with the DOE Laboratory Accreditation Program for Radiobioassay; or,

(2) Determined by the Secretarial Officer responsible for environment, safety and health matters to have performance substantially equivalent to that of programs accredited under the DOE Laboratory Accreditation Program for Radiobioassy.

[63 FR 59683, Nov. 4, 1998, as amended at 72 FR 31926, June 8, 2007]

### § 835.403 Air monitoring.

(a) Monitoring of airborne radioactivity shall be performed:

(1) Where an individual is likely to receive an exposure of 40 or more DAC-hours in a year; or

(2) As necessary to characterize the airborne radioactivity hazard where respiratory protective devices for protection against airborne radionuclides have been prescribed.

(b) Real-time air monitoring shall be performed as necessary to detect and provide warning of airborne radioactivity concentrations that warrant immediate action to terminate inhalation of airborne radioactive material.

[63 FR 59683, Nov. 4, 1998]

### § 835.404 [Reserved]

### § 835.405 Receipt of packages containing radioactive material.

(a) If packages containing quantities of radioactive material in excess of a Type A quantity (as defined at 10 CFR 71.4) are expected to be received from radioactive material transportation, arrangements shall be made to either:

(1) Take possession of the package when the carrier offers it for delivery; or

(2) Receive notification as soon as practicable after arrival of the package at the carrier's terminal and to take possession of the package expeditiously after receiving such notification.

(b) Upon receipt from radioactive material transportation, external surfaces of packages known to contain radioactive material shall be monitored if the package:

(1) Is labeled with a Radioactive White I, Yellow II, or Yellow III label (as specified at 49 CFR 172.403 and 172.436–440); or

(2) Has been transported as low specific activity material (as defined at 10 CFR 71.4) on an exclusive use vehicle (as defined at 10 CFR 71.4); or

(3) Has evidence of degradation, such as packages that are crushed, wet, or damaged.

(c) The monitoring required by paragraph (b) of this section shall include:

(1) Measurements of removable contamination levels, unless the package contains only special form (as defined at 10 CFR 71.4) or gaseous radioactive material; and

(2) Measurements of the radiation levels, if the package contains a Type B quantity (as defined at 10 CFR 71.4) of radioactive material.

(d) The monitoring required by paragraph (b) of this section shall be completed as soon as practicable following receipt of the package, but not later than 8 hours after the beginning of the working day following receipt of the package.

(e) Monitoring pursuant to § 835.405(b) is not required for packages transported on a DOE site which have remained under the continuous observation and control of a DOE employee or DOE contractor employee who is

knowledgeable of and implements required exposure control measures.

[63 FR 59683, Nov. 4, 1998, as amended at 72 FR 31926, June 8, 2007]

## Subpart F—Entry Control Program

### § 835.501 Radiological areas.

(a) Personnel entry control shall be maintained for each radiological area.

(b) The degree of control shall be commensurate with existing and potential radiological hazards within the area.

(c) One or more of the following methods shall be used to ensure control:

(1) Signs and barricades;

(2) Control devices on entrances;

(3) Conspicuous visual and/or audible alarms;

(4) Locked entrance ways; or

(5) Administrative controls.

(d) Written authorizations shall be required to control entry into and perform work within radiological areas. These authorizations shall specify radiation protection measures commensurate with the existing and potential hazards.

(e) No control(s) shall be installed at any radiological area exit that would prevent rapid evacuation of personnel under emergency conditions.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59684, Nov. 4, 1998]

### § 835.502 High and very high radiation areas.

(a) The following measures shall be implemented for each entry into a high radiation area:

(1) The area shall be monitored as necessary during access to determine the exposure rates to which the individuals are exposed; and

(2) Each individual shall be monitored by a supplemental dosimetry device or other means capable of providing an immediate estimate of the individual's integrated equivalent dose to the whole body during the entry.

(b) *Physical controls.* One or more of the following features shall be used for each entrance or access point to a high radiation area where radiation levels exist such that an individual could exceed an equivalent dose to the whole body of 1 rem (0.01 sievert) in any one hour at 30 centimeters from the source or from any surface that the radiation penetrates:

(1) A control device that prevents entry to the area when high radiation levels exist or upon entry causes the radiation level to be reduced below that level defining a high radiation area;

(2) A device that functions automatically to prevent use or operation of the radiation source or field while individuals are in the area;

(3) A control device that energizes a conspicuous visible or audible alarm signal so that the individual entering the high radiation area and the supervisor of the activity are made aware of the entry;

(4) Entryways that are locked. During periods when access to the area is required, positive control over each entry is maintained;

(5) Continuous direct or electronic surveillance that is capable of preventing unauthorized entry;

(6) A control device that will automatically generate audible and visual alarm signals to alert personnel in the area before use or operation of the radiation source and in sufficient time to permit evacuation of the area or activation of a secondary control device that will prevent use or operation of the source.

(c) *Very high radiation areas.* In addition to the above requirements, additional measures shall be implemented to ensure individuals are not able to gain unauthorized or inadvertent access to very high radiation areas.

(d) No control(s) shall be established in a high or very high radiation area that would prevent rapid evacuation of personnel.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59684, Nov. 4, 1998; 72 FR 31926, June 8, 2007]

## Subpart G—Posting and Labeling

### § 835.601 General requirements.

(a) Except as otherwise provided in this subpart, postings and labels required by this subpart shall include the standard radiation warning trefoil in black or magenta imposed upon a yellow background.

(b) Signs required by this subpart shall be clearly and conspicuously posted and may include radiological protection instructions.

(c) The posting and labeling requirements in this subpart may be modified to reflect the special considerations of DOE activities conducted at private residences or businesses. Such modifications shall provide the same level of protection to individuals as the existing provisions in this subpart.

[63 FR 59684, Nov. 4, 1998]

### § 835.602 Controlled areas.

(a) Each access point to a controlled area (as defined at § 835.2) shall be posted whenever radiological areas or radioactive material areas exist in the area. Individuals who enter only controlled areas without entering radiological areas or radioactive material areas are not expected to receive a total effective dose of more than 0.1 rem (0.001 sievert) in a year.

(b) Signs used for this purpose may be selected by the contractor to avoid conflict with local security requirements.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59684, Nov. 4, 1998; 72 FR 31926, June 8, 2007]

### § 835.603 Radiological areas and radioactive material areas.

Each access point to radiological areas and radioactive material areas (as defined at § 835.2) shall be posted with conspicuous signs bearing the wording provided in this section.

(a) *Radiation area.* The words ''Caution, Radiation Area'' shall be posted at each radiation area.

(b) *High radiation area.* The words ''Caution, High Radiation Area'' or ''Danger, High Radiation Area'' shall be posted at each high radiation area.

(c) *Very high radiation area.* The words ''Grave Danger, Very High Radiation Area'' shall be posted at each very high radiation area.

(d) *Airborne radioactivity area.* The words ''Caution, Airborne Radioactivity Area'' or ''Danger, Airborne Radioactivity Area'' shall be posted at each airborne radioactivity area.

(e) *Contamination area.* The words ''Caution, Contamination Area'' shall be posted at each contamination area.

(f) *High contamination area.* The words ''Caution, High Contamination Area'' or ''Danger, High Contamination Area'' shall be posted at each high contamination area.

(g) *Radioactive material area.* The words ''Caution, Radioactive Material(s)'' shall be posted at each radioactive material area.

[63 FR 59684, Nov. 4, 1998]

### § 835.604 Exceptions to posting requirements.

(a) Areas may be excepted from the posting requirements of § 835.603 for periods of less than 8 continuous hours when placed under continuous observation and control of an individual knowledgeable of, and empowered to implement, required access and exposure control measures.

(b) Areas may be excepted from the radioactive material area posting requirements of § 835.603(g) when:

(1) Posted in accordance with §§ 835.603(a) through (f); or

(2) Each item or container of radioactive material is labeled in accordance with this subpart such that individuals entering the area are made aware of the hazard; or

(3) The radioactive material of concern consists solely of structures or installed components which have been activated (i.e., such as by being exposed to neutron radiation or particles produced by an accelerator).

(c) Areas containing only packages received from radioactive material transportation labeled and in non-degraded condition need not be posted in accordance with § 835.603 until the packages are monitored in accordance with § 835.405.

[63 FR 59684, Nov. 4, 1998]

### § 835.605 Labeling items and containers.

Except as provided at § 835.606, each item or container of radioactive material shall bear a durable, clearly visible label bearing the standard radiation warning trefoil and the words ''Caution, Radioactive Material'' or ''Danger, Radioactive Material.'' The label

shall also provide sufficient information to permit individuals handling, using, or working in the vicinity of the items or containers to take precautions to avoid or control exposures.

[63 FR 59684, Nov. 4, 1998]

### § 835.606 Exceptions to labeling requirements.

(a) Items and containers may be excepted from the radioactive material labeling requirements of § 835.605 when:

(1) Used, handled, or stored in areas posted and controlled in accordance with this subpart and sufficient information is provided to permit individuals to take precautions to avoid or control exposures; or

(2) The quantity of radioactive material is less than one tenth of the values specified in appendix E of this part and less than 0.1 Ci; or

(3) Packaged, labeled, and marked in accordance with the regulations of the Department of Transportation or DOE Orders governing radioactive material transportation; or

(4) Inaccessible, or accessible only to individuals authorized to handle or use them, or to work in the vicinity; or

(5) Installed in manufacturing, process, or other equipment, such as reactor components, piping, and tanks; or

(6) The radioactive material consists solely of nuclear weapons or their components.

(b) Radioactive material labels applied to sealed radioactive sources may be excepted from the color specifications of § 835.601(a).

[63 FR 59684, Nov. 4, 1998, as amended at 72 FR 31927, June 8, 2007]

## Subpart H—Records

### § 835.701 General provisions.

(a) Records shall be maintained to document compliance with this part and with radiation protection programs required by § 835.101.

(b) Unless otherwise specified in this subpart, records shall be retained until final disposition is authorized by DOE.

### § 835.702 Individual monitoring records.

(a) Except as authorized by § 835.702(b), records shall be maintained to document doses received by all individuals for whom monitoring was conducted and to document doses received during planned special exposures, unplanned doses exceeding the monitoring thresholds of § 835.402, and authorized emergency exposures.

(b) Recording of the non-uniform equivalent dose to the skin is not required if the dose is less than 2 percent of the limit specified for the skin at § 835.202(a)(4). Recording of internal dose (committed effective dose or committed equivalent dose) is not required for any monitoring result estimated to correspond to an individual receiving less than 0.01 rem (0.1 mSv) committed effective dose. The bioassay or air monitoring result used to make the estimate shall be maintained in accordance with § 835.703(b) and the unrecorded internal dose estimated for any individual in a year shall not exceed the applicable monitoring threshold at § 835.402(c).

(c) The records required by this section shall:

(1) Be sufficient to evaluate compliance with subpart C of this part;

(2) Be sufficient to provide dose information necessary to complete reports required by subpart I of this part;

(3) Include the results of monitoring used to assess the following quantities for external dose received during the year:

(i) The effective dose from external sources of radiation (equivalent dose to the whole body may be used as effective dose for external exposure);

(ii) The equivalent dose to the lens of the eye;

(iii) The equivalent dose to the skin; and

(iv) The equivalent dose to the extremities.

(4) Include the following information for internal dose resulting from intakes received during the year:

(i) Committed effective dose;

(ii) Committed equivalent dose to any organ or tissue of concern; and

(iii) Identity of radionuclides.

(5) Include the following quantities for the summation of the external and internal dose:

(i) Total effective dose in a year;

(ii) For any organ or tissue assigned an internal dose during the year, the

sum of the equivalent dose to the whole body from external exposures and the committed equivalent dose to that organ or tissue; and

(iii) Cumulative total effective dose.

(6) Include the equivalent dose to the embryo/fetus of a declared pregnant worker.

(d) Documentation of all occupational doses received during the current year, except for doses resulting from planned special exposures conducted in compliance with § 835.204 and emergency exposures authorized in accordance with § 835.1302(d), shall be obtained to demonstrate compliance with § 835.202(a). If complete records documenting previous occupational dose during the year cannot be obtained, a written estimate signed by the individual may be accepted to demonstrate compliance.

(e) For radiological workers whose occupational dose is monitored in accordance with § 835.402, reasonable efforts shall be made to obtain complete records of prior years occupational internal and external doses.

(f) The records specified in this section that are identified with a specific individual shall be readily available to that individual.

(g) Data necessary to allow future verification or reassessment of the recorded doses shall be recorded.

(h) All records required by this section shall be transferred to the DOE upon cessation of activities at the site that could cause exposure to individuals.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59685, Nov. 4, 1998; 72 FR 31927, June 8, 2007]

### § 835.703 Other monitoring records.

The following information shall be documented and maintained:

(a) Results of monitoring for radiation and radioactive material as required by subparts E and L of this part, except for monitoring required by § 835.1102(d);

(b) Results of monitoring used to determine individual occupational dose from external and internal sources;

(c) Results of monitoring for the release and control of material and equipment as required by § 835.1101; and

(d) Results of maintenance and calibration performed on instruments and equipment as required by § 835.401(b).

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59685, Nov. 4, 1998]

### § 835.704 Administrative records.

(a) Training records shall be maintained, as necessary, to demonstrate compliance with §§ 835.901.

(b) Actions taken to maintain occupational exposures as low as reasonably achievable, including the actions required for this purpose by § 835.101, as well as facility design and control actions required by §§ 835.1001, 835.1002, and 835.1003, shall be documented.

(c) Records shall be maintained to document the results of internal audits and other reviews of program content and implementation.

(d) Written declarations of pregnancy, including the estimated date of conception, and revocations of declarations of pregnancy shall be maintained.

(e) Changes in equipment, techniques, and procedures used for monitoring shall be documented.

(f) Records shall be maintained as necessary to demonstrate compliance with the requirements of §§ 835.1201 and 835.1202 for sealed radioactive source control, inventory, and source leak tests.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59685, Nov. 4, 1998]

## Subpart I—Reports to Individuals

### § 835.801 Reports to individuals.

(a) Radiation exposure data for individuals monitored in accordance with § 835.402 shall be reported as specified in this section. The information shall include the data required under § 835.702(c). Each notification and report shall be in writing and include: the DOE site or facility name, the name of the individual, and the individual's social security number, employee number, or other unique identification number.

(b) Upon the request from an individual terminating employment, records of exposure shall be provided to that individual as soon as the data are available, but not later than 90 days after termination. A written estimate

of the radiation dose received by that employee based on available information shall be provided at the time of termination, if requested.

(c) Each DOE- or DOE-contractor-operated site or facility shall, on an annual basis, provide a radiation dose report to each individual monitored during the year at that site or facility in accordance with § 835.402.

(d) Detailed information concerning any individual's exposure shall be made available to the individual upon request of that individual, consistent with the provisions of the Privacy Act (5 U.S.C. 552a).

(e) When a DOE contractor is required to report to the Department, pursuant to Departmental requirements for occurrence reporting and processing, any exposure of an individual to radiation and/or radioactive material, or planned special exposure in accordance with § 835.204(e), the contractor shall also provide that individual with a report on his or her exposure data included therein. Such report shall be transmitted at a time not later than the transmittal to the Department.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59685, Nov. 4, 1998]

## Subpart J—Radiation Safety Training

### § 835.901 Radiation safety training.

(a) Each individual shall complete radiation safety training on the topics established at § 835.901(c) commensurate with the hazards in the area and the required controls:

(1) Before being permitted unescorted access to controlled areas; and

(2) Before receiving occupational dose during access to controlled areas at a DOE site or facility.

(b) Each individual shall demonstrate knowledge of the radiation safety training topics established at § 835.901(c), commensurate with the hazards in the area and required controls, by successful completion of an examination and performance demonstrations:

(1) Before being permitted unescorted access to radiological areas; and

(2) Before performing unescorted assignments as a radiological worker.

(c) Radiation safety training shall include the following topics, to the extent appropriate to each individual's prior training, work assignments, and degree of exposure to potential radiological hazards:

(1) Risks of exposure to radiation and radioactive materials, including prenatal radiation exposure;

(2) Basic radiological fundamentals and radiation protection concepts;

(3) Physical design features, administrative controls, limits, policies, procedures, alarms, and other measures implemented at the facility to manage doses and maintain doses ALARA, including both routine and emergency actions;

(4) Individual rights and responsibilities as related to implementation of the facility radiation protection program;

(5) Individual responsibilities for implementing ALARA measures required by § 835.101; and

(6) Individual exposure reports that may be requested in accordance with § 835.801.

(d) When an escort is used in lieu of training in accordance with paragraph (a) or (b) of this section, the escort shall:

(1) Have completed radiation safety training, examinations, and performance demonstrations required for entry to the area and performance of the work; and

(2) Ensure that all escorted individuals comply with the documented radiation protection program.

(e) Radiation safety training shall be provided to individuals when there is a significant change to radiation protection policies and procedures that may affect the individual and at intervals not to exceed 24 months. Such training provided for individuals subject to the requirements of § 835.901(b)(1) and (b)(2) shall include successful completion of an examination.

[63 FR 59685, Nov. 4, 1998]

§§ 835.902–835.903 [Reserved]

## Subpart K—Design and Control

### § 835.1001 Design and control.

(a) Measures shall be taken to maintain radiation exposure in controlled areas ALARA through engineered and administrative controls. The primary methods used shall be physical design features (e.g., confinement, ventilation, remote handling, and shielding). Administrative controls shall be employed only as supplemental methods to control radiation exposure.

(b) For specific activities where use of engineered controls is demonstrated to be impractical, administrative controls shall be used to maintain radiation exposures ALARA.

[63 FR 59686, Nov. 4, 1998, as amended at 72 FR 31927, June 8, 2007]

### § 835.1002 Facility design and modifications.

During the design of new facilities or modification of existing facilities, the following objectives shall be adopted:

(a) Optimization methods shall be used to assure that occupational exposure is maintained ALARA in developing and justifying facility design and physical controls.

(b) The design objective for controlling personnel exposure from external sources of radiation in areas of continuous occupational occupancy (2000 hours per year) shall be to maintain exposure levels below an average of 0.5 millirem (5 μSv) per hour and as far below this average as is reasonably achievable. The design objectives for exposure rates for potential exposure to a radiological worker where occupancy differs from the above shall be ALARA and shall not exceed 20 percent of the applicable standards in § 835.202.

(c) Regarding the control of airborne radioactive material, the design objective shall be, under normal conditions, to avoid releases to the workplace atmosphere and in any situation, to control the inhalation of such material by workers to levels that are ALARA; confinement and ventilation shall normally be used.

(d) The design or modification of a facility and the selection of materials shall include features that facilitate operations, maintenance, decontamination, and decommissioning.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59686, Nov. 4, 1998; 72 FR 31927, June 8, 2007]

### § 835.1003 Workplace controls.

During routine operations, the combination of engineered and administrative controls shall provide that:

(a) The anticipated occupational dose to general employees shall not exceed the limits established at § 835.202; and

(b) The ALARA process is utilized for personnel exposures to ionizing radiation.

[63 FR 59686, Nov. 4, 1998, as amended at 72 FR 31927, June 8, 2007]

## Subpart L—Radioactive Contamination Control

SOURCE: 63 FR 59686, Nov. 4, 1998, unless otherwise noted.

### § 835.1101 Control of material and equipment.

(a) Except as provided in paragraphs (b) and (c) of this section, material and equipment in contamination areas, high contamination areas, and airborne radioactivity areas shall not be released to a controlled area if:

(1) Removable surface contamination levels on accessible surfaces exceed the removable surface contamination values specified in appendix D of this part; or

(2) Prior use suggests that the removable surface contamination levels on inaccessible surfaces are likely to exceed the removable surface contamination values specified in appendix D of this part.

(b) Material and equipment exceeding the removable surface contamination values specified in appendix D of this part may be conditionally released for movement on-site from one radiological area for immediate placement in another radiological area only if appropriate monitoring is performed and appropriate controls for the movement are established and exercised.

(c) Material and equipment with fixed contamination levels that exceed

the total contamination values specified in appendix D of this part may be released for use in controlled areas outside of radiological areas only under the following conditions:

(1) Removable surface contamination levels are below the removable surface contamination values specified in appendix D of this part; and

(2) The material or equipment is routinely monitored and clearly marked or labeled to alert personnel of the contaminated status.

### § 835.1102 Control of areas.

(a) Appropriate controls shall be maintained and verified which prevent the inadvertent transfer of removable contamination to locations outside of radiological areas under normal operating conditions.

(b) Any area in which contamination levels exceed the values specified in appendix D of this part shall be controlled in a manner commensurate with the physical and chemical characteristics of the contaminant, the radionuclides present, and the fixed and removable surface contamination levels.

(c) Areas accessible to individuals where the measured total surface contamination levels exceed, but the removable surface contamination levels are less than, corresponding surface contamination values specified in appendix D of this part, shall be controlled as follows when located outside of radiological areas:

(1) The area shall be routinely monitored to ensure the removable surface contamination level remains below the removable surface contamination values specified in appendix D of this part; and

(2) The area shall be conspicuously marked to warn individuals of the contaminated status.

(d) Individuals exiting contamination, high contamination, or airborne radioactivity areas shall be monitored, as appropriate, for the presence of surface contamination.

(e) Protective clothing shall be required for entry to areas in which removable contamination exists at levels exceeding the removable surface contamination values specified in appendix D of this part.

## Subpart M—Sealed Radioactive Source Control

SOURCE: 63 FR 59686, Nov. 4, 1998, unless otherwise noted.

### § 835.1201 Sealed radioactive source control.

Sealed radioactive sources shall be used, handled, and stored in a manner commensurate with the hazards associated with operations involving the sources.

### § 835.1202 Accountable sealed radioactive sources.

(a) Each accountable sealed radioactive source shall be inventoried at intervals not to exceed six months. This inventory shall:

(1) Establish the physical location of each accountable sealed radioactive source;

(2) Verify the presence and adequacy of associated postings and labels; and

(3) Establish the adequacy of storage locations, containers, and devices.

(b) Except for sealed radioactive sources consisting solely of gaseous radioactive material or tritium, each accountable sealed radioactive source shall be subject to a source leak test upon receipt, when damage is suspected, and at intervals not to exceed six months. Source leak tests shall be capable of detecting radioactive material leakage equal to or exceeding 0.005 μCi.

(c) Notwithstanding the requirements of paragraph (b) of this section, an accountable sealed radioactive source is not subject to periodic source leak testing if that source has been removed from service. Such sources shall be stored in a controlled location, subject to periodic inventory as required by paragraph (a) of this section, and subject to source leak testing prior to being returned to service.

(d) Notwithstanding the requirements of paragraphs (a) and (b) of this section, an accountable sealed radioactive source is not subject to periodic inventory and source leak testing if that source is located in an area that is unsafe for human entry or otherwise inaccessible.

(e) An accountable sealed radioactive source found to be leaking radioactive

material shall be controlled in a manner that minimizes the spread of radioactive contamination.

[63 FR 59686, Nov. 4, 1998, as amended at 72 FR 31927, June 8, 2007]

## Subpart N—Emergency Exposure Situations

### § 835.1301 General provisions.

(a) A general employee whose occupational dose has exceeded the numerical value of any of the limits specified in § 835.202 as a result of an authorized emergency exposure may be permitted to return to work in radiological areas during the current year providing that all of the following conditions are met:

(1) Approval is first obtained from the contractor management and the Head of the responsible DOE field organization;

(2) The individual receives counseling from radiological protection and medical personnel regarding the consequences of receiving additional occupational exposure during the year; and

(3) The affected employee agrees to return to radiological work.

(b) All doses exceeding the limits specified in § 835.202 shall be recorded in the affected individual's occupational dose record.

(c) When the conditions under which a dose was received in excess of the limits specified in § 835.202, except those received in accordance with § 835.204, have been eliminated, operating management shall notify the Head of the responsible DOE field organization.

(d) Operations which have been suspended as a result of a dose in excess of the limits specified in § 835.202, except those received in accordance with § 835.204, may be resumed only with the approval of DOE.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59687, Nov. 4, 1998; 72 FR 31927, June 8, 2007]

### § 835.1302 Emergency exposure situations.

(a) The risk of injury to those individuals involved in rescue and recovery operations shall be minimized.

(b) Operating management shall weigh actual and potential risks against the benefits to be gained.

(c) No individual shall be required to perform a rescue action that might involve substantial personal risk.

(d) Each individual authorized to perform emergency actions likely to result in occupational doses exceeding the values of the limits provided at § 835.202(a) shall be trained in accordance with § 835.901(b) and briefed beforehand on the known or anticipated hazards to which the individual will be subjected.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59687, Nov. 4, 1998]

### § 835.1303 [Reserved]

### § 835.1304 Nuclear accident dosimetry.

(a) Installations possessing sufficient quantities of fissile material to potentially constitute a critical mass, such that the excessive exposure of individuals to radiation from a nuclear accident is possible, shall provide nuclear accident dosimetry for those individuals.

(b) Nuclear accident dosimetry shall include the following:

(1) A method to conduct initial screening of individuals involved in a nuclear accident to determine whether significant exposures to radiation occurred;

(2) Methods and equipment for analysis of biological materials;

(3) A system of fixed nuclear accident dosimeter units; and

(4) Personal nuclear accident dosimeters.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59687, Nov. 4, 1998]

## APPENDIX A TO PART 835—DERIVED AIR CONCENTRATIONS (DAC) FOR CONTROLLING RADIATION EXPOSURE TO WORKERS AT DOE FACILITIES

The data presented in appendix A are to be used for controlling individual internal doses in accordance with § 835.209, identifying the need for air monitoring in accordance with § 835.403, and identifying and posting airborne radioactivity areas in accordance with § 835.603(d).

The DAC values are given for individual radionuclides. For known mixtures of radionuclides, determine the sum of the ratio of the observed concentration of a particular

radionuclide and its corresponding DAC for all radionuclides in the mixture. If this sum exceeds unity (1), then the DAC has been exceeded. For unknown radionuclides, the most restrictive DAC (lowest value) for those isotopes not known to be absent shall be used. For any single radionuclide not listed in appendix A with decay mode other than alpha emission or spontaneous fission and with radioactive half-life greater than two hours, the DAC value shall be 4 E-11 μCi/mL (1 Bq/m³). For any single radionuclide not listed in appendix A that decays by alpha emission or spontaneous fission the DAC value shall be 2 E-13 μCi/mL (8 E-03 Bq/m³).

The DACs for limiting radiation exposures through inhalation of radionuclides by workers are listed in this appendix. The values are based on either a stochastic (committed effective dose) dose limit of 5 rems (0.05 Sv) or a deterministic (organ or tissue) dose limit of 50 rems (0.5 Sv) per year, whichever is more limiting.

NOTE: The 15 rems (0.15 Sv) dose limit for the lens of the eye does not appear as a critical organ dose limit.

The columns in this appendix contain the following information: (1) Radionuclide; (2) inhaled air DAC for type F (fast), type M (moderate), and type S (slow) materials in units of μCi/mL; (3) inhaled air DAC for type F (fast), type M (moderate), and type S (slow) materials in units of Bq/m³; (4) an indication of whether or not the DAC for each class is controlled by the stochastic (effective dose) or deterministic (organ or tissue) dose. The absorption types (F, M, and S) have been established to describe the absorption type of the materials from the respiratory tract into the blood. The range of half-times for the absorption types correspond to: Type F, 100% at 10 minutes; Type M, 10% at 10 minutes and 90% at 140 days; and Type S 0.1% at 10 minutes and 99.9% at 7000 days. The DACs are listed by radionuclide, in order of increasing atomic mass, and are based on the assumption that the particle size distribution of 5 micrometers AMAD is used. For situations where the particle size distribution is known to differ significantly from 5 micrometers AMAD, appropriate corrections may be made to both the estimated dose to workers and the DACs.

| Radionuclide | Absorption type [3] | | | Absorption type [3] | | | Stochastic or organ or tissue [1] |
|---|---|---|---|---|---|---|---|
| | μCi/mL | | | Bq/m [3] | | | |
| | F | M | S | F | M | S | (F/M/S) |
| H-3 (Water) [2] | 2 E−05 | 2 E−05 | 2 E−05 | 7 E + 05 | 7 E + 05 | 7 E + 05 | St/St/St |
| H-3 (Elemental) [2]. | 2 E−01 | 2 E−01 | 2 E−01 | 9 E + 09 | 9 E + 09 | 9 E + 09 | St/St/St |
| STCs (Insoluble) [4]. | 1 E−05 | 6 E−06 | 2 E−06 | 3 E + 05 | 2 E + 05 | 8 E + 04 | St/St/St |
| STCs (Soluble) | 1 E−05 | 1 E−05 | 1 E−05 | 5 E + 05 | 5 E + 05 | 5 E + 05 | St/St/St |
| Be-7 | – | 1 E−05 | 1 E−05 | – | 4 E + 05 | 4 E + 05 | /St/St |
| Be-10 | – | 8 E−08 | 2 E−08 | – | 3 E + 03 | 1 E + 03 | /St/St |
| C-11 (Vapor) [2] | – | 1 E−04 | – | – | 6 E + 06 | – | /St/ |
| C-11 (CO) [2] | 4 E−04 | 4 E−04 | 4 E−04 | 1 E + 07 | 1 E + 07 | 1 E + 07 | St/St/St |
| C-11 ($CO_2$) [2] | 2 E−04 | 2 E−04 | 2 E−04 | 9 E + 06 | 9 E + 06 | 9 E + 06 | St/St/St |
| C-14 (Vapor) [2] | – | 9 E−07 | – | – | 3 E + 04 | – | /St/ |
| C-14 (CO) [2] | 7 E−04 | 7 E−04 | 7 E−04 | 2 E + 07 | 2 E + 07 | 2 E + 07 | St/St/St |
| C-14 ($CO_2$) [2] | 8 E−05 | 8 E−05 | 8 E−05 | 3 E + 06 | 3 E + 06 | 3 E + 06 | St/St/St |
| F-18 | 4 E−06 | 3 E−06 | 3 E−06 | 1 E + 05 | 1 E + 05 | 1 E + 05 | ET/ET/ET |
| Na-22 | 2 E−07 | – | – | 1 E + 04 | – | – | E/ / |
| Na-24 | 4 E−07 | – | – | 1 E + 04 | – | – | ET/ / |
| Mg-28 | 3 E−07 | 3 E−07 | – | 1 E + 04 | 1 E + 04 | – | ET/St/ |
| Al-26 | 4 E−08 | 4 E−08 | – | 1 E + 03 | 1 E + 03 | – | St/St/ |
| Si-31 | 9 E−06 | 5 E−06 | 5 E−06 | 3 E + 05 | 1 E + 05 | 1 E + 05 | ET/St/St |
| Si-32 | 1 E−07 | 5 E−08 | 1 E−08 | 5 E + 03 | 2 E + 03 | 3 E + 02 | St/St/St |
| P-32 | 5 E−07 | 1 E−07 | – | 1 E + 04 | 7 E + 03 | – | St/St/ |
| P-33 | 4 E−06 | 4 E−07 | – | 1 E + 05 | 1 E + 04 | – | St/St/ |
| S-35 (Vapor) | – | 4 E−06 | – | – | 1 E + 05 | – | /St/ |
| S-35 | 7 E−06 | 5 E−07 | – | 2 E + 05 | 1 E + 04 | – | St/St/ |
| Cl-36 | 1 E−06 | 1 E−07 | – | 4 E + 04 | 4 E + 03 | – | St/St/ |
| Cl-38 | 7 E−06 | 5 E−06 | – | 2 E + 05 | 2 E + 05 | – | ET/ET/ |
| Cl-39 | 2 E−06 | 4 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| K-40 | 1 E−07 | – | – | 6 E + 03 | – | – | St/ / |
| K-42 | 2 E−06 | – | – | 1 E + 05 | – | – | E/ / |
| K-43 | 9 E−07 | – | – | 3 E + 04 | – | – | ET/ / |
| K-44 | 8 E−06 | – | – | 2 E + 05 | – | – | ET/ / |
| K-45 | 9 E−06 | – | – | 3 E + 05 | – | – | ET/ / |
| Ca-41 | – | 2 E−06 | – | – | 8 E + 04 | – | /BS/ |
| Ca-45 | – | 2 E−07 | – | – | 9 E + 03 | – | /St/ |
| Ca-47 | – | 2 E−07 | – | – | 9 E + 03 | – | /St/ |
| Sc-43 | – | – | 2 E−06 | – | – | 7 E + 04 | / /ET |
| Sc-44m | – | – | 2 E−07 | – | – | 1 E + 04 | / /St |
| Sc-44 | – | – | 1 E−06 | – | – | 4 E + 04 | / /ET |

| Radionuclide | Absorption type [3] | | | Absorption type [3] | | | Stochastic or organ or tissue [1] |
|---|---|---|---|---|---|---|---|
| | μCi/mL | | | Bq/m [3] | | | |
| | F | M | S | F | M | S | (F/M/S) |
| Sc-46 | – | – | 1 E−07 | – | – | 4 E + 03 | / /St |
| Sc-47 | – | – | 7 E−07 | – | – | 2 E + 04 | / /St |
| Sc-48 | – | – | 2 E−07 | – | – | 1 E + 04 | / /ET |
| Sc-49 | – | – | 8 E−06 | – | – | 3 E + 05 | / /ET |
| Ti-44 | 7 E−09 | 2 E−08 | 9 E−09 | 2 E + 02 | 7 E + 02 | 3 E + 02 | St/St/St |
| Ti-45 | 3 E−06 | 2 E−06 | 2 E−06 | 1 E + 05 | 1 E + 05 | 1 E + 05 | ET/ET/ET |
| V-47 | 8 E−06 | 6 E−06 | – | 3 E + 05 | 2 E + 05 | – | ET/ET/ |
| V-48 | 2 E−07 | 2 E−07 | – | 9 E + 03 | 7 E + 03 | – | ET/St/ |
| V-49 | 1 E−05 | 2 E−05 | – | 7 E + 05 | 9 E + 05 | – | BS/St/ |
| Cr-48 | 2 E−06 | 2 E−06 | 2 E−06 | 8 E + 04 | 8 E + 04 | 8 E + 04 | ET/ET/ET |
| Cr-49 | 7 E−06 | 5 E−06 | 5 E−06 | 2 E + 05 | 2 E + 05 | 2 E + 05 | ET/ET/ET |
| Cr-51 | 1 E−05 | 1 E−05 | 1 E−05 | 6 E + 05 | 6 E + 05 | 5 E + 05 | St/St/St |
| Mn-51 | 7 E−06 | 5 E−06 | – | 2 E + 05 | 2 E + 05 | – | ET/ET/ |
| Mn-52m | 7 E−06 | 5 E−06 | – | 2 E + 05 | 2 E + 05 | – | ET/ET/ |
| Mn-52 | 2 E−07 | 2 E−07 | – | 8 E + 03 | 8 E + 03 | – | ET/ET/ |
| Mn-53 | 5 E−06 | 1 E−05 | – | 2 E + 05 | 5 E + 05 | – | BS/St/ |
| Mn-54 | 5 E−07 | 4 E−07 | – | 1 E + 04 | 1 E + 04 | – | St/St/ |
| Mn-56 | 2 E−06 | 2 E−06 | – | 9 E + 04 | 8 E + 04 | – | ET/ET/ |
| Fe-52 | 6 E−07 | 5 E−07 | – | 2 E + 04 | 2 E + 04 | – | ET/E/ |
| Fe-55 | 6 E−07 | 1 E−06 | – | 2 E + 04 | 6 E + 04 | – | St/St/ |
| Fe-59 | 1 E−07 | 1 E−07 | – | 6 E + 03 | 6 E + 03 | – | St/St/ |
| Fe-60 | 1 E−09 | 4 E−09 | – | 6 E + 01 | 1 E + 02 | – | St/St/ |
| Co-55 | – | 5 E−07 | 5 E−07 | – | 2 E + 04 | 2 E + 04 | /ET/ET |
| Co-56 | – | 1 E−07 | 1 E−07 | – | 5 E + 03 | 4 E + 03 | /St/St |
| Co-57 | – | 1 E−06 | 9 E−07 | – | 5 E + 04 | 3 E + 04 | /St/St |
| Co-58m | – | 3 E−05 | 3 E−05 | – | 1 E + 06 | 1 E + 06 | /St/St |
| Co-58 | – | 4 E−07 | 3 E−07 | – | 1 E + 04 | 1 E + 04 | /St/St |
| Co-60m | – | 4 E−04 | 4 E−04 | – | 1 E + 07 | 1 E + 07 | /St/St |
| Co-60 | – | 7 E−08 | 3 E−08 | – | 2 E + 03 | 1 E + 03 | /St/St |
| Co-61 | – | 6 E−06 | 6 E−06 | – | 2 E + 05 | 2 E + 05 | /ET/ET |
| Co-62m | – | 7 E−06 | 6 E−06 | – | 2 E + 05 | 2 E + 05 | /ET/ET |
| Ni-56 (Inorg) | 4 E−07 | 4 E−07 | – | 1 E + 04 | 1 E + 04 | – | ET/ET/ |
| Ni-56 (Carbonyl). | – | 4 E−07 | – | – | 1 E + 04 | – | /St/ |
| Ni-57 (Inorg) | 5 E−07 | 5 E−07 | – | 2 E + 04 | 2 E + 04 | – | ET/ET/ |
| Ni-57 (Carbonyl). | – | 7 E−07 | – | – | 2 E + 04 | – | /ET/ |
| Ni-59 (Inorg) | 2 E−06 | 5 E−06 | – | 9 E + 04 | 2 E + 05 | – | St/St/ |
| Ni-59 (Carbonyl). | – | 6 E−07 | – | – | 2 E + 04 | – | /St/ |
| Ni-63 (Inorg) | 1 E−06 | 1 E−06 | – | 4 E + 04 | 6 E + 04 | – | St/St/ |
| Ni-63 (Carbonyl). | – | 2 E−07 | – | – | 1 E + 04 | – | /St/ |
| Ni-65 (Inorg) | 5 E−06 | 4 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| Ni-65 (Carbonyl). | – | 8 E−07 | – | – | 3 E + 04 | – | /ET/ |
| Ni-66 (Inorg) | 7 E−07 | 2 E−07 | – | 2 E + 04 | 1 E + 04 | – | St/St/ |
| Ni-66 (Carbonyl). | – | 2 E−07 | – | – | 1 E + 04 | – | /ET/ |
| Cu-60 | 5 E−06 | 4 E−06 | 4 E−06 | 1 E + 05 | 1 E + 05 | 1 E + 05 | ET/ET/ET |
| Cu-61 | 3 E−06 | 3 E−06 | 3 E−06 | 1 E + 05 | 1 E + 05 | 1 E + 05 | ET/ET/ET |
| Cu-64 | 4 E−06 | 3 E−06 | 3 E−06 | 1 E + 05 | 1 E + 05 | 1 E + 05 | ET/E/E |
| Cu-67 | 2 E−06 | 1 E−06 | 9 E−07 | 8 E + 04 | 3 E + 04 | 3 E + 04 | ET/St/St |
| Zn-62 | – | – | 8 E−07 | – | – | 3 E + 04 | / /St |
| Zn-63 | – | – | 5 E−06 | – | – | 2 E + 05 | / /ET |
| Zn-65 | – | – | 2 E−07 | – | – | 7 E + 03 | / /St |
| Zn-69m | – | – | 1 E−06 | – | – | 6 E + 04 | / /St |
| Zn-69 | – | – | 7 E−06 | – | – | 2 E + 05 | / /ET |
| Zn-71m | – | – | 1 E−06 | – | – | 5 E + 04 | / /ET |
| Zn-72 | – | – | 3 E−07 | – | – | 1 E + 04 | / /St |
| Ga-65 | 1 E−05 | 9 E−06 | – | 4 E + 05 | 3 E + 05 | – | ET/ET/ |
| Ga-66 | 8 E−07 | 7 E−07 | – | 3 E + 04 | 2 E + 04 | – | ET/St/ |
| Ga-67 | 3 E−06 | 2 E−06 | – | 1 E + 05 | 7 E + 04 | – | ET/St/ |
| Ga-68 | 6 E−06 | 4 E−06 | – | 2 E + 05 | 1 E + 05 | – | ET/ET/ |
| Ga-70 | 1 E−05 | 1 E−05 | – | 6 E + 05 | 4 E + 05 | – | ET/ET/ |
| Ga-72 | 5 E−07 | 5 E−07 | – | 2 E + 04 | 2 E + 04 | – | ET/ET/ |
| Ga-73 | 4 E−06 | 2 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/St/ |
| Ge-66 | 2 E−06 | 2 E−06 | – | 9 E + 04 | 9 E + 04 | – | ET/ET/ |
| Ge-67 | 1 E−05 | 7 E−06 | – | 3 E + 05 | 2 E + 05 | – | ET/ET/ |
| Ge-68 | 6 E−07 | 7 E−08 | – | 2 E + 04 | 2 E + 03 | – | ET/St/ |
| Ge-69 | 1 E−06 | 1 E−06 | – | 3 E + 04 | 3 E + 04 | – | ET/ET/ |

| Radionuclide | Absorption type [3] | | | Absorption type [3] | | | Stochastic or organ or tissue [1] |
|---|---|---|---|---|---|---|---|
| | μCi/mL | | | Bq/m [3] | | | |
| | F | M | S | F | M | S | (F/M/S) |
| Ge-71 | 5 E−05 | 5 E−05 | – | 2 E + 06 | 1 E + 06 | – | ET/E/ |
| Ge-75 | 1 E−05 | 7 E−06 | – | 4 E + 05 | 2 E + 05 | – | ET/ET/ |
| Ge-77 | 1 E−06 | 1 E−06 | – | 4 E + 04 | 4 E + 04 | – | ET/ET/ |
| Ge-78 | 3 E−06 | 3 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| As-69 | – | 9 E−06 | – | – | 3 E + 05 | – | /ET/ |
| As-70 | – | 2 E−06 | – | – | 8 E + 04 | – | /ET/ |
| As-71 | – | 1 E−06 | – | – | 4 E + 04 | – | /St/ |
| As-72 | – | 4 E−07 | – | – | 1 E + 04 | – | /St/ |
| As-73 | – | 8 E−07 | – | – | 3 E + 04 | – | /St/ |
| As-74 | – | 3 E−07 | – | – | 1 E + 04 | – | /St/ |
| As-76 | – | 6 E−07 | – | – | 2 E + 04 | – | /St/ |
| As-77 | – | 1 E−06 | – | – | 4 E + 04 | – | /St/ |
| As-78 | – | 3 E−06 | – | – | 1 E + 05 | – | /ET/ |
| Se-70 | 2 E−06 | 2 E−06 | – | 1 E + 05 | 9 E + 04 | – | ET/ET/ |
| Se-73m | 1 E−05 | 1 E−05 | – | 5 E + 05 | 4 E + 05 | – | ET/ET/ |
| Se-73 | 1 E−06 | 1 E−06 | – | 6 E + 04 | 5 E + 04 | – | ET/ET/ |
| Se-75 | 4 E−07 | 3 E−07 | – | 1 E + 04 | 1 E + 04 | – | St/St/ |
| Se-79 | 3 E−07 | 1 E−07 | – | 1 E + 04 | 6 E + 03 | – | K/St/ |
| Se-81m | 1 E−05 | 6 E−06 | – | 3 E + 05 | 2 E + 05 | – | ET/ET/ |
| Se-81 | 1 E−05 | 1 E−05 | – | 6 E + 05 | 4 E + 05 | – | ET/ET/ |
| Se-83 | 6 E−06 | 5 E−06 | – | 2 E + 05 | 1 E + 05 | – | ET/ET/ |
| Br-74m | 3 E−06 | 2 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| Br-74 | 4 E−06 | 4 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| Br-75 | 4 E−06 | 3 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| Br-76 | 5 E−07 | 5 E−07 | – | 2 E + 04 | 2 E + 04 | – | ET/ET/ |
| Br-77 | 2 E−06 | 2 E−06 | – | 7 E + 04 | 7 E + 04 | – | ET/ET/ |
| Br-80m | 6 E−06 | 5 E−06 | – | 2 E + 05 | 2 E + 05 | – | ET/St/ |
| Br-80 | 3 E−05 | 2 E−05 | – | 1 E + 06 | 7 E + 05 | – | ET/ET/ |
| Br-82 | 3 E−07 | 3 E−07 | – | 1 E + 04 | 1 E + 04 | – | ET/ET/ |
| Br-83 | 9 E−06 | 6 E−06 | – | 3 E + 05 | 2 E + 05 | – | ET/ET/ |
| Br-84 | 7 E−06 | 5 E−06 | – | 2 E + 05 | 2 E + 05 | – | ET/ET/ |
| Rb-79 | 8 E−06 | – | – | 2 E + 05 | – | – | ET/ / |
| Rb-81m | 1 E−05 | – | – | 6 E + 05 | – | – | ET/ / |
| Rb-81 | 2 E−06 | – | – | 1 E + 05 | – | – | ET/ / |
| Rb-82m | 8 E−07 | – | – | 3 E + 04 | – | – | ET/ / |
| Rb-83 | 5 E−07 | – | – | 2 E + 04 | – | – | St/ / |
| Rb-84 | 3 E−07 | – | – | 1 E + 04 | – | – | St/ / |
| Rb-86 | 4 E−07 | – | – | 1 E + 04 | – | – | St/ / |
| Rb-87 | 7 E−07 | – | – | 2 E + 04 | – | – | St/ / |
| Rb-88 | 1 E−05 | – | – | 5 E + 05 | – | – | ET/ / |
| Rb-89 | 1 E−05 | – | – | 3 E + 05 | – | – | ET/ / |
| Sr-80 | 3 E−06 | – | 2 E−06 | 1 E + 05 | – | 9 E + 04 | ET/ /St |
| Sr-81 | 7 E−06 | – | 5 E−06 | 2 E + 05 | – | 2 E + 05 | ET/ /ET |
| Sr-82 | 1 E−07 | – | 7 E−08 | 6 E + 03 | – | 2 E + 03 | St/ /St |
| Sr-83 | 1 E−06 | – | 9 E−07 | 3 E + 04 | – | 3 E + 04 | ET/ /ET |
| Sr-85m | 4 E−05 | – | 3 E−05 | 1 E + 06 | – | 1 E + 06 | ET/ /ET |
| Sr-85 | 1 E−06 | – | 8 E−07 | 3 E + 04 | – | 3 E + 04 | St/ /St |
| Sr-87m | 1 E−05 | – | 9 E−06 | 4 E + 05 | – | 3 E + 05 | ET/ /ET |
| Sr-89 | 4 E−07 | – | 1 E−07 | 1 E + 04 | – | 3 E + 03 | St/ /St |
| Sr-90 | 1 E−08 | – | 7 E−09 | 4 E + 02 | – | 2 E + 02 | BS/ /St |
| Sr-91 | 1 E−06 | – | 9 E−07 | 5 E + 04 | – | 3 E + 04 | ET/ /St |
| Sr-92 | 2 E−06 | – | 1 E−06 | 8 E + 04 | – | 6 E + 04 | ET/ /St |
| Y-86m | – | 7 E−06 | 6 E−06 | – | 2 E + 05 | 2 E + 05 | /ET/ET |
| Y-86 | – | 4 E−07 | 4 E−07 | – | 1 E + 04 | 1 E + 04 | /ET/ET |
| Y-87 | – | 9 E−07 | 8 E−07 | – | 3 E + 04 | 3 E + 04 | /ET/ET |
| Y-88 | – | 1 E−07 | 1 E−07 | – | 6 E + 03 | 6 E + 03 | /St/St |
| Y-90m | – | 4 E−06 | 4 E−06 | – | 1 E + 05 | 1 E + 05 | /St/St |
| Y-90 | – | 3 E−07 | 3 E−07 | – | 1 E + 04 | 1 E + 04 | /St/St |
| Y-91m | – | 2 E−05 | 2 E−05 | – | 7 E + 05 | 7 E + 05 | /ET/ET |
| Y-91 | – | 1 E−07 | 9 E−08 | – | 4 E + 03 | 3 E + 03 | /St/St |
| Y-92 | – | 2 E−06 | 2 E−06 | – | 7 E + 04 | 7 E + 04 | /St/St |
| Y-93 | – | 9 E−07 | 9 E−07 | – | 3 E + 04 | 3 E + 04 | /St/St |
| Y-94 | – | 8 E−06 | 8 E−06 | – | 3 E + 05 | 3 E + 05 | /ET/ET |
| Y-95 | – | 1 E−05 | 1 E−05 | – | 4 E + 05 | 4 E + 05 | /ET/ET |
| Zr-86 | 5 E−07 | 5 E−07 | 5 E−07 | 2 E + 04 | 2 E + 04 | 2 E + 04 | ET/ET/ET |
| Zr-88 | 1 E−07 | 3 E−07 | 3 E−07 | 5 E + 03 | 1 E + 04 | 1 E + 04 | St/St/St |
| Zr-89 | 6 E−07 | 6 E−07 | 6 E−07 | 2 E + 04 | 2 E + 04 | 2 E + 04 | ET/ET/ET |
| Zr-93 | 3 E−09 | 1 E−08 | 1 E−07 | 1 E + 02 | 6 E + 02 | 5 E + 03 | BS/BS/BS |
| Zr-95 | 9 E−08 | 1 E−07 | 1 E−07 | 3 E + 03 | 5 E + 03 | 4 E + 03 | BS/St/St |
| Zr-97 | 7 E−07 | 4 E−07 | 4 E−07 | 2 E + 04 | 1 E + 04 | 1 E + 04 | ET/St/St |
| Nb-88 | – | 5 E−06 | 5 E−06 | – | 1 E + 05 | 1 E + 05 | /ET/ET |

| Radionuclide | Absorption type [3] | | | Absorption type [3] | | | Stochastic or organ or tissue [1] |
|---|---|---|---|---|---|---|---|
| | μCi/mL | | | Bq/m [3] | | | |
| | F | M | S | F | M | S | (F/M/S) |
| Nb-89 (66 min) | – | 3 E−06 | 3 E−06 | – | 1 E + 05 | 1 E + 05 | /ET/ET |
| Nb-89 (122 min). | – | 2 E−06 | 2 E−06 | – | 1 E + 05 | 1 E + 05 | /ET/ET |
| Nb-90 | – | 3 E−07 | 3 E−07 | – | 1 E + 04 | 1 E + 04 | /ET/ET |
| Nb-93m | – | 1 E−06 | 6 E−07 | – | 7 E + 04 | 2 E + 04 | /St/St |
| Nb-94 | – | 7 E−08 | 2 E−08 | – | 2 E + 03 | 8 E + 02 | /St/St |
| Nb-95m | – | 7 E−07 | 6 E−07 | – | 2 E + 04 | 2 E + 04 | /St/St |
| Nb-95 | – | 4 E−07 | 4 E−07 | – | 1 E + 04 | 1 E + 04 | /St/St |
| Nb-96 | – | 4 E−07 | 4 E−07 | – | 1 E + 04 | 1 E + 04 | /ET/ET |
| Nb-97 | – | 5 E−06 | 5 E−06 | – | 1 E + 05 | 1 E + 05 | /ET/ET |
| Nb-98 | – | 3 E−06 | 3 E−06 | – | 1 E + 05 | 1 E + 05 | /ET/ET |
| Mo-90 | 8 E−07 | – | 7 E−07 | 3 E + 04 | – | 2 E + 04 | ET/ /ET |
| Mo-93m | 1 E−06 | – | 1 E−06 | 3 E + 04 | – | 3 E + 04 | ET/ /ET |
| Mo-93 | 2 E−07 | – | 4 E−07 | 7 E + 03 | – | 1 E + 04 | BS/ /St |
| Mo-99 | 1 E−06 | – | 5 E−07 | 5 E + 04 | – | 1 E + 04 | E/ /St |
| Mo-101 | 8 E−06 | – | 6 E−06 | 3 E + 05 | – | 2 E + 05 | ET/ /ET |
| Tc-93m | 8 E−06 | 7 E−06 | – | 3 E + 05 | 2 E + 05 | – | ET/ET/ |
| Tc-93 | 3 E−06 | 3 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| Tc-94m | 5 E−06 | 4 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| Tc-94 | 1 E−06 | 1 E−06 | – | 4 E + 04 | 3 E + 04 | – | ET/ET/ |
| Tc-95m | 8 E−07 | 6 E−07 | – | 3 E + 04 | 2 E + 04 | – | ET/St/ |
| Tc-95 | 1 E−06 | 1 E−06 | – | 5 E + 04 | 5 E + 04 | – | ET/ET/ |
| Tc-96m | 2 E−05 | 2 E−05 | – | 1 E + 06 | 1 E + 06 | – | ET/ET/ |
| Tc-96 | 3 E−07 | 3 E−07 | – | 1 E + 04 | 1 E + 04 | – | ET/ET/ |
| Tc-97m | 1 E−06 | 2 E−07 | – | 5 E + 04 | 7 E + 03 | – | St/St/ |
| Tc-97 | 4 E−06 | 3 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/St/ |
| Tc-98 | 3 E−07 | 9 E−08 | – | 1 E + 04 | 3 E + 03 | – | St/St/ |
| Tc-99m | 1 E−05 | 1 E−05 | – | 5 E + 05 | 4 E + 05 | – | ET/ET/ |
| Tc-99 | 1 E−06 | 1 E−07 | – | 5 E + 04 | 6 E + 03 | – | St/St/ |
| Tc-101 | 1 E−05 | 1 E−05 | – | 6 E + 05 | 4 E + 05 | – | ET/ET/ |
| Tc-104 | 9 E−06 | 7 E−06 | – | 3 E + 05 | 2 E + 05 | – | ET/ET/ |
| Ru-94 | 5 E−06 | 5 E−06 | 5 E−06 | 2 E + 05 | 1 E + 05 | 1 E + 05 | ET/ET/ET |
| Ru-97 | 2 E−06 | 2 E−06 | 2 E−06 | 8 E + 04 | 8 E + 04 | 8 E + 04 | ET/ET/ET |
| Ru-103 | 8 E−07 | 2 E−07 | 2 E−07 | 3 E + 04 | 1 E + 04 | 9 E + 03 | St/St/St |
| Ru-105 | 2 E−06 | 2 E−06 | 2 E−06 | 9 E + 04 | 8 E + 04 | 8 E + 04 | ET/ET/ET |
| Ru-106 | 5 E−08 | 3 E−08 | 1 E−08 | 2 E + 03 | 1 E + 03 | 5 E + 02 | St/St/St |
| Rh-99m | 3 E−06 | 3 E−06 | 3 E−06 | 1 E + 05 | 1 E + 05 | 1 E + 05 | ET/ET/ET |
| Rh-99 | 8 E−07 | 6 E−07 | 6 E−07 | 3 E + 04 | 2 E + 04 | 2 E + 04 | ET/St/St |
| Rh-100 | 5 E−07 | 5 E−07 | 5 E−07 | 1 E + 04 | 1 E + 04 | 1 E + 04 | ET/ET/ET |
| Rh-101m | 1 E−06 | 1 E−06 | 1 E−06 | 6 E + 04 | 6 E + 04 | 6 E + 04 | ET/ET/ET |
| Rh-101 | 3 E−07 | 3 E−07 | 1 E−07 | 1 E + 04 | 1 E + 04 | 6 E + 03 | St/St/St |
| Rh-102m | 2 E−07 | 2 E−07 | 1 E−07 | 1 E + 04 | 7 E + 03 | 4 E + 03 | St/St/St |
| Rh-102 | 6 E−08 | 1 E−07 | 6 E−08 | 2 E + 03 | 4 E + 03 | 2 E + 03 | St/St/St |
| Rh-103m | 4 E−04 | 2 E−04 | 2 E−04 | 1 E + 07 | 8 E + 06 | 8 E + 06 | St/St/St |
| Rh-105 | 3 E−06 | 1 E−06 | 1 E−06 | 1 E + 05 | 5 E + 04 | 4 E + 04 | ET/St/St |
| Rh-106m | 1 E−06 | 1 E−06 | 1 E−06 | 6 E + 04 | 5 E + 04 | 5 E + 04 | ET/ET/ET |
| Rh-107 | 1 E−05 | 9 E−06 | 9 E−06 | 5 E + 05 | 3 E + 05 | 3 E + 05 | ET/ET/ET |
| Pd-100 | 5 E−07 | 5 E−07 | 5 E−07 | 2 E + 04 | 2 E + 04 | 2 E + 04 | ET/ET/ET |
| Pd-101 | 3 E−06 | 3 E−06 | 3 E−06 | 1 E + 05 | 1 E + 05 | 1 E + 05 | ET/ET/ET |
| Pd-103 | 4 E−06 | 1 E−06 | 1 E−06 | 1 E + 05 | 6 E + 04 | 7 E + 04 | E/St/St |
| Pd-107 | 1 E−05 | 1 E−05 | 1 E−06 | 5 E + 05 | 4 E + 05 | 7 E + 04 | K/St/St |
| Pd-109 | 2 E−06 | 1 E−06 | 1 E−06 | 9 E + 04 | 4 E + 04 | 4 E + 04 | St/St/St |
| Ag-102 | 9 E−06 | 7 E−06 | 7 E−06 | 3 E + 05 | 2 E + 05 | 2 E + 05 | ET/ET/ET |
| Ag-103 | 8 E−06 | 7 E−06 | 7 E−06 | 3 E + 05 | 2 E + 05 | 2 E + 05 | ET/ET/ET |
| Ag-104m | 8 E−06 | 6 E−06 | 6 E−06 | 2 E + 05 | 2 E + 05 | 2 E + 05 | ET/ET/ET |
| Ag-104 | 3 E−06 | 3 E−06 | 3 E−06 | 1 E + 05 | 1 E + 05 | 1 E + 05 | ET/ET/ET |
| Ag-105 | 7 E−07 | 8 E−07 | 7 E−07 | 2 E + 04 | 2 E + 04 | 2 E + 04 | St/St/St |
| Ag-106m | 2 E−07 | 2 E−07 | 2 E−07 | 9 E + 03 | 9 E + 03 | 9 E + 03 | ET/ET/ET |
| Ag-106 | 1 E−05 | 1 E−05 | 1 E−05 | 5 E + 05 | 4 E + 05 | 4 E + 05 | ET/ET/ET |
| Ag-108m | 7 E−08 | 1 E−07 | 2 E−08 | 2 E + 03 | 4 E + 03 | 1 E + 03 | St/St/St |
| Ag-110m | 8 E−08 | 9 E−08 | 7 E−08 | 3 E + 03 | 3 E + 03 | 2 E + 03 | St/St/St |
| Ag-111 | 9 E−07 | 3 E−07 | 3 E−07 | 3 E + 04 | 1 E + 04 | 1 E + 04 | St/St/St |
| Ag-112 | 4 E−06 | 2 E−06 | 2 E−06 | 1 E + 05 | 8 E + 04 | 8 E + 04 | E/St/St |
| Ag-115 | 1 E−05 | 8 E−06 | 8 E−06 | 4 E + 05 | 3 E + 05 | 3 E + 05 | ET/ET/ET |
| Cd-104 | 4 E−06 | 4 E−06 | 4 E−06 | 1 E + 05 | 1 E + 05 | 1 E + 05 | ET/ET/ET |
| Cd-107 | 5 E−06 | 5 E−06 | 4 E−06 | 2 E + 05 | 1 E + 05 | 1 E + 05 | ET/ET/ET |
| Cd-109 | 2 E−08 | 9 E−08 | 1 E−07 | 9 E + 02 | 3 E + 03 | 4 E + 03 | K/K/St |
| Cd-113m | 1 E−09 | 6 E−09 | 1 E−08 | 6 E + 01 | 2 E + 02 | 6 E + 02 | K/K/K |
| Cd-113 | 1 E−09 | 5 E−09 | 1 E−08 | 5 E + 01 | 2 E + 02 | 5 E + 02 | K/K/K |
| Cd-115m | 3 E−08 | 1 E−07 | 1 E−07 | 1 E + 03 | 3 E + 03 | 3 E + 03 | K/St/St |
| Cd-115 | 9 E−07 | 4 E−07 | 4 E−07 | 3 E + 04 | 1 E + 04 | 1 E + 04 | K/St/St |

| Radionuclide | Absorption type [3] | | | Absorption type [3] | | | Stochastic or organ or tissue [1] |
|---|---|---|---|---|---|---|---|
| | μCi/mL | | | Bq/m [3] | | | |
| | F | M | S | F | M | S | (F/M/S) |
| Cd-117m | 1 E−06 | 1 E−06 | 1 E−06 | 4 E + 04 | 4 E + 04 | 4 E + 04 | ET/ET/ET |
| Cd-117 | 2 E−06 | 2 E−06 | 2 E−06 | 8 E + 04 | 7 E + 04 | 7 E + 04 | ET/ET/ET |
| In-109 | 4 E−06 | 4 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| In-110 (69 min) | 5 E−06 | 4 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| In-110 (5 h) | 9 E−07 | 9 E−07 | – | 3 E + 04 | 3 E + 04 | – | ET/ET/ |
| In-111 | 1 E−06 | 1 E−06 | – | 5 E + 04 | 5 E + 04 | – | ET/ET/ |
| In-112 | 2 E−05 | 1 E−05 | – | 9 E + 05 | 6 E + 05 | – | ET/ET/ |
| In-113m | 1 E−05 | 1 E−05 | – | 4 E + 05 | 3 E + 05 | – | ET/ET/ |
| In-114m | 5 E−08 | 9 E−08 | – | 1 E + 03 | 3 E + 03 | – | St/St/ |
| In-115m | 6 E−06 | 5 E−06 | – | 2 E + 05 | 2 E + 05 | – | ET/ET/ |
| In-115 | 1 E−09 | 5 E−09 | – | 4 E + 01 | 1 E + 02 | – | St/St/ |
| In-116m | 4 E−06 | 3 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| In-117m | 5 E−06 | 4 E−06 | – | 2 E + 05 | 1 E + 05 | – | ET/ET/ |
| In-117 | 7 E−06 | 5 E−06 | – | 2 E + 05 | 2 E + 05 | – | ET/ET/ |
| In-119m | 1 E−05 | 1 E−05 | – | 6 E + 05 | 4 E + 05 | – | ET/ET/ |
| Sn-110 | 1 E−06 | 1 E−06 | – | 6 E + 04 | 6 E + 04 | – | ET/ET/ |
| Sn-111 | 1 E−05 | 1 E−05 | – | 6 E + 05 | 5 E + 05 | – | ET/ET/ |
| Sn-113 | 7 E−07 | 2 E−07 | – | 2 E + 04 | 1 E + 04 | – | St/St/ |
| Sn-117m | 8 E−07 | 2 E−07 | – | 3 E + 04 | 9 E + 03 | – | BS/St/ |
| Sn-119m | 1 E−06 | 3 E−07 | – | 5 E + 04 | 1 E + 04 | – | St/St/ |
| Sn-121m | 5 E−07 | 1 E−07 | – | 2 E + 04 | 6 E + 03 | – | St/St/ |
| Sn-121 | 4 E−06 | 2 E−06 | – | 1 E + 05 | 7 E + 04 | – | ET/St/ |
| Sn-123m | 1 E−05 | 7 E−06 | – | 4 E + 05 | 2 E + 05 | – | ET/ET/ |
| Sn-123 | 3 E−07 | 1 E−07 | – | 1 E + 04 | 3 E + 03 | – | St/St/ |
| Sn-125 | 4 E−07 | 2 E−07 | – | 1 E + 04 | 7 E + 03 | – | St/St/ |
| Sn-126 | 4 E−08 | 3 E−08 | – | 1 E + 03 | 1 E + 03 | – | St/St/ |
| Sn-127 | 2 E−06 | 2 E−06 | – | 9 E + 04 | 7 E + 04 | – | ET/ET/ |
| Sn-128 | 2 E−06 | 2 E−06 | – | 1 E + 05 | 8 E + 04 | – | ET/ET/ |
| Sb-115 | 1 E−05 | 1 E−05 | – | 5 E + 05 | 4 E + 05 | – | ET/ET/ |
| Sb-116m | 3 E−06 | 2 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| Sb-116 | 1 E−05 | 1 E−05 | – | 4 E + 05 | 3 E + 05 | – | ET/ET/ |
| Sb-117 | 1 E−05 | 1 E−05 | – | 4 E + 05 | 3 E + 05 | – | ET/ET/ |
| Sb-118m | 1 E−06 | 1 E−06 | – | 4 E + 04 | 4 E + 04 | – | ET/ET/ |
| Sb-119 | 6 E−06 | 6 E−06 | – | 2 E + 05 | 2 E + 05 | – | ET/ET/ |
| Sb-120 (16 min). | 2 E−05 | 2 E−05 | – | 1 E + 06 | 7 E + 05 | – | ET/ET/ |
| Sb-120 (6 d) | 3 E−07 | 3 E−07 | – | 1 E + 04 | 1 E + 04 | – | ET/ET/ |
| Sb-122 | 8 E−07 | 4 E−07 | – | 3 E + 04 | 1 E + 04 | – | St/St/ |
| Sb-124m | 4 E−05 | 3 E−05 | – | 1 E + 06 | 1 E + 06 | – | ET/ET/ |
| Sb-124 | 2 E−07 | 1 E−07 | – | 1 E + 04 | 4 E + 03 | – | St/St/ |
| Sb-125 | 2 E−07 | 1 E−07 | – | 7 E + 03 | 6 E + 03 | – | BS/St/ |
| Sb-126m | 1 E−05 | 7 E−06 | – | 3 E + 05 | 2 E + 05 | – | ET/ET/ |
| Sb-126 | 2 E−07 | 1 E−07 | – | 9 E + 03 | 6 E + 03 | – | ET/St/ |
| Sb-127 | 7 E−07 | 3 E−07 | – | 2 E + 04 | 1 E + 04 | – | E/St/ |
| Sb-128 (9 h) | 5 E−07 | 5 E−07 | – | 2 E + 04 | 2 E + 04 | – | ET/ET/ |
| Sb-128 (10 min). | 1 E−05 | 9 E−06 | – | 4 E + 05 | 3 E + 05 | – | ET/ET/ |
| Sb-129 | 1 E−06 | 1 E−06 | – | 6 E + 04 | 5 E + 04 | – | ET/ET/ |
| Sb-130 | 3 E−06 | 2 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| Sb-131 | 6 E−06 | 4 E−06 | – | 2 E + 05 | 1 E + 05 | – | ET/ET/ |
| Te-116 (Vapor) | – | 6 E−06 | – | – | 2 E + 05 | – | /St / |
| Te-116 | 2 E−06 | 2 E−06 | – | 8 E + 04 | 7 E + 04 | – | ET/ET/ |
| Te-121m (Vapor). | – | 4 E−08 | – | – | 1 E + 03 | – | /BS/ |
| Te-121m | 1 E−07 | 1 E−07 | – | 4 E + 03 | 5 E + 03 | – | BS/St/ |
| Te-121 (Vapor) | – | 1 E−06 | – | – | 4 E + 04 | – | /St / |
| Te-121 | 1 E−06 | 1 E−06 | – | 3 E + 04 | 3 E + 04 | – | ET/ET/ |
| Te-123m (Vapor). | – | 5 E−08 | – | – | 2 E + 03 | – | /BS/ |
| Te-123m | 1 E−07 | 1 E−07 | – | 4 E + 03 | 6 E + 03 | – | BS/St/ |
| Te-123 (Vapor) | – | 1 E−08 | – | – | 4 E + 02 | – | /BS/ |
| Te-123 | 2 E−08 | 5 E−08 | – | 1 E + 03 | 1 E + 03 | – | BS/BS/ |
| Te-125m (Vapor). | – | 1 E−07 | – | – | 3 E + 03 | – | /BS/ |
| Te-125m | 2 E−07 | 1 E−07 | – | 9 E + 03 | 7 E + 03 | – | BS/St/ |
| Te-127m (Vapor). | – | 6 E−08 | – | – | 2 E + 03 | – | /BS/ |
| Te-127m | 1 E−07 | 9 E−08 | – | 5 E + 03 | 3 E + 03 | – | BS/St/ |
| Te-127 (Vapor) | – | 7 E−06 | – | – | 2 E + 05 | – | /St/ |
| Te-127 | 5 E−06 | 3 E−06 | – | 2 E + 05 | 1 E + 05 | – | ET/St/ |
| Te-129m (Vapor). | – | 1 E−07 | – | – | 5 E + 03 | – | /St/ |

| Radionuclide | Absorption type [3] | | | Absorption type [3] | | | Stochastic or organ or tissue [1] |
|---|---|---|---|---|---|---|---|
| | μCi/mL | | | Bq/m [3] | | | |
| | F | M | S | F | M | S | (F/M/S) |
| Te-129m | 3 E−07 | 1 E−07 | – | 1 E + 04 | 3 E + 03 | – | St/St/ |
| Te-129 (Vapor) | – | 1 E−05 | – | – | 5 E + 05 | – | /St/ |
| Te-129 | 1 E−05 | 7 E−06 | – | 4 E + 05 | 2 E + 05 | – | ET/ET/ |
| Te-131m (Vapor). | – | 1 E−07 | – | – | 5 E + 03 | – | /T/ |
| Te-131m | 3 E−07 | 3 E−07 | – | 1 E + 04 | 1 E + 04 | – | T/St/ |
| Te-131 (Vapor) | – | 6 E−06 | – | – | 2 E + 05 | – | /T/ |
| Te-131 | 1 E−05 | 7 E−06 | – | 4 E + 05 | 2 E + 05 | – | ET/ET/ |
| Te-132 (Vapor) | – | 7 E−08 | – | – | 2 E + 03 | – | /T/ |
| Te-132 | 1 E−07 | 1 E−07 | – | 6 E + 03 | 6 E + 03 | – | T/St/ |
| Te-133m (Vapor). | – | 1 E−06 | – | – | 6 E + 04 | – | /T/ |
| Te-133m | 3 E−06 | 2 E−06 | – | 1 E + 05 | 1 E + 05 | – | T/ET/ |
| Te-133 (Vapor) | – | 7 E−06 | – | – | 2 E + 05 | – | /T/ |
| Te-133 | 1 E−05 | 9 E−06 | – | 4 E + 05 | 3 E + 05 | – | ET/ET/ |
| Te-134 (Vapor) | – | 6 E−06 | – | – | 2 E + 05 | – | /St/ |
| Te-134 | 3 E−06 | 2 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| I-120m (Methyl). | 4 E−06 | – | – | 1 E + 05 | – | – | T/ / |
| I-120m (Vapor) | – | 3 E−06 | – | – | 1 E + 05 | – | /St / |
| I-120m | 2 E−06 | – | – | 8 E + 04 | – | – | ET/ / |
| I-120 (Methyl) | 1 E−06 | – | – | 6 E + 04 | – | – | T/ / |
| I-120 (Vapor) | – | 1 E−06 | – | – | 5 E + 04 | – | /T/ |
| I-120 | 2 E−06 | – | – | 1 E + 05 | – | – | E/ / |
| I-121 (Methyl) | 5 E−06 | – | – | 2 E + 05 | – | – | T/ / |
| I-121 (Vapor) | – | 4 E−06 | – | – | 1 E + 05 | – | /T/ |
| I-121 | 8 E−06 | – | – | 3 E + 05 | – | – | T/ / |
| I-123 (Methyl) | 1 E−06 | – | – | 7 E + 04 | – | – | T/ / |
| I-123 (Vapor) | – | 1 E−06 | – | – | 5 E + 04 | – | /T/ |
| I-123 | 2 E−06 | – | – | 1 E + 05 | – | – | T/ / |
| I-124 (Methyl) | 3 E−08 | – | – | 1 E + 03 | – | – | T/ / |
| I-124 (Vapor) | – | 2 E−08 | – | – | 9 E + 02 | – | /T/ |
| I-124 | 4 E−08 | – | – | 1 E + 03 | – | – | T/ / |
| I-125 (Methyl) | 2 E−08 | – | – | 9 E + 02 | – | – | T/ / |
| I-125 (Vapor) | – | 2 E−08 | – | – | 7 E + 02 | – | /T/ |
| I-125 | 3 E−08 | – | – | 1 E + 03 | – | – | T/ / |
| I-126 (Methyl) | 1 E−08 | – | – | 5 E + 02 | – | – | T/ / |
| I-126 (Vapor) | – | 1 E−08 | – | – | 4 E + 02 | – | /T/ |
| I-126 | 2 E−08 | – | – | 7 E + 02 | – | – | T/ / |
| I-128 (Methyl) | 3 E−05 | – | – | 1 E + 06 | – | – | T/ / |
| I-128 (Vapor) | – | 8 E−06 | – | – | 3 E + 05 | – | /St/ |
| I-128 | 1 E−05 | – | – | 6 E + 05 | – | – | ET/ / |
| I-129 (Methyl) | 3 E−09 | – | – | 1 E + 02 | – | – | T/ / |
| I-129 (Vapor) | – | 2 E−09 | – | – | 1 E + 02 | – | /T/ |
| I-129 | 5 E−09 | – | – | 2 E + 02 | – | – | T/ / |
| I-130 (Methyl) | 2 E−07 | – | – | 7 E + 03 | – | – | T/ / |
| I-130 (Vapor) | – | 1 E−07 | – | – | 6 E + 03 | – | /T/ |
| I-130 | 3 E−07 | – | – | 1 E + 04 | – | – | T/ / |
| I-131 (Methyl) | 1 E−08 | – | – | 6 E + 02 | – | – | T/ / |
| I-131 (Vapor) | – | 1 E−08 | – | – | 5 E + 02 | – | /T/ |
| I-131 | 2 E−08 | – | – | 9 E + 02 | – | – | T/ / |
| I-132m (Methyl). | 1 E−06 | – | – | 7 E + 04 | – | – | T/ / |
| I-132m (Vapor) | – | 1 E−06 | – | – | 6 E + 04 | – | /T/ |
| I-132m | 3 E−06 | – | – | 1 E + 05 | – | – | T/ / |
| I-132 (Methyl) | 1 E−06 | – | – | 6 E + 04 | – | – | T/ / |
| I-132 (Vapor) | – | 1 E−06 | – | – | 5 E + 04 | – | /T/ |
| I-132 | 2 E−06 | – | – | 7 E + 04 | – | – | T/ / |
| I-133 (Methyl) | 9 E−08 | – | – | 3 E + 03 | – | – | T/ / |
| I-133 (Vapor) | – | 7 E−08 | – | – | 2 E + 03 | – | /T/ |
| I-133 | 1 E−07 | – | – | 5 E + 03 | – | – | T/ / |
| I-134 (Methyl) | 8 E−06 | – | – | 2 E + 05 | – | – | T/ / |
| I-134 (Vapor) | – | 3 E−06 | – | – | 1 E + 05 | – | /St/ |
| I-134 | 3 E−06 | – | – | 1 E + 05 | – | – | ET/ / |
| I-135 (Methyl) | 4 E−07 | – | – | 1 E + 04 | – | – | T/ / |
| I-135 (Vapor) | – | 3 E−07 | – | – | 1 E + 04 | – | /T/ |
| I-135 | 6 E−07 | – | – | 2 E + 04 | – | – | T/ / |
| Cs-125 | 1 E−05 | – | – | 4 E + 05 | – | – | ET/ / |
| Cs-127 | 4 E−06 | – | – | 1 E + 05 | – | – | ET/ / |
| Cs-129 | 2 E−06 | – | – | 9 E + 04 | – | – | ET/ / |
| Cs-130 | 1 E−05 | – | – | 6 E + 05 | – | – | ET/ / |

| Radionuclide | Absorption type [3] | | | Absorption type [3] | | | Stochastic or organ or tissue [1] |
|---|---|---|---|---|---|---|---|
| | μCi/mL | | | Bq/m [3] | | | |
| | F | M | S | F | M | S | (F/M/S) |
| Cs-131 | 7 E−06 | – | – | 2 E + 05 | – | – | ET/ / |
| Cs-132 | 9 E−07 | – | – | 3 E + 04 | – | – | ET/ / |
| Cs-134m | 8 E−06 | – | – | 2 E + 05 | – | – | ET/ / |
| Cs-134 | 5 E−08 | – | – | 2 E + 03 | – | – | St/ / |
| Cs-135m | 8 E−06 | – | – | 2 E + 05 | – | – | ET/ / |
| Cs-135 | 5 E−07 | – | – | 2 E + 04 | – | – | St/ / |
| Cs-136 | 2 E−07 | – | – | 1 E + 04 | – | – | E/ / |
| Cs-137 | 8 E−08 | – | – | 3 E + 03 | – | – | St/ / |
| Cs-138 | 5 E−06 | – | – | 2 E + 05 | – | – | ET/ / |
| Ba-126 | 4 E−06 | – | – | 1 E + 05 | – | – | ET/ / |
| Ba-128 | 4 E−07 | – | – | 1 E + 04 | – | – | St/ / |
| Ba-131m | 4 E−05 | – | – | 1 E + 06 | – | – | ET/ / |
| Ba-131 | 1 E−06 | – | – | 4 E + 04 | – | – | ET/ / |
| Ba-133m | 2 E−06 | – | – | 7 E + 04 | – | – | St/ / |
| Ba-133 | 3 E−07 | – | – | 1 E + 04 | – | – | St/ / |
| Ba-135m | 2 E−06 | – | – | 9 E + 04 | – | – | St/ / |
| Ba-139 | 1 E−05 | – | – | 3 E + 05 | – | – | St/ / |
| Ba-140 | 3 E−07 | – | – | 1 E + 04 | – | – | St/ / |
| Ba-141 | 1 E−05 | – | – | 4 E + 05 | – | – | ET/ / |
| Ba-142 | 9 E−06 | – | – | 3 E + 05 | – | – | ET/ / |
| La-131 | 1 E−05 | 8 E−06 | – | 4 E + 05 | 3 E + 05 | – | ET/ET/ |
| La-132 | 1 E−06 | 1 E−06 | – | 5 E + 04 | 5 E + 04 | – | ET/ET/ |
| La-135 | 1 E−05 | 1 E−05 | – | 4 E + 05 | 4 E + 05 | – | ET/ET/ |
| La-137 | 4 E−08 | 2 E−07 | – | 1 E + 03 | 8 E + 03 | – | L/L/ |
| La-138 | 3 E−09 | 1 E−08 | – | 1 E + 02 | 4 E + 02 | – | St/St/ |
| La-140 | 4 E−07 | 3 E−07 | – | 1 E + 04 | 1 E + 04 | – | ET/St/ |
| La-141 | 5 E−06 | 2 E−06 | – | 1 E + 05 | 9 E + 04 | – | St/St/ |
| La-142 | 2 E−06 | 2 E−06 | – | 9 E + 04 | 8 E + 04 | – | ET/ET/ |
| La-143 | 1 E−05 | 1 E−05 | – | 6 E + 05 | 4 E + 05 | – | ET/ET/ |
| Ce-134 | – | 3 E−07 | 3 E−07 | – | 1 E + 04 | 1 E + 04 | /St/St |
| Ce-135 | – | 5 E−07 | 5 E−07 | – | 2 E + 04 | 2 E + 04 | /ET/ET |
| Ce-137m | – | 1 E−06 | 9 E−07 | – | 3 E + 04 | 3 E + 04 | /St/St |
| Ce-137 | – | 1 E−05 | 1 E−05 | – | 7 E + 05 | 7 E + 05 | /ET/ET |
| Ce-139 | – | 4 E−07 | 4 E−07 | – | 1 E + 04 | 1 E + 04 | /St/St |
| Ce-141 | – | 2 E−07 | 1 E−07 | – | 7 E + 03 | 6 E + 03 | /St/St |
| Ce-143 | – | 5 E−07 | 5 E−07 | – | 2 E + 04 | 2 E + 04 | /St/St |
| Ce-144 | – | 2 E−08 | 1 E−08 | – | 9 E + 02 | 7 E + 02 | /St/St |
| Pr-136 | – | 1 E−05 | 1 E−05 | – | 3 E + 05 | 3 E + 05 | /ET/ET |
| Pr-137 | – | 9 E−06 | 9 E−06 | – | 3 E + 05 | 3 E + 05 | /ET/ET |
| Pr-138m | – | 2 E−06 | 2 E−06 | – | 7 E + 04 | 7 E + 04 | /ET/ET |
| Pr-139 | – | 1 E−05 | 1 E−05 | – | 5 E + 05 | 5 E + 05 | /ET/ET |
| Pr-142m | – | 6 E−05 | 5 E−05 | – | 2 E + 06 | 2 E + 06 | /St/St |
| Pr-142 | – | 8 E−07 | 7 E−07 | – | 2 E + 04 | 2 E + 04 | /St/St |
| Pr-143 | – | 2 E−07 | 2 E−07 | – | 1 E + 04 | 9 E + 03 | /St/St |
| Pr-144 | – | 1 E−05 | 1 E−05 | – | 4 E + 05 | 4 E + 05 | /ET/ET |
| Pr-145 | – | 2 E−06 | 2 E−06 | – | 8 E + 04 | 8 E + 04 | /St/St |
| Pr-147 | – | 9 E−06 | 9 E−06 | – | 3 E + 05 | 3 E + 05 | /ET/ET |
| Nd-136 | – | 4 E−06 | 4 E−06 | – | 1 E + 05 | 1 E + 05 | /ET/ET |
| Nd-138 | – | 1 E−06 | 1 E−06 | – | 5 E + 04 | 5 E + 04 | /St/St |
| Nd-139m | – | 1 E−06 | 1 E−06 | – | 5 E + 04 | 5 E + 04 | /ET/ET |
| Nd-139 | – | 1 E−05 | 1 E−05 | – | 6 E + 05 | 6 E + 05 | /ET/ET |
| Nd-141 | – | 3 E−05 | 3 E−05 | – | 1 E + 06 | 1 E + 06 | /ET/ET |
| Nd-147 | – | 2 E−07 | 2 E−07 | – | 1 E + 04 | 9 E + 03 | /St/St |
| Nd-149 | – | 4 E−06 | 4 E−06 | – | 1 E + 05 | 1 E + 05 | /ET/ET |
| Nd-151 | – | 9 E−06 | 9 E−06 | – | 3 E + 05 | 3 E + 05 | /ET/ET |
| Pm-141 | – | 1 E−05 | 1 E−05 | – | 4 E + 05 | 4 E + 05 | /ET/ET |
| Pm-143 | – | 5 E−07 | 6 E−07 | – | 2 E + 04 | 2 E + 04 | /St/St |
| Pm-144 | – | 1 E−07 | 1 E−07 | – | 3 E + 03 | 5 E + 03 | /St/St |
| Pm-145 | – | 1 E−07 | 4 E−07 | – | 5 E + 03 | 1 E + 04 | /BS/St |
| Pm-146 | – | 4 E−08 | 6 E−08 | – | 1 E + 03 | 2 E + 03 | /St/St |
| Pm-147 | – | 1 E−07 | 1 E−07 | – | 4 E + 03 | 6 E + 03 | /BS/St |
| Pm-148m | – | 1 E−07 | 1 E−07 | – | 5 E + 03 | 4 E + 03 | /St/St |
| Pm-148 | – | 2 E−07 | 2 E−07 | – | 9 E + 03 | 9 E + 03 | /St/St |
| Pm-149 | – | 7 E−07 | 6 E−07 | – | 2 E + 04 | 2 E + 04 | /St/St |
| Pm-150 | – | 2 E−06 | 2 E−06 | – | 8 E + 04 | 8 E + 04 | /ET/ET |
| Pm-151 | – | 9 E−07 | 8 E−07 | – | 3 E + 04 | 3 E + 04 | /St/St |
| Sm-141m | – | 5 E−06 | – | – | 2 E + 05 | – | /ET/ |
| Sm-141 | – | 1 E−05 | – | – | 4 E + 05 | – | /ET/ |
| Sm-142 | – | 4 E−06 | – | – | 1 E + 05 | – | /ET/ |
| Sm-145 | – | 4 E−07 | – | – | 1 E + 04 | – | /BS/ |
| Sm-146 | – | 2 E−11 | – | – | 1 E + 00 | – | /BS/ |

| Radionuclide | Absorption type [3] | | | Absorption type [3] | | | Stochastic or organ or tissue [1] |
|---|---|---|---|---|---|---|---|
| | μCi/mL | | | Bq/m [3] | | | |
| | F | M | S | F | M | S | (F/M/S) |
| Sm-147 | – | 2 E−11 | – | – | 1 E + 00 | – | /BS/ |
| Sm-151 | – | 7 E−08 | – | – | 2 E + 03 | – | /BS/ |
| Sm-153 | – | 8 E−07 | – | – | 3 E + 04 | – | /St/ |
| Sm-155 | – | 1 E−05 | – | – | 3 E + 05 | – | /ET/ |
| Sm-156 | – | 2 E−06 | – | – | 7 E + 04 | – | /St/ |
| Eu-145 | – | 5 E−07 | – | – | 2 E + 04 | – | /ET/ |
| Eu-146 | – | 3 E−07 | – | – | 1 E + 04 | – | /ET/ |
| Eu-147 | – | 5 E−07 | – | – | 2 E + 04 | – | /St/ |
| Eu-148 | – | 2 E−07 | – | – | 9 E + 03 | – | /St/ |
| Eu-149 | – | 2 E−06 | – | – | 9 E + 04 | – | /St/ |
| Eu-150 (12 h) | – | 2 E−06 | – | – | 7 E + 04 | – | /St/ |
| Eu-150 (34 yr) | – | 1 E−08 | – | – | 6 E + 02 | – | /St/ |
| Eu-152m | – | 1 E−06 | – | – | 6 E + 04 | – | /St/ |
| Eu-152 | – | 2 E−08 | – | – | 7 E + 02 | – | /St/ |
| Eu-154 | – | 1 E−08 | – | – | 5 E + 02 | – | /St/ |
| Eu-155 | – | 7 E−08 | – | – | 2 E + 03 | – | /BS/ |
| Eu-156 | – | 1 E−07 | – | – | 6 E + 03 | – | /St/ |
| Eu-157 | – | 1 E−06 | – | – | 4 E + 04 | – | /St/ |
| Eu-158 | – | 5 E−6 | – | – | 1 E + 05 | – | /ET/ |
| Gd-145 | 9 E−06 | 7 E−06 | – | 3 E + 05 | 2 E + 05 | – | ET/ET/ |
| Gd-146 | 1 E−07 | 1 E−07 | – | 4 E + 03 | 4 E + 03 | – | St/St/ |
| Gd-147 | 7 E−07 | 6 E−07 | – | 2 E + 04 | 2 E + 04 | – | ET/ET/ |
| Gd-148 | 5 E−12 | 2 E−11 | – | 2 E−01 | 9 E−01 | – | BS/BS/ |
| Gd-149 | 1 E−06 | 7 E−07 | – | 4 E + 04 | 2 E + 04 | – | St/St/ |
| Gd-151 | 2 E−07 | 8 E−07 | – | 9 E + 03 | 3 E + 04 | – | BS/St/ |
| Gd-152 | 7 E−12 | 3 E−11 | – | 2 E−01 | 1 E + 00 | – | BS/BS/ |
| Gd-153 | 9 E−08 | 4 E−07 | – | 3 E + 03 | 1 E + 04 | – | BS/St/ |
| Gd-159 | 3 E−06 | 1 E−06 | – | 1 E + 05 | 5 E + 04 | – | St/St/ |
| Tb-147 | – | 2 E−06 | – | – | 1 E + 05 | – | /ET/ |
| Tb-149 | – | 1 E−07 | – | – | 6 E + 03 | – | /St/ |
| Tb-150 | – | 2 E−06 | – | – | 8 E + 04 | – | /ET/ |
| Tb-151 | – | 1 E−06 | – | – | 4 E + 04 | – | /ET/ |
| Tb-153 | – | 2 E−06 | – | – | 8 E + 04 | – | /St/ |
| Tb-154 | – | 5 E−07 | – | – | 2 E + 04 | – | /ET/ |
| Tb-155 | – | 2 E−06 | – | – | 8 E + 04 | – | /St/ |
| Tb-156m (24 h) | – | 2 E−06 | – | – | 9 E + 04 | – | /St/ |
| Tb-156m (5 h) | – | 4 E−06 | – | – | 1 E + 05 | – | /St/ |
| Tb-156 | – | 4 E−07 | – | – | 1 E + 04 | – | /E/ |
| Tb-157 | – | 2 E−07 | – | – | 8 E + 03 | – | /BS/ |
| Tb-158 | – | 1 E−08 | – | – | 6 E + 02 | – | /BS/ |
| Tb-160 | – | 1 E−07 | – | – | 3 E + 03 | – | /St/ |
| Tb-161 | – | 4 E−07 | – | – | 1 E + 04 | – | /St/ |
| Dy-155 | – | 2 E−06 | – | – | 1 E + 05 | – | /ET/ |
| Dy-157 | – | 5 E−06 | – | – | 1 E + 05 | – | /ET/ |
| Dy-159 | – | 2 E−06 | – | – | 8 E + 04 | – | /BS/ |
| Dy-165 | – | 6 E−06 | – | – | 2 E + 05 | – | /ET/ |
| Dy-166 | – | 3 E−07 | – | – | 1 E + 04 | – | /St/ |
| Ho-155 | – | 1 E−05 | – | – | 4 E + 05 | – | /ET/ |
| Ho-157 | – | 2 E−05 | – | – | 1 E + 06 | – | /ET/ |
| Ho-159 | – | 2 E−05 | – | – | 9 E + 05 | – | /ET/ |
| Ho-161 | – | 3 E−05 | – | – | 1 E + 06 | – | /ET/ |
| Ho-162m | – | 9 E−06 | – | – | 3 E + 05 | – | /ET/ |
| Ho-162 | – | 5 E−05 | – | – | 2 E + 06 | – | /ET/ |
| Ho-164m | – | 3 E−05 | – | – | 1 E + 06 | – | /St/ |
| Ho-164 | – | 2 E−05 | – | – | 8 E + 05 | – | /ET/ |
| Ho-166m | – | 7 E−09 | – | – | 2 E + 02 | – | /St/ |
| Ho-166 | – | 6 E−07 | – | – | 2 E + 04 | – | /St/ |
| Ho-167 | – | 4 E−06 | – | – | 1 E + 05 | – | /ET/ |
| Er-161 | – | 3 E−06 | – | – | 1 E + 05 | – | /ET/ |
| Er-165 | – | 2 E−05 | – | – | 1 E + 06 | – | /ET/ |
| Er-169 | – | 6 E−07 | – | – | 2 E + 04 | – | /St/ |
| Er-171 | – | 1 E−06 | – | – | 6 E + 04 | – | /St/ |
| Er-172 | – | 4 E−07 | – | – | 1 E + 04 | – | /St/ |
| Tm-162 | – | 9 E−06 | – | – | 3E + 05 | – | /ET/ |
| Tm-166 | – | 1 E−06 | – | – | 4 E + 04 | – | /ET/ |
| Tm-167 | – | 5 E−07 | – | – | 2 E + 04 | – | /St/ |
| Tm-170 | – | 1 E−07 | – | – | 4 E + 03 | – | /St/ |
| Tm-171 | – | 2 E−07 | – | – | 9 E + 03 | – | /BS/ |
| Tm-172 | – | 4 E−07 | – | – | 1 E + 04 | – | /St/ |
| Tm-173 | – | 2 E−06 | – | – | 8 E + 04 | – | /St/ |
| Tm-175 | – | 8 E−06 | – | – | 2 E + 05 | – | /ET/ |

| Radionuclide | Absorption type [3] | | | Absorption type [3] | | | Stochastic or organ or tissue [1] |
|---|---|---|---|---|---|---|---|
| | μCi/mL | | | Bq/m [3] | | | |
| | F | M | S | F | M | S | (F/M/S) |
| Yb-162 | – | 1 E−05 | 1 E−05 | – | 5 E + 05 | 5 E + 05 | /ET/ET |
| Yb-166 | – | 6 E−07 | 5 E−07 | – | 2 E + 04 | 2 E + 04 | /St/St |
| Yb-167 | – | 3 E−05 | 3 E−05 | – | 1 E + 06 | 1 E + 06 | /ET/ET |
| Yb-169 | – | 2 E−07 | 2 E−07 | – | 9 E + 03 | 8 E + 03 | /St/St |
| Yb-175 | – | 8 E−07 | 8 E−07 | – | 3 E + 04 | 2 E + 04 | /St/St |
| Yb-177 | – | 6 E−06 | 5 E−06 | – | 2 E + 05 | 2 E + 05 | /ET/ET |
| Yb-178 | – | 5 E−06 | 5 E−06 | – | 1 E + 05 | 1 E + 05 | /ET/E |
| Lu-169 | – | 9 E−07 | 9 E−07 | – | 3 E + 04 | 3 E + 04 | /ET/ET |
| Lu-170 | – | 4 E−07 | 4 E−07 | – | 1 E + 04 | 1 E + 04 | /ET/ET |
| Lu-171 | – | 6 E−07 | 6 E−07 | – | 2 E + 04 | 2 E + 04 | /St/St |
| Lu-172 | – | 3 E−07 | 3 E−07 | – | 1 E + 04 | 1 E + 04 | /St/St |
| Lu-173 | – | 2 E−07 | 4 E−07 | – | 8 E + 03 | 1 E + 04 | /BS/St |
| Lu-174m | – | 2 E−07 | 2 E−07 | – | 7 E + 03 | 8 E + 03 | /BS/St |
| Lu-174 | – | 9 E−08 | 2 E−07 | – | 3 E + 03 | 8 E + 03 | /BS/St |
| Lu-176m | – | 3 E−06 | 3 E−06 | – | 1 E + 05 | 1 E + 05 | /St/St |
| Lu-176 | – | 3 E−09 | 1 E−08 | – | 1 E + 02 | 6 E + 02 | /BS/St |
| Lu-177m | – | 5 E−08 | 4 E−08 | – | 2 E + 03 | 1 E + 03 | /St/St |
| Lu-177 | – | 5 E−07 | 5 E−07 | – | 2 E + 04 | 1 E + 04 | /St/St |
| Lu-178m | – | 4 E−06 | 4 E−06 | – | 1 E + 05 | 1 E + 05 | /ET/ET |
| Lu-178 | – | 8 E−06 | 8 E−06 | – | 3 E + 05 | 3 E + 05 | /ET/ET |
| Lu-179 | – | 3 E−06 | 3 E−06 | – | 1 E + 05 | 1 E + 05 | /St/St |
| Hf-170 | 1 E−06 | 1 E−06 | – | 4 E + 04 | 4 E + 04 | – | ET/ET/ |
| Hf-172 | 6 E−09 | 3 E−08 | – | 2 E + 02 | 1 E + 03 | – | BS/BS/ |
| Hf-173 | 2 E−06 | 2 E−06 | – | 9 E + 04 | 8 E + 04 | – | ET/ET/ |
| Hf-175 | 5 E−07 | 6 E−07 | – | 2 E + 04 | 2 E + 04 | – | BS/St/ |
| Hf-177m | 2 E−06 | 1 E−06 | – | 9 E + 04 | 6 E + 04 | – | ET/ET/ |
| Hf-178m | 8 E−10 | 4 E−09 | – | 3 E + 01 | 1 E + 02 | – | BS/BS/ |
| Hf-179m | 2 E−07 | 1 E−07 | – | 8 E + 03 | 6 E + 03 | – | BS/St/ |
| Hf-180m | 2 E−06 | 1 E−06 | – | 7 E + 04 | 6 E + 04 | – | ET/ET/ |
| Hf-181 | 1 E−07 | 1 E−07 | – | 4 E + 03 | 5 E + 03 | – | BS/St/ |
| Hf-182m | 5 E−06 | 4 E−06 | – | 2 E + 05 | 1 E + 05 | – | ET/ET/ |
| Hf-182 | 5 E−10 | 2 E−09 | – | 2 E + 01 | 9 E + 01 | – | BS/BS/ |
| Hf-183 | 6 E−06 | 4 E−06 | – | 2 E + 05 | 1 E + 05 | – | ET/ET/ |
| Hf-184 | 1 E−06 | 1 E−06 | – | 5 E + 04 | 4 E + 04 | – | ET/St/ |
| Ta-172 | – | 5 E−06 | 5 E−06 | – | 1 E + 05 | 1 E + 05 | /ET/ET |
| Ta-173 | – | 3 E−06 | 3 E−06 | – | 1 E + 05 | 1 E + 05 | /E/E |
| Ta-174 | – | 5 E−06 | 5 E−06 | – | 2 E + 05 | 2 E + 05 | /ET/ET |
| Ta-175 | – | 1 E−06 | 1 E−06 | – | 6 E + 04 | 6 E + 04 | /ET/ET |
| Ta-176 | – | 1 E−06 | 1 E−06 | – | 3 E + 04 | 3 E + 04 | /ET/ET |
| Ta-177 | – | 4 E−06 | 4 E−06 | – | 1 E + 05 | 1 E + 05 | /St/St |
| Ta-178 | – | 3 E−06 | 3 E−06 | – | 1 E + 05 | 1 E + 05 | /ET/ET |
| Ta-179 | – | 4 E−06 | 1 E−06 | – | 1 E + 05 | 7 E + 04 | /St/St |
| Ta-180m | – | 9 E−06 | 9 E−06 | – | 3 E + 05 | 3 E + 05 | /St/St |
| Ta-180 | – | 1 E−07 | 4 E−08 | – | 4 E + 03 | 1 E + 03 | /St/St |
| Ta-182m | – | 6 E−06 | 6 E−06 | – | 2 E + 05 | 2 E + 05 | /ET/ET |
| Ta-182 | – | 9 E−08 | 7 E−08 | – | 3 E + 03 | 2 E + 03 | /St/St |
| Ta-183 | – | 3 E−07 | 2 E−07 | – | 1 E + 04 | 1 E + 04 | /St/St |
| Ta-184 | – | 8 E−07 | 8 E−07 | – | 3 E + 04 | 3 E + 04 | /ET/ET |
| Ta-185 | – | 5 E−06 | 5 E−06 | – | 2 E + 05 | 1 E + 05 | /ET/ET |
| Ta-186 | – | 7 E−06 | 7 E−06 | – | 2 E + 05 | 2 E + 05 | /ET/ET |
| W-176 | 3 E−06 | – | – | 1 E + 05 | – | – | ET/ / |
| W-177 | 5 E−06 | – | – | 2 E + 05 | – | – | ET/ / |
| W-178 | 3 E−06 | – | – | 1 E + 05 | – | – | ET/ / |
| W-179 | 1 E−04 | – | – | 5 E + 06 | – | – | ET/ / |
| W-181 | 1 E−05 | – | – | 4 E + 05 | – | – | ET/ / |
| W-185 | 2 E−06 | – | – | 9 E + 04 | – | – | St/ / |
| W-187 | 1 E−06 | – | – | 5 E + 04 | – | – | ET/ / |
| W-188 | 6 E−07 | – | – | 2 E + 04 | – | – | St/ / |
| Re-177 | 1 E−05 | 1 E−05 | – | 6 E + 05 | 4 E + 05 | – | ET/ET/ |
| Re-178 | 1 E−05 | 1 E−05 | – | 5 E + 05 | 3 E + 05 | – | ET/ET/ |
| Re-181 | 1 E−06 | 1 E−06 | – | 5 E + 04 | 4 E + 04 | – | ET/ET/ |
| Re-182 (64 h) | 4 E−07 | 3 E−07 | – | 1 E + 04 | 1 E + 04 | – | ET/St/ |
| Re-182 (12 h) | 1 E−06 | 1 E−06 | – | 4 E + 04 | 4 E + 04 | – | ET/ET/ |
| Re-184m | 6 E−07 | 1 E−07 | – | 2 E + 04 | 4 E + 03 | – | St/St/ |
| Re-184 | 7 E−07 | 3 E−07 | – | 2 E + 04 | 1 E + 04 | – | ET/St/ |
| Re-186m | 4 E−7 | 7 E−08 | – | 1 E + 04 | 2 E + 03 | – | St/St/ |
| Re-186 | 7 E−07 | 4 E−07 | – | 2 E + 04 | 1 E + 04 | – | St/St/ |
| Re-187 | 2 E−04 | 1 E−04 | – | 8 E + 06 | 4 E + 06 | – | St/St/ |
| Re-188m | 3 E−05 | 2 E−05 | – | 1 E + 06 | 1 E + 06 | – | St/St/ |
| Re-188 | 8 E−07 | 7 E−07 | – | 3 E + 04 | 2 E + 04 | – | St/St/ |
| Re-189 | 1 E−06 | 9 E−07 | – | 4 E + 04 | 3 E + 04 | – | St/St/ |

| Radionuclide | Absorption type [3] | | | Absorption type [3] | | | Stochastic or organ or tissue [1] |
|---|---|---|---|---|---|---|---|
| | μCi/mL | | | Bq/m [3] | | | |
| | F | M | S | F | M | S | (F/M/S) |
| Os-180 | 1 E−05 | 1 E−05 | 1 E−05 | 5 E + 05 | 3 E + 05 | 3 E + 05 | ET/ET/ET |
| Os-181 | 3 E−06 | 3 E−06 | 3 E−06 | 1 E + 05 | 1 E + 05 | 1 E + 05 | ET/ET/ET |
| Os-182 | 1 E−06 | 9 E−07 | 9 E−07 | 3 E + 04 | 3 E + 04 | 3 E + 04 | ET/ET/ET |
| Os-185 | 4 E−07 | 5 E−07 | 5 E−07 | 1 E + 04 | 2 E + 04 | 1 E + 04 | St/St/St |
| Os-189m | 1 E−04 | 7 E−05 | 7 E−05 | 4 E + 06 | 2 E + 06 | 2 E + 06 | St/St/St |
| Os-191m | 1 E−05 | 4 E−06 | 4 E−06 | 5 E + 05 | 1 E + 05 | 1 E + 05 | St/St/St |
| Os-191 | 1 E−06 | 4 E−07 | 3 E−07 | 5 E + 04 | 1 E + 04 | 1 E + 04 | St/St/St |
| Os-193 | 2 E−06 | 8 E−07 | 8 E−07 | 7 E + 04 | 3 E + 04 | 3 E + 04 | St/St/St |
| Os-194 | 4 E−08 | 4 E−08 | 1 E−08 | 1 E + 03 | 1 E + 03 | 4 E + 02 | St/St/St |
| Ir-182 | 9 E−06 | 7 E−06 | 7 E−06 | 3 E + 05 | 2 E + 05 | 2 E + 05 | ET/ET/ET |
| Ir-184 | 1 E−06 | 1 E−06 | 1 E−06 | 7 E + 04 | 6 E + 04 | 7 E + 04 | ET/ET/ET |
| Ir-185 | 2 E−06 | 1 E−06 | 1 E−06 | 7 E + 04 | 7 E + 04 | 7 E + 04 | ET/ET/ET |
| Ir-186 (16 h) | 8 E−07 | 7 E−07 | 7 E−07 | 2 E + 04 | 2 E + 04 | 2 E + 04 | ET/ET/ET |
| Ir-186 (2 h) | 5 E−06 | 4 E−06 | 4 E−06 | 1 E + 05 | 1 E + 05 | 1 E + 05 | ET/ET/ET |
| Ir-187 | 4 E−06 | 3 E−06 | 3 E−06 | 1 E + 05 | 1 E + 05 | 1 E + 05 | ET/ET/ET |
| Ir-188 | 6 E−07 | 6 E−07 | 6 E−07 | 2 E + 04 | 2 E + 04 | 2 E + 04 | ET/ET/ET |
| Ir-189 | 3 E−06 | 1 E−06 | 1 E−06 | 1 E + 05 | 5 E + 04 | 4 E + 04 | St/St/St |
| Ir-190m (3 h) | 2 E−06 | 2 E−06 | 2 E−06 | 8 E + 04 | 8 E + 04 | 7 E + 04 | ET/ET/ET |
| Ir-190m (1 h) | 9 E−05 | 5 E−05 | 5 E−05 | 3 E + 06 | 2 E + 06 | 1 E + 06 | ET/St/St |
| Ir-190 | 4 E−07 | 2 E−07 | 2 E−07 | 1 E + 04 | 9 E + 03 | 8 E + 03 | ET/St/St |
| Ir-192m | 1 E−07 | 1 E−07 | 2 E−08 | 3 E + 03 | 6 E + 03 | 1 E + 03 | St/St/St |
| Ir-192 | 2 E−07 | 1 E−07 | 1 E−07 | 9 E + 03 | 5 E + 03 | 4 E + 03 | St/St/St |
| Ir-194m | 8 E−08 | 8 E−08 | 6 E−08 | 3 E + 03 | 3 E + 03 | 2 E + 03 | St/St/St |
| Ir-194 | 1 E−06 | 7 E−07 | 7 E−07 | 5 E + 04 | 2 E + 04 | 2 E + 04 | St/St/St |
| Ir-195m | 2 E−06 | 2 E−06 | 2 E−06 | 9 E + 04 | 7 E + 04 | 7 E + 04 | ET/ET/ET |
| Ir-195 | 7 E−06 | 5 E−06 | 4 E−06 | 2 E + 05 | 1 E + 05 | 1 E + 05 | ET/ET/ET |
| Pt-186 | 3 E−06 | – | – | 1 E + 05 | – | – | ET/ / |
| Pt-188 | 8 E−07 | – | – | 3 E + 04 | – | – | E/ / |
| Pt-189 | 3 E−06 | – | – | 1 E + 05 | – | – | ET/ / |
| Pt-191 | 1 E−06 | – | – | 7 E + 04 | – | – | ET/ / |
| Pt-193m | 2 E−06 | – | – | 8 E + 04 | – | – | ET/ / |
| Pt-193 | 2 E−05 | – | – | 7 E + 05 | – | – | ET/ / |
| Pt-195m | 1 E−06 | – | – | 5 E + 04 | – | – | ET/ / |
| Pt-197m | 7 E−06 | – | – | 2 E + 05 | – | – | ET/ / |
| Pt-197 | 3 E−06 | – | – | 1 E + 05 | – | – | ET/ / |
| Pt-199 | 1 E−05 | – | – | 4 E + 05 | – | – | ET/ / |
| Pt-200 | 1 E−06 | – | – | 5 E + 04 | – | – | St/ / |
| Au-193 | 4 E−06 | 3 E−06 | 3 E−06 | 1 E + 05 | 1 E + 05 | 1 E + 05 | ET/E/St |
| Au-194 | 9 E−07 | 9 E−07 | 9 E−07 | 3 E + 04 | 3 E + 04 | 3 E + 04 | ET/ET/ET |
| Au-195 | 3 E−06 | 7 E−07 | 4 E−07 | 1 E + 05 | 2 E + 04 | 1 E + 04 | ET/St/St |
| Au-198m | 6 E−07 | 2 E−07 | 2 E−07 | 2 E + 04 | 1 E + 04 | 1 E + 04 | ET/St/St |
| Au-198 | 1 E−06 | 5 E−07 | 5 E−07 | 4 E + 04 | 2 E + 04 | 1 E + 04 | ET/St/St |
| Au-199 | 2 E−06 | 8 E−07 | 7 E−07 | 7 E + 04 | 3 E + 04 | 2 E + 04 | ET/St/St |
| Au-200m | 5 E−07 | 4 E−07 | 4 E−07 | 1 E + 04 | 1 E + 04 | 1 E + 04 | ET/ET/ET |
| Au-200 | 1 E−05 | 7 E−06 | 7 E−06 | 4 E + 05 | 2 E + 05 | 2 E + 05 | ET/ET/ET |
| Au-201 | 1 E−05 | 1 E−05 | 9 E−06 | 5 E + 05 | 3 E + 05 | 3 E + 05 | ET/ET/ET |
| Hg-193m (Org) | 1 E−06 | – | – | 4 E + 04 | – | – | ET/ / |
| Hg-193m | 1 E−06 | 1 E−06 | – | 4 E + 04 | 4 E + 04 | – | ET/ET/ |
| Hg-193m (Vapor). | – | 1 E−07 | – | – | 6 E + 03 | – | /St/ |
| Hg-193 (Org) | 5 E−06 | – | – | 1 E + 05 | – | – | ET/ / |
| Hg-193 | 5 E−06 | 4 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| Hg-193 (Vapor) | – | 5 E−07 | – | – | 1 E + 04 | – | /St/ |
| Hg-194 (Org) | 2 E−08 | – | – | 1 E + 03 | – | – | St/ / |
| Hg-194 | 3 E−08 | 1 E−07 | – | 1 E + 03 | 3 E + 03 | – | St/St/ |
| Hg-194 (Vapor) | – | 1 E−08 | – | – | 5 E + 02 | – | /St/ |
| Hg-195m (Org) | 1 E−06 | – | – | 5 E + 04 | – | – | ET/ / |
| Hg-195m | 1 E−06 | 8 E−07 | – | 5 E + 04 | 3 E + 04 | – | ET/St/ |
| Hg-195m (Vapor). | – | 6 E−08 | – | – | 2 E + 03 | – | /St/ |
| Hg-195 (Org) | 6 E−06 | – | – | 2 E + 05 | – | – | ET/ / |
| Hg-195 | 6 E−06 | 6 E−06 | – | 2 E + 05 | 2 E + 05 | – | ET/ET/ |
| Hg-195 (Vapor) | – | 4 E−07 | – | – | 1 E + 04 | – | /St/ |
| Hg-197m (Org) | 1 E−06 | – | – | 5 E + 04 | – | – | ET/ / |
| Hg-197m | 1 E−06 | 8 E−07 | – | 5 E + 04 | 3 E + 04 | – | ET/St/ |
| Hg-197m (Vapor). | – | 9 E−08 | – | – | 3 E + 03 | – | /St/ |
| Hg-197 (Org) | 4 E−06 | – | – | 1 E + 05 | – | – | ET/ / |
| Hg-197 | 4 E−06 | 2 E−06 | – | 1 E + 05 | 7 E + 04 | – | ET/St/ |
| Hg-197 (Vapor) | – | 1 E−07 | – | – | 4 E + 03 | – | /St/ |
| Hg-199m (Org) | 8 E−06 | – | – | 3 E + 05 | – | – | ET/ / |

| Radionuclide | Absorption type [3] | | | Absorption type [3] | | | Stochastic or organ or tissue [1] |
|---|---|---|---|---|---|---|---|
| | μCi/mL | | | Bq/m [3] | | | |
| | F | M | S | F | M | S | (F/M/S) |
| Hg-199m | 8 E−06 | 5 E−06 | – | 3 E + 05 | 1 E + 05 | – | ET/ET/ |
| Hg-199m (Vapor). | – | 3 E−06 | – | – | 1 E + 05 | – | /St/ |
| Hg-203 (Org) | 7 E−07 | – | – | 2 E + 04 | – | – | St/ / |
| Hg-203 | 9 E−07 | 2 E−07 | – | 3 E + 04 | 1 E + 04 | – | St/St/ |
| Hg-203 (Vapor) | – | 8 E−08 | – | – | 2 E + 03 | – | /St/ |
| Tl-194m | 5 E−06 | – | – | 2 E + 05 | – | – | ET/ / |
| Tl-194 | 2 E−05 | – | – | 8 E + 05 | – | – | ET/ / |
| Tl-195 | 6 E−06 | – | – | 2 E + 05 | – | – | ET/ / |
| Tl-197 | 8 E−06 | – | – | 2 E + 05 | – | – | ET/ / |
| Tl-198m | 2 E−06 | – | – | 9 E + 04 | – | – | ET/ / |
| Tl-198 | 1 E−06 | – | – | 5 E + 04 | – | – | ET/ / |
| Tl-199 | 5 E−06 | – | – | 2 E + 05 | – | – | ET/ / |
| Tl-200 | 8 E−07 | – | – | 3 E + 04 | – | – | ET/ / |
| Tl-201 | 4 E−06 | – | – | 1 E + 05 | – | – | ET/ / |
| Tl-202 | 1 E−06 | – | – | 5 E + 04 | – | – | ET/ / |
| Tl-204 | 9 E−07 | – | – | 3 E + 04 | – | – | St/ / |
| Pb-195m | 7 E−06 | – | – | 2 E + 05 | – | – | ET/ / |
| Pb-198 | 2 E−06 | – | – | 9 E + 04 | – | – | ET/ / |
| Pb-199 | 4 E−06 | – | – | 1 E + 05 | – | – | ET/ / |
| Pb-200 | 1 E−06 | – | – | 4 E + 04 | – | – | ET/ / |
| Pb-201 | 2 E−06 | – | – | 7 E + 04 | – | – | ET/ / |
| Pb-202m | 1 E−06 | – | – | 6 E + 04 | – | – | ET/ / |
| Pb-202 | 4 E−08 | – | – | 1 E + 03 | – | – | St/ / |
| Pb-203 | 2 E−06 | – | – | 7 E + 04 | – | – | ET/ / |
| Pb-205 | 9 E−07 | – | – | 3 E + 04 | – | – | BS/ / |
| Pb-209 | 9 E−06 | – | – | 3 E + 05 | – | – | ET/ / |
| Pb-210 | 1 E−10 | – | – | 5 E + 00 | – | – | BS/ / |
| Pb-211 | 4 E−08 | – | – | 1 E + 03 | – | – | ET/ / |
| Pb-212 | 5 E−09 | – | – | 2 E + 02 | – | – | ET/ / |
| Pb-214 | 4 E−08 | – | – | 1 E + 03 | – | – | ET/ / |
| Bi-200 | 5 E−06 | 4 E−06 | – | 2 E + 05 | 1 E + 05 | – | ET/ET/ |
| Bi-201 | 3 E−06 | 2 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| Bi-202 | 2 E−06 | 2 E−06 | – | 9 E + 04 | 9 E + 04 | – | ET/ET/ |
| Bi-203 | 7 E−07 | 7 E−07 | – | 2 E + 04 | 2 E + 04 | – | ET/ET/ |
| Bi-205 | 4 E−07 | 4 E−07 | – | 1 E + 04 | 1 E + 04 | – | ET/ET/ |
| Bi-206 | 2 E−07 | 2 E−07 | – | 9 E + 03 | 8 E + 03 | – | ET/ET/ |
| Bi-207 | 4 E−07 | 1 E−07 | – | 1 E + 04 | 6 E + 03 | – | ET/St/ |
| Bi-210m | 3 E−09 | 2 E−10 | – | 1 E + 02 | 9 E + 00 | – | K/St/ |
| Bi-210 | 1 E−07 | 9 E−09 | – | 6 E + 03 | 3 E + 02 | – | K/St/ |
| Bi-212 | 1 E−08 | 8 E−09 | – | 4 E + 02 | 3 E + 02 | – | ET/ET/ |
| Bi-213 | 1 E−08 | 7 E−09 | – | 4 E + 02 | 2 E + 02 | – | ET/ET/ |
| Bi-214 | 1 E−08 | 1 E−08 | – | 6 E + 02 | 4 E + 02 | – | ET/ET/ |
| Po-203 | 5 E−06 | 4 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| Po-205 | 4 E−06 | 3 E−06 | – | 1 E + 05 | 1 E + 05 | – | ET/ET/ |
| Po-207 | 1 E−06 | 1 E−06 | – | 7 E + 04 | 6 E + 04 | – | ET/ET/ |
| Po-210 | 7 E−10 | 2 E−10 | – | 2 E + 01 | 9 E + 00 | – | K/St/ |
| At-207 | 1 E−06 | 2 E−07 | – | 4 E + 04 | 1 E + 04 | – | St/St/ |
| At-211 | 7 E−09 | 5 E−09 | – | 2 E + 02 | 1 E + 02 | – | ET/St/ |
| Rn-220 [5] | 1 E−08 | – | – | 6 E + 02 | – | – | – |
| Rn-222 [5] | 8 E−08 | – | – | 3 E + 03 | – | – | – |
| Fr-222 | 1 E−08 | – | – | 3 E + 02 | – | – | ET/ / |
| Fr-223 | 4 E−07 | – | – | 1 E + 04 | – | – | St/ / |
| Ra-223 | – | 9 E−11 | – | – | 3 E + 00 | – | /St/ |
| Ra-224 | – | 2 E−10 | – | – | 8 E + 00 | – | /St/ |
| Ra-225 | – | 1 E−10 | – | – | 4 E + 00 | – | /St/ |
| Ra-226 | – | 2 E−10 | – | – | 9 E + 00 | – | /St/ |
| Ra-227 | – | 8 E−07 | – | – | 3 E + 04 | – | /BS/ |
| Ra-228 | – | 1 E−10 | – | – | 5 E + 00 | – | /BS/ |
| Ac-224 | 1 E−08 | 6 E−09 | 5 E−09 | 6 E + 02 | 2 E + 02 | 2 E + 02 | BS/St/St |
| Ac-225 | 2 E−10 | 9 E−11 | 8 E−11 | 7 E + 00 | 3 E + 00 | 3 E + 00 | BS/St/St |
| Ac-226 | 1 E−09 | 6 E−10 | 5 E−10 | 4 E + 01 | 2 E + 01 | 2 E + 01 | ET/St/St |
| Ac-227 | 2 E−13 | 1 E−12 | 1 E−11 | 1 E−02 | 5 E−02 | 4 E−01 | BS/BS/St |
| Ac-228 | 6 E−09 | 3 E−08 | 4 E−08 | 2 E + 02 | 1 E + 03 | 1 E + 03 | BS/BS/St |
| Th-226 | – | 4 E−09 | 4 E−09 | – | 1 E + 02 | 1 E + 02 | /ET/ET |
| Th-227 | – | 9 E−11 | 7 E−11 | – | 3 E + 00 | 2 E + 00 | /St/St |
| Th-228 | – | 2 E−11 | 2 E−11 | – | 7 E−01 | 8 E−01 | /BS/St |
| Th-229 | – | 2 E−12 | 1 E−11 | – | 7 E−02 | 4 E−01 | /BS/St |
| Th-230 | – | 3 E−12 | 4 E−11 | – | 1 E−01 | 1 E + 00 | /BS/BS |
| Th-231 | – | 1 E−06 | 1 E−06 | – | 5 E + 04 | 5 E + 04 | /St/St |
| Th-232 | – | 3 E−12 | 4 E−11 | – | 1 E−01 | 1 E + 00 | /BS/BS |

| Radionuclide | Absorption type [3] | | | Absorption type [3] | | | Stochastic or organ or tissue [1] |
|---|---|---|---|---|---|---|---|
| | μCi/mL | | | Bq/m [3] | | | |
| | F | M | S | F | M | S | (F/M/S) |
| Th-234 | – | 1 E−07 | 9 E−08 | – | 3 E + 03 | 3 E + 03 | /St/St |
| Pa-227 | – | 4 E−09 | 4 E−09 | – | 1 E + 02 | 1 E + 02 | /ET/ET |
| Pa-228 | – | 1 E−08 | 1 E−08 | – | 3 E + 02 | 4 E + 02 | /BS/St |
| Pa-230 | – | 1 E−09 | 9 E−10 | – | 4 E + 01 | 3 E + 01 | /St/St |
| Pa-231 | – | 1 E−12 | 1 E−11 | – | 4 E−02 | 4 E−01 | /BS/BS |
| Pa-232 | – | 1 E−08 | 1 E−07 | – | 6 E + 02 | 7 E + 03 | /BS/BS |
| Pa-233 | – | 2 E−07 | 1 E−07 | – | 7 E + 03 | 6 E + 03 | /St/St |
| Pa-234 | – | 7 E−07 | 7 E−07 | – | 2 E + 04 | 2 E + 04 | /ET/ET |
| U-230 | 6 E−10 | 5 E−11 | 4 E−11 | 2 E + 01 | 2 E + 00 | 1 E + 00 | K/St/St |
| U-231 | 2 E−06 | 1 E−06 | 1 E−06 | 8 E + 04 | 4 E + 04 | 4 E + 04 | ET/St/St |
| U-232 | 5 E−11 | 1 E−10 | 2 E−11 | 2 E + 00 | 4 E + 00 | 7 E−01 | BS/St/ET |
| U-233 | 4 E−10 | 2 E−10 | 7 E−11 | 1 E + 01 | 9 E + 00 | 2 E + 00 | BS/St/ET |
| U-234 | 5 E−10 | 2 E−10 | 7 E−11 | 1 E + 01 | 9 E + 00 | 2 E + 00 | BS/St/ET |
| U-235 | 5 E−10 | 3 E−10 | 8 E−11 | 1 E + 01 | 1 E + 01 | 3 E + 00 | BS/St/ET |
| U-236 | 5 E−10 | 2 E−10 | 7 E−11 | 1 E + 01 | 1 E + 01 | 2 E + 00 | BS/St/ET |
| U-237 | 1 E−06 | 3 E−07 | 3 E−07 | 4 E + 04 | 1 E + 04 | 1 E + 04 | ET/St/St |
| U-238 | 5 E−10 | 3 E−10 | 8 E−11 | 2 E + 01 | 1 E + 01 | 3 E + 00 | BS/St/ET |
| U-239 | 1 E−05 | 9 E−06 | 9 E−06 | 5 E + 05 | 3 E + 05 | 3 E + 05 | ET/ET/ET |
| U-240 | 1 E−06 | 7 E−07 | 6 E−07 | 5 E + 04 | 2 E + 04 | 2 E + 04 | ET/St/St |
| Np-232 | – | 3 E−06 | – | – | 1 E + 05 | – | /BS/ |
| Np-233 | – | 7 E−05 | – | – | 2 E + 06 | – | /ET/ |
| Np-234 | – | 5 E−07 | – | – | 2 E + 04 | – | /ET/ |
| Np-235 | – | 1 E−06 | – | – | 4 E + 04 | – | /BS/ |
| Np-236 (1 E + 05 yr). | – | 4 E−11 | – | – | 1 E + 00 | – | /BS/ |
| Np-236 (22 h) | – | 5 E−08 | – | – | 1 E + 03 | – | /BS/ |
| Np-237 | – | 8 E−12 | – | – | 3 E−01 | – | /BS/ |
| Np-238 | – | 1 E−07 | – | – | 4 E + 03 | – | /BS/ |
| Np-239 | – | 5 E−07 | – | – | 1 E + 04 | – | /St/ |
| Np-240 | – | 2 E−06 | – | – | 8 E + 04 | – | /ET/ |
| Pu-234 | – | 3 E−08 | 3 E−08 | – | 1 E + 03 | 1 E + 03 | /St/St |
| Pu-235 | – | 9 E−05 | 8 E−05 | – | 3 E + 06 | 3 E + 06 | /ET/ET |
| Pu-236 | – | 1 E−11 | 7 E−11 | – | 6 E−01 | 2 E + 00 | /BS/St |
| Pu-237 | – | 1 E−06 | 1 E−06 | – | 7 E + 04 | 6 E + 04 | /St/St |
| Pu-238 | – | 6 E−12 | 5 E−11 | – | 2 E−01 | 1 E + 00 | /BS/St |
| Pu-239 | – | 5 E−12 | 6 E−11 | – | 2 E−01 | 2 E + 00 | /BS/BS |
| Pu-240 | – | 5 E−12 | 6 E−11 | – | 2 E−01 | 2 E + 00 | /BS/BS |
| Pu-241 | – | 2 E−10 | 2 E−09 | – | 1 E + 01 | 1 E + 02 | /BS/BS |
| Pu-242 | – | 5 E−12 | 6 E−11 | – | 2 E−01 | 2 E + 00 | /BS/BS |
| Pu-243 | – | 5 E−06 | 5 E−06 | – | 1 E + 05 | 1 E + 05 | /E/E |
| Pu-244 | – | 5 E−12 | 6 E−11 | – | 2 E−01 | 2 E + 00 | /BS/BS |
| Pu-245 | – | 9 E−07 | 8 E−07 | – | 3 E + 04 | 3 E + 04 | /St/St |
| Pu-246 | – | 8 E−08 | 8 E−08 | – | 3 E + 03 | 2 E + 03 | /St/St |
| Am-237 | – | 8 E−06 | – | – | 3 E + 05 | – | /ET/ |
| Am-238 | – | 2 E−06 | – | – | 9 E + 04 | – | /BS/ |
| Am-239 | – | 1 E−06 | – | – | 6 E + 04 | – | /ET/ |
| Am-240 | – | 7 E−07 | – | – | 2 E + 04 | – | /ET/ |
| Am-241 | – | 5 E−12 | – | – | 1 E−01 | – | /BS/ |
| Am-242m | – | 5 E−12 | – | – | 1 E−01 | – | /BS/ |
| Am-242 | – | 4 E−08 | – | – | 1 E + 03 | – | /St/ |
| Am-243 | – | 5 E−12 | – | – | 1 E−01 | – | /BS/ |
| Am-244m | – | 3 E−06 | – | – | 1 E + 05 | – | /BS/ |
| Am-244 | – | 1 E−07 | – | – | 5 E + 03 | – | /BS/ |
| Am-245 | – | 5 E−06 | – | – | 2 E + 05 | – | /ET/ |
| Am-246m | – | 6 E−06 | – | – | 2 E + 05 | – | /ET/ |
| Am-246 | – | 2 E−06 | – | – | 9 E + 04 | – | /ET/ |
| Cm-238 | – | 1 E−07 | – | – | 4 E + 03 | – | /St/ |
| Cm-240 | – | 2 E−10 | – | – | 7 E + 00 | – | /St/ |
| Cm-241 | – | 2 E−08 | – | – | 8 E + 02 | – | /St/ |
| Cm-242 | – | 1 E−10 | – | – | 5 E + 00 | – | /St/ |
| Cm-243 | – | 7 E−12 | – | – | 2 E−01 | – | /BS/ |
| Cm-244 | – | 9 E−12 | – | – | 3 E−01 | – | /BS/ |
| Cm-245 | – | 5 E−12 | – | – | 1 E−01 | – | /BS/ |
| Cm-246 | – | 5 E−12 | – | – | 1 E−01 | – | /BS/ |
| Cm-247 | – | 5 E−12 | – | – | 2 E−01 | – | /BS/ |
| Cm-248 | – | 1 E−12 | – | – | 5 E−02 | – | /BS/ |
| Cm-249 | – | 8 E−06 | – | – | 3 E + 05 | – | /ET/ |
| Cm-250 | – | 2 E−13 | – | – | 8 E−03 | – | /BS/ |
| Bk-245 | – | 3 E−07 | – | – | 1 E + 04 | – | /St/ |
| Bk-246 | – | 8 E−07 | – | – | 3 E + 04 | – | /ET/ |
| Bk-247 | – | 3 E−12 | – | – | 1 E−01 | – | /BS/ |

| Radionuclide | Absorption type [3] | | | Absorption type [3] | | | Stochastic or organ or tissue [1] |
|---|---|---|---|---|---|---|---|
| | μCi/mL | | | Bq/m [3] | | | |
| | F | M | S | F | M | S | (F/M/S) |
| Bk-249 | – | 1 E−09 | – | – | 5 E + 01 | – | /BS/ |
| Bk-250 | – | 2 E−07 | – | – | 9 E + 03 | – | /BS/ |
| Cf-244 | – | 1 E−08 | – | – | 5 E + 02 | – | /ET/ |
| Cf-246 | – | 1 E−09 | – | – | 5 E + 01 | – | /St/ |
| Cf-248 | – | 5 E−11 | – | – | 2 E + 00 | – | /BS/ |
| Cf-249 | – | 3 E−12 | – | – | 1 E−01 | – | /BS/ |
| Cf-250 | – | 7 E−12 | – | – | 2 E−01 | – | /BS/ |
| Cf-251 | – | 3 E−12 | – | – | 1 E−01 | – | /BS/ |
| Cf-252 | – | 1 E−11 | – | – | 6 E−01 | – | /BS/ |
| Cf-253 | – | 5 E−10 | – | – | 2 E + 01 | – | /St/ |
| Cf-254 | – | 2 E−11 | – | – | 8 E−01 | – | /BS/ |
| Es-250 | – | 4 E−07 | – | – | 1 E + 04 | – | /BS/ |
| Es-251 | – | 3 E−07 | – | – | 1 E + 04 | – | /St/ |
| Es-253 | – | 2 E−10 | – | – | 9 E + 00 | – | /St/ |
| Es-254m | – | 1 E−09 | – | – | 5 E + 01 | – | /St/ |
| Es-254 | – | 6 E−11 | – | – | 2 E + 00 | – | /BS/ |
| Fm-252 | – | 2 E−09 | – | – | 8 E + 01 | – | /St/ |
| Fm-253 | – | 1 E−09 | – | – | 6 E + 01 | – | /St/ |
| Fm-254 | – | 6 E−09 | – | – | 2 E + 02 | – | /ET/ |
| Fm-255 | – | 2 E−09 | – | – | 8 E + 01 | – | /St/ |
| Fm-257 | – | 1 E−10 | – | – | 4 E + 00 | – | /St/ |
| Md-257 | – | 2 E−08 | – | – | 1 E + 03 | – | /St/ |
| Md-258 | – | 1 E−10 | – | – | 4 E + 00 | – | /St/ |

FOOTNOTES FOR APPENDIX A

[1] A determination of whether the DACs are controlled by stochastic (St) or deterministic (organ or tissue) dose, or if they both give the same result (E), for each absorption type, is given in this column. The key to the organ notation for deterministic dose is: BS = Bone surface, ET = Extrathoracic, K = Kidney, L = Liver, and T = Thyroid. A blank indicates that no calculations were performed for the absorption type shown.

[2] The ICRP identifies these materials as soluble or reactive gases and vapors or highly soluble or reactive gases and vapors. For tritiated water, the inhalation DAC values allow for an additional 50% absorption through the skin, as described in ICRP Publication No. 68, Dose Coefficients for Intakes of Radionuclides by Workers. For elemental tritium, the DAC values include a factor that irradiation from gas within the lungs might increase the dose by 20%.

[3] A dash indicates no values given for this data category.

[4] DAC values derived using hafnium tritide particle and are based on ''observed activity'' (i.e, only radiation emitted from the particle is considered). DAC values derived using methodology found in Radiological Control Programs for Special Tritium Compounds, DOE–HDBK–1184–2004.

[5] These values are appropriate for protection from radon combined with its short-lived decay products and are based on information given in ICRP Publication 65: Protection Against Radon-222 at Home and at Work and in DOE–STD–1121–98: Internal Dosimetry. The values given are for 100% equilibrium concentration conditions of the short-lived radon decay products with the parent. To allow for an actual measured equilibrium concentration or a demonstrated equilibrium concentration, the values given in this table should be multiplied by the ratio (100%/actual %) or (100%/demonstrated %), respectively. Alternatively, the DAC values for Rn-220 and Rn-222 may be replaced by 2.5 working level (WL) and 0.83 WL, respectively, for appropriate limiting of decay product concentrations. A WL is any combination of short-lived radon decay products, in one liter of air without regard to the degree of equilibrium, that will result in the ultimate emission of 1.3 E + 05 MeV of alpha energy.

[72 FR 31927, June 8, 2007]

## APPENDIX B TO PART 835 [RESERVED]

## APPENDIX C TO PART 835—DERIVED AIR CONCENTRATION (DAC) FOR WORKERS FROM EXTERNAL EXPOSURE DURING IMMERSION IN A CLOUD OF AIRBORNE RADIOACTIVE MATERIAL

a. The data presented in appendix C are to be used for controlling occupational exposures in accordance with §835.209, identifying the need for air monitoring in accordance with §835.403 and identifying the need for posting of airborne radioactivity areas in accordance with §835.603(d).

b. The air immersion DAC values shown in this appendix are based on a stochastic dose

limit of 5 rems (0.05 Sv) per year. Four columns of information are presented: (1) Radionuclide; (2) half-life in units of seconds (s), minutes (min), hours (h), days (d), or years (yr); (3) air immersion DAC in units of μCi/mL; and (4) air immersion DAC in units of Bq/m3. The data are listed by radionuclide in order of increasing atomic mass. The air immersion DACs were calculated for a continuous, nonshielded exposure via immersion in a semi-infinite cloud of airborne radioactive material. The DACs listed in this appendix may be modified to allow for submersion in a cloud of finite dimensions.

c. The DAC values are given for individual radionuclides. For known mixtures of radionuclides, determine the sum of the ratio of the observed concentration of a particular radionuclide and its corresponding DAC for all radionuclides in the mixture. If this sum exceeds unity (1), then the DAC has been exceeded. For unknown radionuclides, the most restrictive DAC (lowest value) for those isotopes not known to be absent shall be used.

AIR IMMERSION DAC

| Radionuclide | Half-life | (μCi/mL) | (Bq/m$^3$) |
|---|---|---|---|
| Ar-37 | 35.02 d | 3E + 00 | 1E + 11 |
| Ar-39 | 269 yr | 1E–03 | 5E + 07 |
| Ar-41 | 1.827 h | 3E–06 | 1E + 05 |
| Kr-74 | 11.5 min | 3E–06 | 1E + 05 |
| Kr-76 | 14.8 h | 1E–05 | 3E + 05 |
| Kr-77 | 74.7 min | 4E–06 | 1E + 05 |
| Kr-79 | 35.04 h | 1E–05 | 6E + 05 |
| Kr-81 | 2.1E + 05 yr | 7E–04 | 2E + 07 |
| Kr-83m | 1.83 h | 7E–02 | 2E + 09 |
| Kr-85 | 10.72 yr | 7E–04 | 2E + 07 |
| Kr-85m | 4.48 h | 2E–05 | 1E + 06 |

AIR IMMERSION DAC—Continued

| Radionuclide | Half-life | (μCi/mL) | (Bq/m$^3$) |
|---|---|---|---|
| Kr-87 | 76.3 min | 4E–06 | 1E + 05 |
| Kr-88 | 2.84 h | 1E–06 | 7E + 04 |
| Xe-120 | 40.0 min | 1E–05 | 4E + 05 |
| Xe-121 | 40.1 min | 2E–06 | 8E + 04 |
| Xe-122 | 20.1 h | 8E–05 | 3E + 06 |
| Xe-123 | 2.14 h | 6E–06 | 2E + 05 |
| Xe-125 | 16.8 h | 1E–05 | 6E + 05 |
| Xe-127 | 36.406 d | 1E–05 | 6E + 05 |
| Xe-129m | 8.89 d | 2E–04 | 7E + 06 |
| Xe-131m | 11.84 d | 5E–04 | 1E + 07 |
| Xe-133 | 5.245 d | 1E–04 | 5E + 06 |
| Xe-133m | 2.19 d | 1E–04 | 5E + 06 |
| Xe-135 | 9.11 h | 1E–05 | 6E + 05 |
| Xe-135m | 15.36 min | 1E–05 | 3E + 05 |
| Xe-138 | 14.13 min | 3E–06 | 1E + 05 |

For any single radionuclide not listed above with decay mode other than alpha emission or spontaneous fission and with radioactive half-life less than two hours, the DAC value shall be 6 E–06 μCi/mL (2 E + 04 Bq/m$^3$).

[72 FR 31940, June 8, 2007, as amended at 76 FR 20489, Apr. 13, 2011]

## APPENDIX D TO PART 835—SURFACE CONTAMINATION VALUES

The data presented in appendix D are to be used in identifying the need for posting of contamination and high contamination areas in accordance with §835.603(e) and (f) and identifying the need for surface contamination monitoring and control in accordance with §§835.1101 and 835.1102.

SURFACE CONTAMINATION VALUES[1] IN DPM/100 CM[2]

| Radionuclide | Removable[2 4] | Total (Fixed + Removable)[2 3] |
|---|---|---|
| U-nat, U-235, U-238, and associated decay products | [7] 1,000 | [7] 5,000 |
| Transuranics, Ra-226, Ra-228, Th-230, Th-228, Pa-231, Ac-227, I-125, I-129 | 20 | 500 |
| Th-nat, Th-232, Sr-90, Ra-223, Ra-224, U-232, I-126, I-131, I-133 | 200 | 1,000 |
| Beta-gamma emitters (nuclides with decay modes other than alpha emission or spontaneous fission) except Sr-90 and others noted above[5] | 1,000 | 5,000 |
| Tritium and STCs[6] | 10,000 | See Footnote 6 |

[1] The values in this appendix, with the exception noted in footnote 6 below, apply to radioactive contamination deposited on, but not incorporated into the interior or matrix of, the contaminated item. Where surface contamination by both alpha- and beta-gamma-emitting nuclides exists, the limits established for alpha- and beta-gamma-emitting nuclides apply independently.

[2] As used in this table, dpm (disintegrations per minute) means the rate of emission by radioactive material as determined by correcting the counts per minute observed by an appropriate detector for background, efficiency, and geometric factors associated with the instrumentation.

[3] The levels may be averaged over one square meter provided the maximum surface activity in any area of 100 cm$^2$ is less than three times the value specified. For purposes of averaging, any square meter of surface shall be considered to be above the surface contamination value if: (1) From measurements of a representative number of sections it is determined that the average contamination level exceeds the applicable value; or (2) it is determined that the sum of the activity of all isolated spots or particles in any 100 cm$^2$ area exceeds three times the applicable value.

[4] The amount of removable radioactive material per 100 cm$^2$ of surface area should be determined by swiping the area with dry filter or soft absorbent paper, applying moderate pressure, and then assessing the amount of radioactive material on the swipe with an appropriate instrument of known efficiency. (Note—The use of dry material may not be appropriate for tritium.) When removable contamination on objects of surface area less than 100 cm$^2$ is determined, the activity per unit area shall be based on the actual area and the entire surface shall be wiped. It is not necessary to use swiping techniques to measure removable contamination levels if direct scan surveys indicate that the total residual surface contamination levels are within the limits for removable contamination.

[5] This category of radionuclides includes mixed fission products, including the Sr-90 which is present in them. It does not apply to Sr-90 which has been separated from the other fission products or mixtures where the Sr-90 has been enriched.

[6] Tritium contamination may diffuse into the volume or matrix of materials. Evaluation of surface contamination shall consider the extent to which such contamination may migrate to the surface in order to ensure the surface contamination value provided in this appendix is not exceeded. Once this contamination migrates to the surface, it may be removable, not fixed; therefore, a ''Total'' value does not apply. In certain cases, a ''Total'' value of 10,000 dpm/100 $cm^2$ may be applicable either to metals, of the types which form insoluble special tritium compounds that have been exposed to tritium; or to bulk materials to which particles of insoluble special tritium compound are fixed to a surface.

[7] These limits only apply to the alpha emitters within the respective decay series.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59688, Nov. 4, 1998; 72 FR 31940, June 8, 2007; 74 FR 18116, Apr. 21, 2009]

## Appendix E to Part 835—Values for Establishing Sealed Radioactive Source Accountability and Radioactive Material Posting and Labeling Requirements

The data presented in appendix E are to be used for identifying accountable sealed radioactive sources and radioactive material areas as those terms are defined at § 835.2(a), establishing the need for radioactive material area posting in accordance with § 835.603(g), and establishing the need for radioactive material labeling in accordance with § 835.605.

| Nuclide | Activity (μCi) |
|---|---|
| H-3 | 1.5E + 08 |
| Be-7 | 3.1E + 03 |
| Be-10 | 1.4E + 05 |
| C-14 | 4.6E + 06 |
| Na-22 | 1.9E + 01 |
| Al-26 | 1.5E + 01 |
| Si-32 | 4.9E + 04 |
| S-35 | 2.4E + 06 |
| Cl-36 | 5.2E + 05 |
| K-40 | 2.7E + 02 |
| Ca-41 | 9.3E + 06 |
| Ca-45 | 1.1E + 06 |
| Sc-46 | 6.2E + 01 |
| Ti-44 | 1.5E + 02 |
| V-49 | 1.0E + 08 |
| Mn-53 | 7.5E + 07 |
| Mn-54 | 6.5E + 01 |
| Fe-55 | 2.9E + 06 |
| Fe-59 | 1.9E + 02 |
| Fe-60 | 8.1E + 03 |
| Co-56 | 3.9E + 01 |
| Co-57 | 2.3E + 02 |
| Co-58 | 1.3E + 02 |
| Co-60 | 1.7E + 01 |
| Ni-59 | 3.2E + 06 |
| Ni-63 | 1.3E + 06 |
| Zn-65 | 1.1E + 02 |
| Ge-68 | 5.6E + 02 |
| As-73 | 5.3E + 02 |
| Se-75 | 6.3E + 01 |
| Se-79 | 8.7E + 05 |
| Rb-83 | 9.1E + 01 |
| Rb-84 | 2.0E + 02 |
| Sr-85 | 1.2E + 02 |
| Sr-89 | 4.8E + 05 |
| Sr-90 | 3.5E + 04 |
| Y-88 | 3.3E + 01 |
| Y-91 | 5.0E + 04 |
| Zr-88 | 1.1E + 02 |
| Zr-93 | 9.3E + 04 |
| Zr-95 | 1.9E + 02 |
| Nb-91 | 6.9E + 01 |
| Nb-91m | 3.6E + 02 |
| Nb-92 | 1.8E + 01 |
| Nb-93m | 4.4E + 02 |
| Nb-94 | 2.3E + 01 |
| Nb-95 | 3.4E + 02 |
| Mo-93 | 7.7E + 01 |
| Tc-95m | 1.3E + 02 |
| Tc-97 | 8.1E + 01 |
| Tc-97m | 3.5E + 02 |
| Tc-98 | 2.5E + 01 |
| Tc-99 | 8.4E + 05 |
| Ru-103 | 4.4E + 02 |
| Ru-106 | 2.5E + 02 |
| Rh-101 | 8.7E + 05 |
| Rh-102 | 3.0E + 05 |
| Rh-102m | 6.4E + 05 |
| Pd-107 | 9.3E + 06 |
| Ag-105 | 3.3E + 06 |
| Ag-108m | 1.8E + 01 |
| Ag-110m | 2.2E + 01 |
| Cd-109 | 1.6E + 02 |
| Cd-113m | 2.0E + 04 |
| Cd-115m | 1.0E + 04 |
| In-114m | 7.7E + 02 |
| Sn-113 | 3.1E + 02 |
| Sn-119m | 3.3E + 02 |
| Sn-121m | 8.1E + 05 |
| Sn-123 | 1.3E + 04 |
| Sn-126 | 1.8E + 02 |
| Sb-124 | 9.1E + 01 |
| Sb-125 | 6.7E + 01 |
| Te-121m | 1.8E + 02 |
| Te-123m | 2.8E + 02 |
| Te-125m | 4.4E + 02 |
| Te-127m | 8.0E + 02 |
| Te-129m | 2.3E + 03 |
| I-125 | 3.5E + 02 |
| I-129 | 1.8E + 02 |
| Cs-134 | 2.6E + 01 |
| Cs-135 | 1.3E + 06 |
| Cs-137 | 6.0E + 01 |
| Ba-133 | 5.1E + 01 |
| La-137 | 2.7E + 05 |
| Ce-139 | 2.4E + 02 |
| Ce-141 | 2.4E + 03 |
| Ce-144 | 1.4E + 03 |
| Pm-143 | 1.3E + 02 |
| Pm-144 | 2.9E + 01 |
| Pm-145 | 2.6E + 02 |
| Pm-146 | 4.4E + 01 |
| Pm-147 | 7.7E + 05 |
| Pm-148m | 1.0E + 02 |
| Sm-145 | 2.4E + 06 |
| Sm-146 | 4.0E + 02 |
| Sm-151 | 2.5E + 05 |
| Eu-148 | 1.1E + 06 |
| Eu-149 | 1.1E + 07 |
| Eu-152 | 3.1E + 01 |
| Eu-154 | 3.1E + 01 |
| Eu-155 | 3.6E + 02 |
| Gd-146 | 5.1E + 05 |
| Gd-148 | 9.0E + 01 |
| Gd-151 | 2.9E + 06 |
| Gd-153 | 2.1E + 02 |

| Nuclide | Activity (μCi) |
|---|---|
| Tb-157 | 2.5E + 03 |
| Tb-158 | 9.0E + 04 |
| Tb-160 | 1.2E + 02 |
| Dy-159 | 1.0E + 07 |
| Ho-166m | 2.1E + 01 |
| Tm-170 | 8.4E + 03 |
| Tm-171 | 2.8E + 04 |
| Yb-169 | 5.5E + 02 |
| Lu-173 | 1.8E + 06 |
| Lu-174 | 9.3E + 05 |
| Lu-174m | 1.0E + 06 |
| Lu-177m | 5.8E + 01 |
| Hf-172 | 7.3E + 04 |
| Hf-175 | 3.0E + 06 |
| Hf-178m | 8.7E + 03 |
| Hf-181 | 3.4E + 02 |
| Hf-182 | 7.5E + 03 |
| Ta-179 | 9.3E + 06 |
| Ta-182 | 7.3E + 01 |
| W-181 | 1.0E + 03 |
| W-185 | 3.9E + 06 |
| W-188 | 6.3E + 04 |
| Re-183 | 5.3E + 02 |
| Re-184 | 2.6E + 02 |
| Re-184m | 1.5E + 02 |
| Re-186m | 3.4E + 05 |
| Os-185 | 1.3E + 02 |
| Os-194 | 6.4E + 04 |
| Ir-192 | 1.3E + 02 |
| Ir-192m | 1.4E + 05 |
| Ir-194m | 2.7E + 01 |
| Pt-193 | 8.7E + 07 |
| Au-195 | 4.8E + 02 |
| Hg-194 | 5.2E + 04 |
| Hg-203 | 4.9E + 02 |
| Tl-204 | 2.2E + 04 |
| Pb-202 | 1.9E + 05 |
| Pb-205 | 9.0E + 01 |
| Pb-210 | 9.2E + 01 |
| Bi-207 | 1.7E + 01 |
| Bi-208 | 1.5E + 01 |
| Bi-210m | 1.2E + 03 |
| Po-209 | 6.3E + 03 |
| Po-210 | 1.2E + 03 |
| Ra-226 | 2.2E + 02 |
| Ra-228 | 1.5E + 03 |
| Ac-227 | 4.2E + 00 |
| Th-228 | 8.4E + 01 |
| Th-229 | 3.1E + 01 |
| Th-230 | 5.4E + 00 |
| Th-232 | 9.3E + 01 |
| Pa-231 | 3.0E + 01 |
| U-232 | 1.0E + 02 |
| U-233 | 3.9E + 02 |
| U-234 | 2.9E + 02 |
| U-235 | 6.7E + 01 |
| U-236 | 3.1E + 02 |
| U-238 | 3.5E + 02 |
| Np-235 | 1.1E + 02 |
| Np-236 | 2.1E + 01 |
| Np-237 | 4.9E + 01 |
| Pu-236 | 2.0E + 02 |
| Pu-237 | 3.3E + 02 |
| Pu-238 | 9.0E + 01 |
| Pu-239 | 8.4E + 01 |
| Pu-240 | 8.4E + 01 |
| Pu-241 | 4.6E + 03 |
| Pu-242 | 8.7E + 01 |
| Pu-244 | 9.0E + 01 |
| Am-241 | 7.2E + 01 |
| Am-242m | 1.1E + 02 |
| Am-243 | 7.3E + 01 |
| Cm-241 | 1.0E + 05 |
| Cm-242 | 6.2E + 02 |
| Cm-243 | 4.8E + 01 |
| Cm-244 | 1.5E + 02 |
| Cm-245 | 5.0E + 01 |
| Cm-246 | 1.0E + 02 |
| Cm-247 | 8.5E + 01 |
| Cm-248 | 2.8E + 01 |
| Cm-250 | 5.4E + 00 |
| Bk-247 | 6.0E + 01 |
| Bk-249 | 2.7E + 04 |
| Cf-248 | 4.4E + 02 |
| Cf-249 | 5.5E + 01 |
| Cf-250 | 1.2E + 02 |
| Cf-251 | 5.3E + 01 |
| Cf-252 | 5.2E + 00 |
| Cf-254 | 1.2E + 02 |
| Es-254 | 6.3E + 01 |
| Es-255 | 8.8E + 03 |
| Fm-257 | 5.1E + 02 |
| Md-258 | 6.1E + 02 |

Any alpha emitting radionuclide not listed in appendix E and mixtures of alpha emitters of unknown composition have a value of 10 μCi.

With the exception that any type of STC has a value of 10 Ci, any radionuclide other than alpha emitting radionuclides not listed in appendix E and mixtures of beta emitters of unknown composition have a value of 100 μCi.

NOTE: Where there is involved a mixture of radionuclides in known amounts, derive the value for the mixture as follows: determine, for each radionuclide in the mixture, the ratio between the quantity present in the mixture and the value otherwise established for the specific radionuclide when not in the mixture. If the sum of such ratios for all radionuclides in the mixture exceeds unity (1), then the accountability criterion has been exceeded.

[72 FR 31940, June 8, 2007]

# PART 840—EXTRAORDINARY NUCLEAR OCCURRENCES

Sec.
840.1 Scope and purpose.
840.2 Procedures.
840.3 Determination of extraordinary nuclear occurrence.
840.4 Criterion I—Substantial discharge of radioactive material or substantial radiation levels offsite.
840.5 Criterion II—Substantial damages to persons offsite or property offsite.

AUTHORITY: Sec. 161 of the Atomic Energy Act of 1954, Pub. L. 83–703, 68 Stat. 919 (42 U.S.C. 2201); sec. 170 of the Atomic Energy Act of 1954, Pub. L. 85–256, 71 Stat. 576, as amended by Pub. L. 89–645, 80 Stat. 891 (42 U.S.C. 2210); Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565–613 (42 U.S.C. 7101–7352).

SOURCE: 49 FR 21473, May 21, 1984, unless otherwise noted.

### § 840.1 Scope and purpose.

(a) *Scope.* This subpart applies to those DOE contractor activities to which the nuclear hazards indemnity provisions in 41 CFR 9–50.704–6 apply, and to other persons indemnified with respect to such activities.

(b) *Purpose.* One purpose of this subpart is to set forth the criteria which the DOE proposes to follow in order to determine whether there has been an ''extraordinary nuclear occurrence.'' The other purpose is to establish the conditions of the waivers of defenses proposed for incorporation in indemnity agreements.

(1) The system is to come into effect only where the discharge or dispersal constitutes a substantial amount of source, special nuclear or byproduct material, or has caused substantial radiation levels offsite. The various limits in present DOE regulations are not appropriate for direct application in the determination of an ''extraordinary nuclear occurrence,'' for they were arrived at with other purposes in mind, and those limits have been set at a level which is conservatively arrived at by incorporating a significant safety factor. Thus, a discharge or dispersal which exceeds the limits in DOE regulations, or in DOE orders, although possible cause for concern, is not one which would be expected to cause substantial injury or damage unless it exceeds by some significant multiple the appropriate regulatory limit. Accordingly, in arriving at the values in the criteria to be deemed ''substantial'' it is more appropriate to adopt values separate from DOE health and safety orders, and, of course the selection of these values will not in any way affect such orders. A substantial discharge, for purposes of the criteria, represents a perturbation of the environment which is clearly above that which could be anticipated from the conduct of normal activities. The criteria are intended solely for the purposes of administration of DOE statutory responsibilities under Pub. L. 89–645, and are not intended to indicate a level of discharge or dispersal at which damage is likely to occur, or even a level at which some type of protective action is indicated. It should be clearly understood that the criteria in no way establish or indicate that there is a specific threshold of exposure at which biological damage from radiation will take place. It cannot be emphasized too frequently that the levels set to be used as criteria for the first part of the determination, that is, the criteria for amounts offsite or radiation levels offsite which are substantial, are not meant to indicate that, because such amounts or levels are determined to be substantial for purposes of administration, they are ''substantial'' in terms of their propensity for causing injury or damage.

(2) It is the purpose of the second part of the determination that DOE decide whether there have in fact been or will probably be substantial damages to persons offsite or property offsite. The criteria for substantial damages were formulated, and the numerical values selected, on a wholly different basis from that on which the criteria used for the first part of the determination with respect to substantial discharge were derived. The only interrelation between the values selected for the discharge criteria and the damage criteria is that the discharge values are set so low that it is extremely unlikely the damage criteria could be satisfied unless the discharge values have been exceeded.

(3) The first part of the test is designed so that DOE can assure itself that something exceptional has occurred; that something untoward and unexpected has in fact taken place and that this event is of sufficient significance to raise the possibility that some damage to persons or property offsite has resulted or may result. If there appears to be no damage, the waivers will not apply because DOE will be unable, under the second part of the test, to make a determination that ''substantial damages'' have resulted or will probably result. If damages have resulted or will probably result, they could vary from de minimis to serious, and the waivers will not apply until the damages, both actual and probable, are determined to be ''substantial'' within the second part of the test.

(4) The presence or absence of an extraordinary nuclear occurrence determination does not concomitantly determine whether or not a particular claimant will recover on his claim. In effect, it is intended primarily to determine whether certain potential obstacles to recovery are to be removed from the route the claimant would ordinarily follow to seek compensation for his injury or damage. If there has not been an extraordinary nuclear occurrence determination, the claimant must proceed (in the absence of settlement) with a tort action subject to whatever issues must be met, and whatever defenses are available to the defendant, under the law applicable in the relevant jurisdiction. If there has been an extraordinary nuclear occurrence determination, the claimant must still proceed (in the absence of settlement) with a tort action, but the claimant's burden is substantially eased by the elimination of certain issues which may be involved and certain defenses which may be available to the defendant. In either case the defendant may defend with respect to such of the following matters as are in issue in any given claim: the nature of the claimant's alleged damages, the causal relationship between the event and the alleged damages, and the amount of the alleged damages.

### § 840.2 Procedures.

(a) DOE may initiate, on its own motion, the making of a determination as to whether or not there has been an extraordinary nuclear occurrence. In the event DOE does not so initiate the making of a determination, any affected person, or any person with whom an indemnity agreement is executed may petition DOE for a determination of whether or not there has been an extraordinary nuclear occurrence. If DOE does not have, or does not expect to have, within 7 days after it has received notification of an alleged event, enough information available to make a determination that there has been an extraordinary nuclear occurrence, DOE will publish a notice in the FEDERAL REGISTER setting forth the date and place of the alleged event and requesting any persons having knowledge thereof to submit their information to DOE.

(b) When a procedure is initiated under paragraph (a) of this section, the principal staff which will begin immediately to assemble the relevant information and prepare a report on which the DOE can make its determination will consist of the Directors or their designees of the following Divisions or Offices: Office of Nuclear Safety, Office of Operational Safety, Office of Health and Environmental Research, the General Counsel or his designee, and a representative of the program division whose facility or device may be involved.

### § 840.3 Determination of extraordinary nuclear occurrence.

If the DOE determines that both of the criteria set forth in § 840.4 and § 840.5 have been met, it will make the determination that there has been an extraordinary nuclear occurrence. If the DOE publishes a notice in the FEDERAL REGISTER in accordance with § 840.2(a) and does not make a determination within 90 days thereafter that there has been an extraordinary nuclear occurrence, the alleged event will be deemed not to be an extraordinary nuclear occurrence. The time for the making of a determination may be extended by DOE by notice published in the FEDERAL REGISTER.

### § 840.4 Criterion I—Substantial discharge of radioactive material or substantial radiation levels offsite.

DOE will determine that there has been a substantial discharge or dispersal of radioactive material offsite, or that there have been substantial levels of radiation offsite, when as a result of an event comprised of one or more related happenings, radioactive material is released from its intended place of confinement or radiation levels occur offsite and either of the following findings are also made:

(a) DOE finds that one or more persons offsite were, could have been, or might be exposed to radiation or to radioactive material, resulting in a dose or in a projected dose in excess of one of the levels in the following table:

TOTAL PROJECTED RADIATION DOSES

| Critical organ | Dose (rems) |
|---|---|
| Thyroid | 30 |
| Whole Body | 20 |
| Bone Marrow | 20 |
| Skin | 60 |
| Other organs or tissues | 30 |

Exposures from the following types of sources of radiation shall be included:

(1) Radiation from sources external to the body;

(2) Radioactive material that may be taken into the body from its occurrence in air or water; and

(3) Radioactive material that may be taken into the body from its occurrence in food or on terrestrial surfaces.

(b) DOE finds that—

(1) Surface contamination of at least a total of any 100 square meters of offsite property has occurred as the result of a release of radioactive material from a production or utilization facility or device and such contamination is characterized by levels of radiation in excess of one of the values listed in column 1 or column 2 of the following table, or

(2) Surface contamination of any offsite property has occurred as the result of a release of radioactive material in the course of transportation and such contamination is characterized by levels of radiation in excess of one of the values listed in column 2 of the following table:

TOTAL SURFACE CONTAMINATION LEVELS [1]

| Type of emitter | Column 1—Offsite property [2] | Column 2—Other offsite property |
|---|---|---|
| Alpha emission from transuranic isotopes. | 3.5 microcuries per square meter. | 0.35 microcuries per square meter. |
| Alpha emission from isotopes other than transuranic isotopes. | 35 microcuries per square meter. | 3.5 microcuries per square meter. |
| Beta or gamma emission. | 40 millirads/hour 1 cm (measured through not more than 7 milligrams per square centimeter of total absorber). | 4 millirads/hour 1 cm (measured through not more than 7 milligrams per square centimeter of total absorber). |

[1] The maximum levels (above background), observed or projected, 8 or more hours after initial deposition.

[2] Contiguous to site, owned or leased by person with whom an indemnity agreement is executed.

[49 FR 21473, May 21, 1984; 49 FR 24374, June 13, 1984]

### § 840.5 Criterion II—Substantial damages to persons offsite or property offsite.

(a) After DOE has determined that an event has satisfied Criterion I, DOE will determine that the event has resulted or will probably result in substantial damages to persons offsite or property offsite if any of the following findings are made:

(1) DOE finds that such event has resulted in the death or hospitalization, within 30 days of the event, of five or more people located offsite showing objective clinical evidence of physical injury from exposure to the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material; or

(2) DOE finds that $2,500,000 or more of damage offsite has been or will probably be sustained by any one person, or $5 million or more of such damage in the aggregate has been or will probably be sustained, as the result of such event; or

(3) DOE finds that $5,000 or more of damage offsite has been or will probably be sustained by each of 50 or more persons, provided that $1 million or more of such damage in the aggregate has been or will probably be sustained, as the result of such event.

(b) As used in paragraphs (a) (2) and (3) of this section ''damage'' shall be that arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material, and shall be based upon estimates of one or more of the following:

(1) Total cost necessary to put affected property back into use.

(2) Loss of use of affected property.

(3) Value of affected property where not practical to restore to use.

(4) Financial loss resulting from protective actions appropriate to reduce or avoid exposure to radiation or to radioactive materials.

# PART 850—CHRONIC BERYLLIUM DISEASE PREVENTION PROGRAM

## Subpart A—General Provisions

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APPENDIX A TO PART 850—CHRONIC BERYLLIUM DISEASE PREVENTION PROGRAM INFORMED CONSENT FORM.

AUTHORITY: 42 U.S.C. 2201(i)(3), (p); 42 U.S.C. 2282c; 29 U.S.C. 668; 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.*, E.O. 12196, 3 CFR 1981 comp., at 145 as amended.

SOURCE: 64 FR 68905, Dec. 8, 1999, unless otherwise noted.

## Subpart A—General Provisions

### § 850.1 Scope.

This part provides for establishment of a chronic beryllium disease prevention program (CBDPP) that supplements and is deemed an integral part of the worker safety and health program under part 851 of this chapter.

[71 FR 6931, Feb. 9, 2006]

### § 850.2 Applicability.

(a) This part applies to:

(1) DOE offices responsible for operations or activities that involve present or past exposure, or the potential for exposure, to beryllium at DOE facilities;

(2) DOE contractors with operations or activities that involve present or past exposure, or the potential for exposure, to beryllium at DOE facilities; and

(3) Any current DOE employee, DOE contractor employee, or other worker at a DOE facility who is or was exposed or potentially exposed to beryllium at a DOE facility.

(b) This part does not apply to:

(1) Beryllium articles; and

(2) DOE laboratory operations that meet the definition of laboratory use of hazardous chemicals in 29 CFR 1910.1450, Occupational Exposure to Hazardous Chemical in Laboratories.

### § 850.3 Definitions.

(a) As used in this part:

*Action level* means the level of airborne concentration of beryllium established pursuant to section 850.23 of this part that, if met or exceeded, requires the implementation of worker protection provisions specified in that section.

*Authorized person* means any person required by work duties to be in a regulated area.

*Beryllium* means elemental beryllium and any insoluble beryllium compound or alloy containing 0.1 percent beryllium or greater that may be released as an airborne particulate.

*Beryllium activity* means an activity taken for, or by, DOE at a DOE facility that can expose workers to airborne beryllium, including but not limited to design, construction, operation, maintenance, or decommissioning, and which may involve one DOE facility or operation or a combination of facilities and operations.

*Beryllium article* means a manufactured item that is formed to a specific shape or design during manufacture, that has end-use functions that depend

in whole or in part on its shape or design during end use, and that does not release beryllium or otherwise result in exposure to airborne concentrations of beryllium under normal conditions of use.

*Beryllium-associated worker* means a current worker who is or was exposed or potentially exposed to airborne concentrations of beryllium at a DOE facility, including:

(1) A beryllium worker;

(2) A current worker whose work history shows that the worker may have been exposed to airborne concentrations of beryllium at a DOE facility;

(3) A current worker who exhibits signs or symptoms of beryllium exposure; and

(4) A current worker who is receiving medical removal protection benefits.

*Beryllium emergency* means any occurrence such as, but not limited to, equipment failure, container rupture, or failure of control equipment or operations that results in an unexpected and significant release of beryllium at a DOE facility.

*Beryllium-induced lymphocyte proliferation test* (Be-LPT) is an in vitro measure of the beryllium antigen-specific, cell-mediated immune response.

*Beryllium worker* means a current worker who is regularly employed in a DOE beryllium activity.

*Breathing zone* is defined as a hemisphere forward of the shoulders, centered on the mouth and nose, with a radius of 6 to 9 inches.

*DOE* means the U.S. Department of Energy.

*DOE contractor* means any entity under contract with DOE (or its subcontractor) that has responsibility for performing beryllium activities at DOE facilities.

*DOE facility* means any facility operated by or for DOE.

*Head of DOE Field Element* means an individual who is the manager or head of the DOE operations office or field office, or any official to whom the Head of DOE Field Element delegates his or her functions under this part.

*High-efficiency particulate air (HEPA) filter* means a filter capable of trapping and retaining at least 99.97 percent of 0.3 micrometer monodispersed particles.

*Immune response* refers to the series of cellular events by which the immune system reacts to challenge by an antigen.

*Medical removal protection benefits* means the employment rights established by section 850.35 of this part for beryllium-associated workers who voluntarily accept temporary or permanent medical removal from beryllium areas following a recommendation by the Site Occupational Medicine Director.

*Operational area* means an area where workers are routinely in the presence of beryllium as part of their work activity.

*Regulated area* means an area demarcated by the responsible employer in which the airborne concentration of beryllium exceeds, or can reasonably be expected to exceed, the action level.

*Removable contamination* means beryllium contamination that can be removed from surfaces by nondestructive means, such as casual contact, wiping, brushing or washing.

*Responsible employer* means:

(1) For DOE contractor employees, the DOE contractor office that is directly responsible for the safety and health of DOE contractor employees while performing a beryllium activity or other activity at a DOE facility; or

(2) For DOE employees, the DOE office that is directly responsible for the safety and health of DOE Federal employees while performing a beryllium activity or other activity at a DOE facility; and

(3) Any person acting directly or indirectly for such office with respect to terms and conditions of employment of beryllium-associated workers.

*Site Occupational Medical Director (SOMD)* means the physician responsible for the overall direction and operation of the site occupational medicine program.

*Unique identifier* means the part of a paired set of labels, used in records that contain confidential information, that does not identify individuals except by using the matching label.

*Worker* means a person who performs work for or on behalf of DOE, including

a DOE employee, an independent contractor, a DOE contractor or subcontractor employee, or any other person who performs work at a DOE facility.

*Worker exposure* means the exposure of a worker to airborne beryllium that would occur if the worker were not using respiratory protective equipment.

(b) Terms undefined in this part that are defined in the Atomic Energy Act of 1954 shall have the same meaning as under that Act.

### § 850.4 Enforcement.

DOE may take appropriate steps pursuant to part 851 of this chapter to enforce compliance by contractors with this part and any DOE-approved CBDPP.

[71 FR 6931, Feb. 9, 2006]

### § 850.5 Dispute resolution.

(a) Subject to paragraphs (b) and (c) of this section, any worker who is adversely affected by an action taken, or failure to act, under this part may petition the Office of Hearings and Appeals for relief in accordance with 10 CFR part 1003, Subpart G.

(b) The Office of Hearings and Appeals may not accept a petition from a worker unless the worker requested the responsible employer to correct the violation, and the responsible employer refused or failed to take corrective action within a reasonable time.

(c) If the dispute relates to a term or condition of employment that is covered by a grievance-arbitration provision in a collective bargaining agreement, the worker must exhaust all applicable grievance-arbitration procedures before filing a petition for relief with the Office of Hearings and Appeals. A worker is deemed to have exhausted all applicable grievance-arbitration procedures if 150 days have passed since the filing of a grievance and a final decision on it has not been issued.

## Subpart B—Administrative Requirements

### § 850.10 Development and approval of the CBDPP.

(a) *Preparation and submission of initial CBDPP to DOE.* (1) The responsible employer at a DOE facility must ensure that a CBDPP is prepared for the facility and submitted to the appropriate Head of DOE Field Element before beginning beryllium activities, but no later than April 6, 2000 of this part.

(2) If the CBDPP has separate sections addressing the activities of multiple contractors at the facility, the Head of DOE Field Element will designate a single DOE contractor to review and approve the sections prepared by other contractors, so that a single consolidated CBDPP for the facility is submitted to the Head of DOE Field Element for review and approval.

(b) *DOE review and approval.* The appropriate Head of DOE Field Element must review and approve the CBDPP.

(1) The initial CBDPP and any updates are deemed approved 90 days after submission if they are not specifically approved or rejected by DOE earlier.

(2) The responsible employer must furnish a copy of the approved CBDPP, upon request, to the DOE Associate Under Secretary for Environment, Health, Safety and Security or designee, DOE program offices, and affected workers or their designated representatives.

(c) *Update.* The responsible employer must submit an update of the CBDPP to the appropriate Head of DOE Field Element for review and approval whenever a significant change or significant addition to the CBDPP is made or a change in contractors occurs. The Head of DOE Field Element must review the CBDPP at least annually and, if necessary, require the responsible employer to update the CBDPP.

(d) *Labor Organizations.* If a responsible employer employs or supervises beryllium-associated workers who are represented for collective bargaining by a labor organization, the responsible employer must:

(1) Give the labor organization timely notice of the development and implementation of the CBDPP and any updates thereto; and

(2) Upon timely request, bargain concerning implementation of this part, consistent with the Federal labor laws.

[64 FR 68905, Dec. 8, 1999, as amended at 71 FR 68733, Nov. 28, 2006; 80 FR 5008, Jan. 30, 2015]

### § 850.11 General CBDPP requirements.

(a) The CBDPP must specify the existing and planned operational tasks that are within the scope of the CBDPP. The CBDPP must augment and, to the extent feasible, be integrated into the existing worker protection programs that cover activities at the facility.

(b) The detail, scope, and content of the CBDPP must be commensurate with the hazard of the activities performed, but in all cases the CBDPP must:

(1) Include formal plans and measures for maintaining exposures to beryllium at or below the permissible exposure level prescribed in § 850.22;

(2) Satisfy each requirement in subpart C of this part;

(3) Contain provisions for:

(i) Minimizing the number of workers exposed and potentially exposed to beryllium;

(ii) Minimizing the number of opportunities for workers to be exposed to beryllium;

(iii) Minimizing the disability and lost work time of workers due to chronic beryllium disease, beryllium sensitization and associated medical care; and

(iv) Setting specific exposure reduction and minimization goals that are appropriate for the beryllium activities covered by the CBDPP to further reduce exposure below the permissible exposure limit prescribed in § 850.22.

### § 850.12 Implementation.

(a) The responsible employer must manage and control beryllium exposures in all DOE beryllium activities consistent with the approved CBDPP.

(b) No person employed by DOE or a DOE contractor may take or cause any action inconsistent with the requirements of:

(1) This part,

(2) An approved CBDPP, and

(3) Any other Federal statute or regulation concerning the exposure of workers to beryllium at DOE facilities.

(c) No task involving potential exposure to airborne beryllium that is outside the scope of the existing CBDPP may be initiated until an update of the CBDPP is approved by the Head of DOE Field Element, except in an unexpected situation and, then, only upon approval of the Head of DOE Field Element.

(d) Nothing in this part precludes a responsible employer from taking any additional protective action that it determines to be necessary to protect the health and safety of workers.

(e) Nothing in this part affects the responsibilities of DOE officials under the Federal Employee Occupational Safety and Health Program (29 CFR part 1960) and related DOE directives.

### § 850.13 Compliance.

(a) The responsible employer must conduct activities in compliance with its CBDPP.

(b) The responsible employer must achieve compliance with all elements of its CBDPP no later than January 7, 2002.

(c) With respect to a particular beryllium activity, the contractor in charge of the activity is responsible for complying with this part. If no contractor is responsible for a beryllium activity, DOE must ensure implementation of, and compliance with, this part.

## Subpart C—Specific Program Requirements

### § 850.20 Baseline beryllium inventory.

(a) The responsible employer must develop a baseline inventory of the locations of beryllium operations and other locations of potential beryllium contamination, and identify the workers exposed or potentially exposed to beryllium at those locations.

(b) In conducting the baseline inventory, the responsible employer must:

(1) Review current and historical records;

(2) Interview workers;

(3) Document the characteristics and locations of beryllium at the facility; and

(4) Conduct air, surface, and bulk sampling.

(c) The responsible employer must ensure that:

(1) The baseline beryllium inventory is managed by a qualified individual (e.g., a certified industrial hygienist); and

(2) The individuals assigned to this task have sufficient knowledge and experience to perform such activities properly.

### § 850.21 Hazard assessment.

(a) If the baseline inventory establishes the presence of beryllium, the responsible employer must conduct a beryllium hazard assessment that includes an analysis of existing conditions, exposure data, medical surveillance trends, and the exposure potential of planned activities. The exposure determinants, characteristics and exposure potential of activities must be prioritized so that the activities with the greatest risks of exposure are evaluated first.

(b) The responsible employer must ensure that:

(1) The hazard assessment is managed by a qualified individual (e.g., a certified industrial hygienist); and

(2) The individuals assigned to this task have sufficient knowledge and experience to perform such activities properly.

### § 850.22 Permissible exposure limit.

The responsible employer must assure that no worker is exposed to an airborne concentration of beryllium greater than the permissible exposure limit established in 29 CFR 1910.1000, as measured in the worker's breathing zone by personal monitoring, or a more stringent TWA PEL that may be promulgated by the Occupational Safety and Health Administration as a health standard.

### § 850.23 Action level.

(a) The responsible employer must include in its CBDPP an action level that is no greater than 0.2 $\mu g/m^3$, calculated as an 8-hour TWA exposure, as measured in the worker's breathing zone by personal monitoring.

(b) If an airborne concentration of beryllium is at or above the action level, the responsible employer must implement §§ 850.24(c) (periodic monitoring), 850.25 (exposure reduction and minimization), 850.26 (regulated areas), 850.27 (hygiene facilities and practices), 850.28 (respiratory protection), 850.29 (protective clothing and equipment), and 850.38 (warning signs) of this part.

### § 850.24 Exposure monitoring.

(a) *General*. The responsible employer must ensure that:

(1) Exposure monitoring is managed by a qualified individual (e.g., a certified industrial hygienist); and

(2) The individuals assigned to this task have sufficient industrial hygiene knowledge and experience to perform such activities properly.

(b) *Initial monitoring*. The responsible employer must perform initial monitoring in areas that may have airborne beryllium, as shown by the baseline inventory and hazard assessment. The responsible employer must apply statistically-based monitoring strategies to obtain a sufficient number of sample results to adequately characterize exposures, before reducing or terminating monitoring.

(1) The responsible employer must determine workers' 8-hour TWA exposure levels by conducting personal breathing zone sampling.

(2) Exposure monitoring results obtained within the 12 months preceding the effective date of this part may be used to satisfy this requirement if the measurements were made as provided in paragraph (b)(1) of this section.

(c) *Periodic exposure monitoring*. The responsible employer must conduct periodic monitoring of workers who work in areas where airborne concentrations of beryllium are at or above the action level. The monitoring must be conducted in a manner and at a frequency necessary to represent workers' exposure, as specified in the CBDPP. This periodic exposure monitoring must be performed at least every 3 months (quarterly).

(d) *Additional exposure monitoring*. The responsible employer must perform additional monitoring if operations, maintenance or procedures change, or when the responsible employer has any reason to suspect such a change has occurred.

(e) *Accuracy of monitoring.* The responsible employer must use a method of monitoring and analysis that has an accuracy of not less than plus or minus 25 percent, with a confidence level of 95 percent, for airborne concentrations of beryllium at the action level.

(f) *Analysis.* The responsible employer must have all samples collected to satisfy the monitoring requirements of this part analyzed in a laboratory accredited for metals by the American Industrial Hygiene Association (AIHA) or a laboratory that demonstrates quality assurance for metals analysis that is equivalent to AIHA accreditation.

(g) *Notification of monitoring results.* (1) The responsible employer must, within 10 working days after receipt of any monitoring results, notify the affected workers of monitoring results in writing. This notification of monitoring results must be:

(i) Made personally to the affected worker; or

(ii) Posted in location(s) that is readily accessible to the affected worker, but in a manner that does not identify the individual to other workers.

(2) If the monitoring results indicate that a worker's exposure is at or above the action level, the responsible employer must include in the notice:

(i) A statement that the action level has been met or exceeded; and

(ii) A description of the corrective action being taken by the responsible employer to reduce the worker's exposure to below the action level, if practicable.

(3) If the monitoring results indicate that worker exposure is at or above the action level, the responsible employer must also notify DOE and the SOMD of these results within 10 working days after receipt.

### § 850.25 Exposure reduction and minimization.

(a) The responsible employer must ensure that no worker is exposed above the exposure limit prescribed in § 850.22.

(b) The responsible employer must, in addition:

(1) Where exposure levels are at or above the action level, establish a formal exposure reduction and minimization program to reduce exposure levels to below the action level, if practicable. This program must be described in the responsible employer's CBDPP and must include:

(i) Annual goals for exposure reduction and minimization;

(ii) A rationale for and a strategy for meeting the goals;

(iii) Actions that will be taken to achieve the goals; and

(iv) A means of tracking progress towards meeting the goals or demonstrating that the goals have been met.

(2) Where exposure levels are below the action level, implement actions for reducing and minimizing exposures, if practicable. The responsible employer must include in the CBDPP a description of the steps to be taken for exposure reduction and minimization and a rationale for those steps.

(c) The responsible employer must implement exposure reduction and minimization actions using the conventional hierarchy of industrial hygiene controls (*i.e.*, engineering controls, administrative controls, and personal protective equipment in that order).

### § 850.26 Regulated areas.

(a) If airborne concentrations of beryllium in areas in DOE facilities are measured at or above the action level, the responsible employer must establish regulated areas for those areas.

(b) The responsible employer must demarcate regulated areas from the rest of the workplace in a manner that adequately alerts workers to the boundaries of such areas.

(c) The responsible employer must limit access to regulated areas to authorized persons.

(d) The responsible employer must keep records of all individuals who enter regulated areas. These records must include the name, date, time in and time out, and work activity.

### § 850.27 Hygiene facilities and practices.

(a) *General.* The responsible employer must assure that in areas where workers are exposed to beryllium at or above the action level, without regard to the use of respirators:

(1) Food or beverage and tobacco products are not used;

(2) Cosmetics are not applied, except in change rooms or areas and shower facilities required under paragraphs (b) and (c) of this section; and

(3) Beryllium workers are prevented from exiting areas that contain beryllium with contamination on their bodies or their personal clothing.

(b) *Change rooms or areas.* The responsible employer must provide clean change rooms or areas for beryllium workers who work in regulated areas.

(1) Separate facilities free of beryllium must be provided for beryllium workers to change into, and store, personal clothing, and clean protective clothing and equipment to prevent cross-contamination;

(2) The change rooms or areas that are used to remove beryllium-contaminated clothing and protective equipment must be maintained under negative pressure or located so as to minimize dispersion of beryllium into clean areas; and

(c) *Showers and handwashing facilities.* (1) The responsible employer must provide handwashing and shower facilities for beryllium workers who work in regulated areas.

(2) The responsible employer must assure that beryllium workers who work in regulated areas shower at the end of the work shift.

(d) *Lunchroom facilities.* (1) The responsible employer must provide lunchroom facilities that are readily accessible to beryllium workers, and ensure that tables for eating are free of beryllium, and that no worker in a lunchroom facility is exposed at any time to beryllium at or above the action level.

(2) The responsible employer must assure that beryllium workers do not enter lunchroom facilities with protective work clothing or equipment unless the surface beryllium has been removed from clothing and equipment by HEPA vacuuming or other method that removes beryllium without dispersing it.

(e) The change rooms or areas, shower and handwashing facilities, and lunchroom facilities must comply with 29 CFR 1910.141, Sanitation.

**§ 850.28 Respiratory protection.**

(a) The responsible employer must establish a respiratory protection program that complies with the respiratory protection program requirements of 29 CFR 1910.134, Respiratory Protection.

(b) The responsible employer must provide respirators to, and ensure that they are used by, all workers who:

(1) Are exposed to an airborne concentration of beryllium at or above the action level, or

(2) Are performing tasks for which analyses indicate the potential for exposures at or above the action level.

(c) The responsible employer must include in the respiratory protection program any beryllium-associated worker who requests to use a respirator for protection against airborne beryllium, regardless of measured exposure levels.

(d) The responsible employer must select for use by workers:

(1) Respirators approved by the National Institute for Occupational Safety and Health (NIOSH) if NIOSH-approved respirators exist for a specific DOE task; or

(2) Respirators that DOE has accepted under the DOE Respiratory Protection Acceptance Program if NIOSH-approved respirators do not exist for specific DOE tasks.

**§ 850.29 Protective clothing and equipment.**

(a) The responsible employer must provide protective clothing and equipment to beryllium workers and ensure its appropriate use and maintenance, where dispersible forms of beryllium may contact worker's skin, enter openings in workers' skin, or contact workers' eyes, including where:

(1) Exposure monitoring has established that airborne concentrations of beryllium are at or above the action level;

(2) Surface contamination levels measured or presumed prior to initiating work are above the level prescribed in § 850.30;

(3) Surface contamination levels results obtained to confirm housekeeping efforts are above the level prescribed in § 850.30; and

(4) Any beryllium-associated worker who requests the use of protective clothing and equipment for protection against airborne beryllium, regardless of measured exposure levels.

(b) The responsible employer must comply with 29 CFR 1910.132, Personal Protective Equipment General Requirements, when workers use personal protective clothing and equipment.

(c) The responsible employer must establish procedures for donning, doffing, handling, and storing protective clothing and equipment that:

(1) Prevent beryllium workers from exiting areas that contain beryllium with contamination on their bodies or their personal clothing; and

(2) Include beryllium workers exchanging their personal clothing for full-body protective clothing and footwear before they begin work in regulated areas.

(d) The responsible employer must ensure that no worker removes beryllium-contaminated protective clothing and equipment from areas that contain beryllium, except for workers authorized to launder, clean, maintain, or dispose of the clothing and equipment.

(e) The responsible employer must prohibit the removal of beryllium from protective clothing and equipment by blowing, shaking, or other means that may disperse beryllium into the air.

(f) The responsible employer must ensure that protective clothing and equipment is cleaned, laundered, repaired, or replaced as needed to maintain effectiveness. The responsible employer must:

(1) Ensure that beryllium-contaminated protective clothing and equipment, when removed for laundering, cleaning, maintenance, or disposal, is placed in containers that prevent the dispersion of beryllium dust and that are labeled in accordance with § 850.38 of this part; and

(2) Inform organizations that launder or clean DOE beryllium-contaminated protective clothing or equipment that exposure to beryllium is potentially harmful, and that clothing and equipment should be laundered or cleaned in a manner prescribed by the responsible employer to prevent the release of airborne beryllium.

### § 850.30 Housekeeping.

(a) Where beryllium is present in operational areas of DOE facilities, the responsible employer must conduct routine surface sampling to determine housekeeping conditions. Surfaces contaminated with beryllium dusts and waste must not exceed a removable contamination level of 3 μg/100 $cm^2$ during non-operational periods. This sampling would not include the interior of installed closed systems such as enclosures, glove boxes, chambers, or ventilation systems.

(b) When cleaning floors and surfaces in areas where beryllium is present at DOE facilities, the responsible employer must clean beryllium-contaminated floors and surfaces using a wet method, vacuuming or other cleaning methods, such as sticky tack cloths, that avoid the production of airborne dust. Compressed air or dry methods must not be used for such cleaning.

(c) The responsible employer must equip the portable or mobile vacuum units that are used to clean beryllium-contaminated areas with HEPA filters, and change the filters as often as needed to maintain their capture efficiency.

(d) The responsible employer must ensure that the cleaning equipment that is used to clean beryllium-contaminated surfaces is labeled, controlled, and not used for non-hazardous materials.

### § 850.31 Release criteria.

(a) The responsible employer must clean beryllium-contaminated equipment and other items to the lowest contamination level practicable, but not to exceed the levels established in paragraphs (b) and (c) of this section, and label the equipment or other items, before releasing them to the general public or a DOE facility for non-beryllium use, or to another facility for work involving beryllium.

(b) Before releasing beryllium-contaminated equipment or other items to the general public or for use in a non-beryllium area of a DOE facility, the responsible employer must ensure that:

(1) The removable contamination level of equipment or item surfaces does not exceed the higher of 0.2 μg/100

$cm^2$ or the concentration level of beryllium in soil at the point or release, whichever is greater;

(2) The equipment or item is labeled in accordance with § 850.38(b); and

(3) The release is conditioned on the recipient's commitment to implement controls that will prevent foreseeable beryllium exposure, considering the nature of the equipment or item and its future use and the nature of the beryllium contamination.

(c) Before releasing beryllium-contaminated equipment or other items to another facility performing work with beryllium, the responsible employer must ensure that:

(1) The removable contamination level of equipment or item surfaces does not exceed 3 μg/100 $cm^2$;

(2) The equipment or item is labeled in accordance with § 850.38(b); and

(3) The equipment or item is enclosed or placed in sealed, impermeable bags or containers to prevent the release of beryllium dust during handling and transportation.

### § 850.32 Waste disposal.

(a) The responsible employer must control the generation of beryllium-containing waste, and beryllium-contaminated equipment and other items that are disposed of as waste, through the application of waste minimization principles.

(b) Beryllium-containing waste, and beryllium-contaminated equipment and other items that are disposed of as waste, must be disposed of in sealed, impermeable bags, containers, or enclosures to prevent the release of beryllium dust during handling and transportation. The bags, containers, and enclosures that are used for disposal of beryllium waste must be labeled according to § 850.38.

### § 850.33 Beryllium emergencies.

(a) The responsible employer must comply with 29 CFR 1910.120(l) for handling beryllium emergencies related to decontamination and decommissioning operations.

(b) The responsible employer must comply with 29 CFR 1910.120(q) for handling beryllium emergencies related to all other operations.

### § 850.34 Medical surveillance.

(a) *General*. (1) The responsible employer must establish and implement a medical surveillance program for beryllium-associated workers who voluntarily participate in the program.

(2) The responsible employer must designate a Site Occupational Medical Director (SOMD) who is responsible for administering the medical surveillance program.

(3) The responsible employer must ensure that the medical evaluations and procedures required by this section are performed by, or under the supervision of, a licensed physician who is familiar with the health effects of beryllium.

(4) The responsible employer must establish, and maintain, a list of beryllium-associated workers who may be eligible for protective measures under this part. The list must be:

(i) Based on the hazard assessment, exposure records, and other information regarding the identity of beryllium-associated workers; and

(ii) Adjusted at regular intervals based on periodic evaluations of beryllium-associated workers performed under paragraph (b)(2) of this section;

(5) The responsible employer must provide the SOMD with the information needed to operate and administer the medical surveillance program, including the:

(i) List of beryllium-associated workers required by paragraph (a)(4) of this section;

(ii) Baseline inventory;

(iii) Hazard assessment and exposure monitoring data;

(iv) Identity and nature of activities or operations on the site that are covered under the CBDPP, related duties of beryllium-associated workers; and

(v) Type of personal protective equipment used.

(6) The responsible employer must provide the following information to the SOMD and the examining physician:

(i) A copy of this rule and its preamble;

(ii) A description of the worker's duties as they pertain to beryllium exposure;

(iii) Records of the worker's beryllium exposure; and

(iv) A description of the personal protective and respiratory protective equipment used by the worker in the past, present, or anticipated future use.

(b) *Medical evaluations and procedures.* The responsible employer must provide, to beryllium-associated workers who voluntarily participate in the medical surveillance program, the medical evaluations and procedures required by this section at no cost and at a time and place that is reasonable and convenient to the worker.

(1) *Baseline medical evaluation.* The responsible employer must provide a baseline medical evaluation to beryllium-associated workers. This evaluation must include:

(i) A detailed medical and work history with emphasis on past, present, and anticipated future exposure to beryllium;

(ii) A respiratory symptoms questionnaire;

(iii) A physical examination with special emphasis on the respiratory system, skin and eyes;

(iv) A chest radiograph (posterior-anterior, 14 × 17 inches) interpreted by a National Institute for Occupational Safety and Health (NIOSH) B-reader of pneumoconiosis or a board-certified radiologist (unless a baseline chest radiograph is already on file);

(v) Spirometry consisting of forced vital capacity (FVC) and forced expiratory volume at 1 second (FEV1);

(vi) A Be-LPT; and

(vii) Any other tests deemed appropriate by the examining physician for evaluating beryllium-related health effects.

(2) *Periodic evaluation.* (i) The responsible employer must provide to beryllium workers a medical evaluation annually, and to other beryllium-associated workers a medical evaluation every three years. The periodic medical evaluation must include:

(A) A detailed medical and work history with emphasis on past, present, and anticipated future exposure to beryllium;

(B) A respiratory symptoms questionnaire;

(C) A physical examination with emphasis on the respiratory system;

(D) A Be-LPT; and

(E) Any other medical evaluations deemed appropriate by the examining physician for evaluating beryllium-related health effects.

(ii) The responsible employer must provide to beryllium-associated workers a chest radiograph every five years.

(3) *Emergency evaluation.* The responsible employer must provide a medical evaluation as soon as possible to any worker who may have been exposed to beryllium because of a beryllium emergency. The medical evaluation must include the requirements of paragraph (b)(2) of this section.

(c) *Multiple physician review.* The responsible employer must establish a multiple physician review process for beryllium-associated workers that allows for the review of initial medical findings, determinations, or recommendations from any medical evaluation conducted pursuant to paragraph (b) of this section.

(1) If the responsible employer selects the initial physician to conduct any medical examination or consultation provided to a beryllium-associated worker, the worker may designate a second physician to:

(i) Review any findings, determinations, or recommendations of the initial physician; and

(ii) Conduct such examinations, consultations and laboratory tests, as the second physician deems necessary to facilitate this review.

(2) The responsible employer must promptly notify a beryllium-associated worker in writing of the right to seek a second medical opinion after the initial physician provided by the responsible employer conducts a medical examination or consultation.

(3) The responsible employer may condition its participation in, and payment for, multiple physician review upon the beryllium-associated worker doing the following within fifteen (15) days after receipt of the notice, or receipt of the initial physician's written opinion, whichever is later:

(i) Informing the responsible employer in writing that he or she intends to seek a second medical opinion; and

(ii) Initiating steps to make an appointment with a second physician.

(4) If the findings, determinations, or recommendations of the second physician differ from those of the initial physician, then the responsible employer and the beryllium-associated worker must make efforts to encourage and assist the two physicians to resolve any disagreement.

(5) If, despite the efforts of the responsible employer and the beryllium-associated worker, the two physicians are unable to resolve their disagreement, then the responsible employer and the worker, through their respective physicians, must designate a third physician to:

(i) Review any findings, determinations, or recommendations of the other two physicians; and

(ii) Conduct such examinations, consultations, laboratory tests, and consultations with the other two physicians, as the third physician deems necessary to resolve the disagreement among them.

(6) The SOMD must act consistently with the findings, determinations, and recommendations of the third physician, unless the SOMD and the beryllium-associated worker reach an agreement that is consistent with the recommendations of at least one of the other two physicians.

(d) *Alternate physician determination.* The responsible employer and the beryllium-associated worker or the worker's designated representative may agree upon the use of any alternate form of physician determination in lieu of the multiple physician review process provided by paragraph (c) of this section, so long as the alternative is expeditious and at least as protective of the worker.

(e) *Written medical opinion and recommendation.* (1) Within two weeks of receipt of results, the SOMD must provide to the responsible employer a written, signed medical opinion for each medical evaluation performed on each beryllium-associated worker. The written opinion must take into account the findings, determinations and recommendations of the other examining physicians who may have examined the beryllium-associated worker. The SOMD's opinion must contain:

(i) The diagnosis of the worker's condition relevant to occupational exposure to beryllium, and any other medical condition that would place the worker at increased risk of material impairment to health from further exposure to beryllium;

(ii) Any recommendation for removal of the worker from DOE beryllium activities, or limitation on the worker's activities or duties or use of personal protective equipment, such as a respirator; and

(iii) A statement that the SOMD or examining physician has clearly explained to the worker the results of the medical evaluation, including all tests results and any medical condition related to beryllium exposure that requires further evaluation or treatment.

(2) The SOMD's written medical opinion must not reveal specific records, findings, and diagnoses that are not related to medical conditions that may be affected by beryllium exposure.

(f) *Information provided to the beryllium-associated worker.* (1) The SOMD must provide each beryllium-associated worker with a written medical opinion containing the results of all medical tests or procedures, an explanation of any abnormal findings, and any recommendation that the worker be referred for additional testing for evidence of CBD, within 10 working days after the SOMD's receipt of the results of the medical tests or procedures.

(2) The responsible employer must, within 30 days after a request by a beryllium-associated worker, provide the worker with the information the responsible employer is required to provide the examining physician under paragraph (a)(6) of this section.

(g) *Reporting.* The responsible employer must report on the applicable OSHA reporting form beryllium sensitization, CBD, or any other abnormal condition or disorder of workers caused or aggravated by occupational exposure to beryllium.

(h) *Data analysis.* (1) The responsible employer must routinely and systematically analyze medical, job, and exposure data with the aim of identifying individuals or groups of individuals potentially at risk for CBD and working conditions that are contributing to that risk.

(2) The responsible employer must use the results of these analyses to identify additional workers to whom the responsible employer must provide medical surveillance and to determine the need for additional exposure controls.

**§ 850.35 Medical removal.**

(a) *Medical removal protection*. The responsible employer must offer a beryllium-associated worker medical removal from exposure to beryllium if the SOMD determines in a written medical opinion that it is medically appropriate to remove the worker from such exposure. The SOMD's determination must be based on one or more positive Be-LPT results, chronic beryllium disease diagnosis, an examining physician's recommendation, or any other signs or symptoms that the SOMD deems medically sufficient to remove a worker.

(1) *Temporary removal pending final medical determination*. The responsible employer must offer a beryllium-associated worker temporary medical removal from exposure to beryllium on each occasion that the SOMD determines in a written medical opinion that the worker should be temporarily removed from such exposure pending a final medical determination of whether the worker should be removed permanently.

(i) In this section, ''final medical determination'' means the outcome of the multiple physician review process or the alternate medical determination process provided for in paragraphs (c) and (d) of § 850.34.

(ii) If a beryllium-associated worker is temporarily removed from beryllium exposure pursuant to this section, the responsible employer must transfer the worker to a comparable job for which the worker is qualified (or for which the worker can be trained in a short period) and where beryllium exposures are as low as possible, but in no event at or above the action level.

(iii) The responsible employer must maintain the beryllium-associated worker's total normal earnings, seniority, and other worker rights and benefits as if the worker had not been removed.

(iv) If there is no such job available, the responsible employer must provide to the beryllium-associated worker the medical removal protection benefits specified in paragraph (b)(2) of this section, until a job becomes available or for one year, whichever comes first.

(2) *Permanent medical removal*. (i) The responsible employer must offer a beryllium-associated worker permanent medical removal from exposure to beryllium if the SOMD determines in a written medical opinion that the worker should be permanently removed from exposure to beryllium.

(ii) If a beryllium-associated worker is removed permanently from beryllium exposure based on the SOMD's recommendation pursuant to this section, the responsible employer must provide the worker the medical removal protection benefits specified in paragraph (b) of this section.

(3) *Worker consultation before temporary or permanent medical removal*. If the SOMD determines that a beryllium-associated worker should be temporarily or permanently removed from exposure to beryllium, the SOMD must:

(i) Advise the beryllium-associated worker of the determination that medical removal is necessary to protect the worker's health;

(ii) Provide the beryllium-associated worker with a copy of this rule and its preamble, and any other information the SOMD deems necessary on the risks of continued exposure to beryllium and the benefits of removal;

(iii) Provide the beryllium-associated worker the opportunity to have any questions concerning medical removal answered; and

(iv) Obtain the beryllium-associated worker's signature acknowledging that the worker has been advised to accept medical removal from beryllium exposure as provided in this section, and has been provided with the information specified in this paragraph, on the benefits of removal and the risks of continued exposure to beryllium.

(4) *Return to work after medical removal*. (i) The responsible employer, subject to paragraph (a)(4)(ii) of this section, must not return a beryllium-associated worker who has been permanently removed under this section to

the worker's former job status unless the SOMD first determines in a written medical opinion that continued medical removal is no longer necessary to protect the worker's health.

(ii) Not withstanding paragraph (a)(4)(i) of this section, if, in the SOMD's opinion, continued exposure to beryllium will not pose an increased risk to the beryllium-associated worker's health, and medical removal is an inappropriate remedy in the circumstances, the SOMD must fully discuss these matters with the worker and then, in a written determination, may authorize the responsible employer to return the worker to his or her former job status. Thereafter, the returned beryllium-associated worker must continue to be provided with medical surveillance under § 850.34 of this part.

(b) *Medical removal protection benefits.* (1) If a beryllium-associated worker has been permanently removed from beryllium exposure pursuant to paragraph (a)(2) of this section, the responsible employer must provide the beryllium-associated worker:

(i) The opportunity to transfer to another position which is available, or later becomes available, for which the beryllium-associated worker is qualified (or for which the worker can be trained in a short period) and where beryllium exposures are as low as possible, but in no event at or above the action level; or

(ii) If the beryllium-associated worker cannot be transferred to a comparable job where beryllium exposures are below the action level, a maximum of 2 years of permanent medical removal protection benefits (specified in paragraph (b)(2) of this section).

(2) If required by this section to provide medical removal protection benefits, the responsible employer must maintain the removed worker's total normal earnings, seniority and other worker rights and benefits, as though the worker had not been removed.

(3) If a removed beryllium-associated worker files a claim for workers' compensation payments for a beryllium-related disability, then the responsible employer must continue to provide medical removal protection benefits pending disposition of the claim. The responsible employer must receive no credit for the workers' compensation payments received by the worker for treatment related expenses.

(4) The responsible employer's obligation to provide medical removal protection benefits to a removed beryllium-associated worker is reduced to the extent that the worker receives compensation for earnings lost during the period of removal either from a publicly- or employer-funded compensation program, or from employment with another employer made possible by virtue of the worker's removal.

(5) For the purposes of this section, the requirement that a responsible 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 collective bargaining agreement.

(6) The responsible employer may condition the provision of medical removal protection benefits upon the beryllium-associated worker's participation in medical surveillance provided in accordance with § 850.34 of this part.

### § 850.36 Medical consent.

(a) The responsible employer must provide each beryllium-associated worker with a summary of the medical surveillance program established in § 850.34 at least one week before the first medical evaluation or procedure or at any time requested by the worker. This summary must include:

(1) The type of data that will be collected in the medical surveillance program;

(2) How the data will be collected and maintained;

(3) The purpose for which the data will be used; and

(4) A description of how confidential data will be protected.

(b) Responsible employers must also provide each beryllium-associated worker with information on the benefits and risks of the medical tests and examinations available to the worker at least one week prior to any such examination or test, and an opportunity to have the worker's questions answered.

(c) The responsible employer must have the SOMD obtain a beryllium-associated worker's signature on the informed consent form found in Appendix A to this part, before performing medical evaluations or any tests.

**§ 850.37 Training and counseling.**

(a) The responsible employer must develop and implement a beryllium training program and ensure participation for:

(1) Beryllium-associated workers;

(2) All other individuals who work at a site where beryllium activities are conducted.

(b) The training provided for workers identified in paragraph (a)(1) of this section, must:

(1) Be in accordance with 29 CFR 1910.1200, Hazard Communication;

(2) Include the contents of the CBDPP; and

(3) Include potential health risks to beryllium worker family members and others who may come in contact with beryllium on beryllium workers or beryllium workers' personal clothing or other personal items as the result of a beryllium control failure at a DOE facility.

(c) The training provided for workers identified in paragraph (a)(2) of this section must consist of general awareness about beryllium hazards and controls.

(d) The responsible employer must provide the training required by this section before or at the time of initial assignment and at least every two years thereafter.

(e) The employer must provide retraining when the employer has reason to believe that a beryllium worker lacks the proficiency, knowledge, or understanding needed to work safely with beryllium, including at least the following situations:

(1) To address any new beryllium hazards resulting from a change to operations, procedures, or beryllium controls about which the beryllium worker was not previously trained; and

(2) If a beryllium worker's performance involving beryllium work indicates that the worker has not retained the requisite proficiency.

(f) The responsible employer must develop and implement a counseling program to assist beryllium-associated workers who are diagnosed by the SOMD to be sensitized to beryllium or to have CBD. This counseling program must include communicating with beryllium-associated workers concerning:

(1) The medical surveillance program provisions and procedures;

(2) Medical treatment options;

(3) Medical, psychological, and career counseling;

(4) Medical benefits;

(5) Administrative procedures and workers rights under applicable Workers' Compensation laws and regulations;

(6) Work practice procedures limiting beryllium-associated worker exposure to beryllium; and

(7) The risk of continued beryllium exposure after sensitization.

**§ 850.38 Warning signs and labels.**

(a) *Warning signs.* The responsible employer must post warning signs at each access point to a regulated area with the following information:

DANGER
BERYLLIUM CAN CAUSE LUNG DAMAGE
CANCER HAZARD
AUTHORIZED PERSONNEL ONLY

(b) *Warning labels.* (1) The responsible employer must affix warning labels to all containers of beryllium, beryllium compounds, or beryllium-contaminated clothing, equipment, waste, scrap, or debris.

(2) Warning labels must contain the following information:

DANGER
CONTAMINATED WITH BERYLLIUM
DO NOT REMOVE DUST BY BLOWING OR SHAKING
CANCER AND LUNG DISEASE HAZARD

(c) Warning signs and labels must be in accordance with 29 CFR 1910.1200, Hazard Communication.

**§ 850.39 Recordkeeping and use of information.**

(a) The responsible employer must establish and maintain accurate records of all beryllium inventory information, hazard assessments, exposure measurements, exposure controls, and medical surveillance.

(b) Heads of DOE Departmental Elements must:

(1) Designate all record series as required under this rule as agency records and, therefore, subject to all applicable agency records management and access laws; and

(2) Ensure that these record series are retained for a minimum of seventy-five years.

(c) The responsible employer must convey to DOE or its designee all record series required under this rule if the employer ceases to be involved in the CBDPP.

(d) The responsible employer must link data on workplace conditions and health outcomes in order to establish a basis for understanding the beryllium health risk.

(e) The responsible employer must ensure the confidentiality of all work-related records generated under this rule by ensuring that:

(1) All records that are transmitted to other parties do not contain names, social security numbers or any other variables, or combination of variables, that could be used to identify particular individuals; and

(2) Individual medical information generated by the CBDPP is:

(i) Either included as part of the worker's site medical records and maintained by the SOMD, or is maintained by another physician designated by the responsible employer;

(ii) Maintained separately from other records; and

(iii) Used or disclosed by the responsible employer only in conformance with any applicable requirements imposed by the Americans with Disabilities Act, the Privacy Act of 1974, the Freedom of Information Act, and any other applicable law.

(f) The responsible employer must maintain all records required by this part in current and accessible electronic systems, which include the ability readily to retrieve data in a format that maintains confidentiality.

(g) The responsible employer must transmit all records generated as required by this rule, in a format that protects the confidentiality of individuals, to the DOE Chief Health, Safety and Security Officer on request.

(h) The responsible employer must semi-annually transmit to the Office of Domestic and International Health Studies, Office of Environment, Health, Safety and Security an electronic registry of beryllium-associated workers that protects confidentiality, and the registry must include, but is not limited to, a unique identifier, date of birth, gender, site, job history, medical screening test results, exposure measurements, and results of referrals for specialized medical evaluations.

[64 FR 68905, Dec. 8, 1999, as amended at 71 FR 68733, Nov. 28, 2006; 80 FR 5008, Jan. 30, 2015]

EDITORIAL NOTE: At 80 FR 5008, Jan. 30, 2015, §850.39 was amended; however, the amendment could not be incorporated due to inaccurate amendatory instruction.

### §850.40 Performance feedback.

(a) The responsible employer must conduct periodic analyses and assessments of monitoring activities, hazards, medical surveillance, exposure reduction and minimization, and occurrence reporting data.

(b) To ensure that information is available to maintain and improve all elements of the CBDPP continuously, the responsible employer must give results of periodic analyses and assessments to the line managers, planners, worker protection staff, workers, medical staff, and labor organizations representing beryllium-associated workers who request such information.

## APPENDIX A TO PART 850—CHRONIC BERYLLIUM DISEASE PREVENTION PROGRAM INFORMED CONSENT FORM

I, _____ have carefully read and understand the attached information about the Be-LPT and other medical tests. I have had the opportunity to ask any questions that I may have had concerning these tests.

I understand that this program is voluntary and I am free to withdraw at any time from all or any part of the medical surveillance program. I understand that the tests are confidential, but not anonymous. I understand that if the results of any test suggest a health problem, the examining physician will discuss the matter with me, whether or not the result is related to my work with beryllium. I understand that my employer will be notified of my diagnosis only if I have a beryllium sensitization or chronic beryllium disease. My employer will not receive the results or diagnoses of any health conditions not related to beryllium exposure.

I understand that, if the results of one or more of these tests indicate that I have a health problem that is related to beryllium, additional examinations will be recommended. If additional tests indicate I do have a beryllium sensitization or CBD, the Site Occupational Medical Director may recommend that I be removed from working with beryllium. If I agree to be removed, I understand that I may be transferred to another job for which I am qualified (or can be trained for in a short period) and where my beryllium exposures will be as low as possible, but in no case above the action level. I will maintain my total normal earnings, seniority, and other benefits for up to two years if I agree to be permanently removed.

I understand that if I apply for another job or for insurance, I may be requested to release my medical records to a future employer or an insurance company.

I understand that my employer will maintain all medical information relative to the tests performed on me in segregated medical files separate from my personnel files, treated as confidential medical records, and used or disclosed only as provided by the Americans with Disability Act, the Privacy Act of 1974, or as required by a court order or under other law.

I understand that the results of my medical tests for beryllium will be included in the Beryllium Registry maintained by DOE, and that a unique identifier will be used to maintain the confidentiality of my medical information. Personal identifiers will not be included in any reports generated from the DOE Beryllium Registry. I understand that the results of my tests and examinations may be published in reports or presented at meetings, but that I will not be identified.

I consent to having the following medical evaluations:

/ / Physical examination concentrating on my lungs and breathing
/ / Chest X-ray
/ / Spirometry (a breathing test)
/ / Blood test called the beryllium-induced lymphocyte proliferation test or Be-LPT
/ / Other test(s). Specify:

_____

Signature of Participant:

_____

Date: _____

I have explained and discussed any questions that the employee expressed concerning the Be-LPT, physical examination, and other medical testing as well as the implications of those tests.

Name of Examining Physician:

_____

Signature of Examining Physician:

_____

Dated: _____

# PART 851—WORKER SAFETY AND HEALTH PROGRAM

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APPENDIX A TO PART 851—WORKER SAFETY AND HEALTH FUNCTIONAL AREAS
APPENDIX B TO PART 851—GENERAL STATEMENT OF ENFORCEMENT POLICY

AUTHORITY: 42 U.S.C. 2201(i)(3), (p); 42 U.S.C. 2282c; 42 U.S.C. 5801 *et seq.;* 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.;* 28 U.S.C. 2461 note.

SOURCE: 71 FR 6931, Feb. 9, 2006, unless otherwise noted.

## Subpart A—General Provisions

### §851.1 Scope and purpose.

(a) The worker safety and health requirements in this part govern the conduct of contractor activities at DOE sites.

(b) This part establishes the:

(1) Requirements for a worker safety and health program that reduces or prevents occupational injuries, illnesses, and accidental losses by providing DOE contractors and their workers with safe and healthful workplaces at DOE sites; and

(2) Procedures for investigating whether a violation of a requirement of this part has occurred, for determining the nature and extent of any such violation, and for imposing an appropriate remedy.

### §851.2 Exclusions.

(a) This part does not apply to work at a DOE site:

(1) Regulated by the Occupational Safety and Health Administration; or

(2) Operated under the authority of the Director, Naval Nuclear Propulsion, pursuant to Executive Order 12344, as set forth in Public Law 98–525, 42 U.S.C. 7158 note.

(b) This part does not apply to radiological hazards or nuclear explosives operations to the extent regulated by 10 CFR Parts 20, 820, 830 or 835.

(c) This part does not apply to transportation to or from a DOE site.

(d) This part does not require compliance with any Occupational Safety and Health Administration beryllium requirement except for any permissible exposure limit for beryllium in 29 CFR 1910.1000.

[71 FR 6931, Feb. 9, 2006, as amended at 80 FR 69566, Nov. 10, 2015]

### §851.3 Definitions.

(a) As used in this part:

*AEA* means the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq*.

*Affected worker* means a worker who would be affected by the granting or denial of a variance, or any authorized representative of the worker, such as a collective bargaining agent.

*Closure facility* means a facility that is non-operational and is, or is expected to be permanently closed and/or demolished, or title to which is expected to be transferred to another entity for reuse.

*Closure facility hazard* means a facility-related condition within a closure facility involving deviations from the technical requirements of §851.23 of this part that would require costly and extensive structural/engineering modifications to be in compliance.

*Cognizant Secretarial Officer* means, with respect to a particular situation, the Assistant Secretary, Deputy Administrator, Program Office Director, or equivalent DOE official who has primary line management responsibility for a contractor, or any other official to whom the CSO delegates in writing a particular function under this part.

*Compliance order* means an order issued by the Secretary to a contractor that mandates a remedy, work stoppage, or other action to address a situation that violates, potentially violates, or otherwise is inconsistent with a requirement of this part.

*Consent order* means any written document, signed by the Director and a contractor, containing stipulations or conclusions of fact or law and a remedy acceptable to both DOE and the contractor.

*Construction* means combination of erection, installation, assembly, demolition, or fabrication activities involved to create a new facility or to alter, add to, rehabilitate, dismantle, or remove an existing facility. It also includes the alteration and repair (including dredging, excavating, and painting) of buildings, structures, or other real property, as well as any construction, demolition, and excavation activities conducted as part of environmental restoration or remediation efforts.

*Construction contractor* means the lowest tiered contractor with primary responsibility for the execution of all construction work described within a construction procurement or authorization document (*e.g.*, construction contract, work order).

*Construction manager* means the individual or firm responsible to DOE for the supervision and administration of a

construction project to ensure the construction contractor's compliance with construction project requirements.

*Construction project* means the full scope of activities required on a construction worksite to fulfill the requirements of the construction procurement or authorization document.

*Construction worksite* is the area within the limits necessary to perform the work described in the construction procurement or authorization document. It includes the facility being constructed or renovated along with all necessary staging and storage areas as well as adjacent areas subject to project hazards.

*Contractor* means any entity, including affiliated entities, such as a parent corporation, under contract with DOE, or a subcontractor at any tier, that has responsibilities for performing work at a DOE site in furtherance of a DOE mission.

*Covered workplace* means a place at a DOE site where a contractor is responsible for performing work in furtherance of a DOE mission.

*Director* means a DOE Official to whom the Secretary assigns the authority to investigate the nature and extent of compliance with the requirements of this part.

*DOE* means the United States Department of Energy, including the National Nuclear Security Administration.

*DOE Enforcement Officer* means a DOE official to whom the Director assigns the authority to investigate the nature and extent of compliance with the requirements of this part.

*DOE site* means a DOE-owned or -leased area or location or other area or location controlled by DOE where activities and operations are performed at one or more facilities or places by a contractor in furtherance of a DOE mission.

*Final notice of violation* means a document that determines a contactor has violated or is continuing to violate a requirement of this part and includes:

(1) A statement specifying the requirement of this part to which the violation relates;

(2) A concise statement of the basis for the determination;

(3) Any remedy, including the amount of any civil penalty; and

(4) A statement explaining the reasoning behind any remedy.

*Final Order* means an order of DOE that represents final agency action and, if appropriate, imposes a remedy with which the recipient of the order must comply.

*General Counsel* means the General Counsel of DOE.

*Head of DOE Field Element* means an individual who is the manager or head of the DOE operations office or field office.

*Interpretative ruling* means a statement by the General Counsel concerning the meaning or effect of a requirement of this part which relates to a specific factual situation but may also be a ruling of general applicability if the General Counsel determines such action to be appropriate.

*National defense variance* means relief from a safety and health standard, or portion thereof, to avoid serious impairment of a national defense mission.

*NNSA* means the National Nuclear Security Administration.

*Nuclear explosive* means an assembly containing fissionable and/or fusionable materials and main charge high-explosive parts or propellants capable of producing a nuclear detonation (*e.g.*, a nuclear weapon or test device).

*Nuclear explosive operation* means any activity involving a nuclear explosive, including activities in which main charge high-explosive parts and pit are collocated.

*Occupational medicine provider* means the designated site occupational medicine director (SOMD) or the individual providing medical services.

*Permanent variance* means relief from a safety and health standard, or portion thereof, to contractors who can prove that their methods, conditions, practices, operations, or processes provide workplaces that are as safe and healthful as those that follow the workplace safety and health standard required by this part.

*Preliminary notice of violation* means a document that sets forth the preliminary conclusions that a contractor has violated or is continuing to violate a requirement of this part and includes:

(1) A statement specifying the requirement of this part to which the violation relates;

(2) A concise statement of the basis for alleging the violation;

(3) Any remedy, including the amount of any proposed civil penalty; and

(4) A statement explaining the reasoning behind any proposed remedy.

*Pressure systems* means all pressure vessels, and pressure sources including cryogenics, pneumatic, hydraulic, and vacuum. Vacuum systems should be considered pressure systems due to their potential for catastrophic failure due to backfill pressurization. Associated hardware (*e.g.*, gauges and regulators), fittings, piping, pumps, and pressure relief devices are also integral parts of the pressure system.

*Remedy* means any action (including, but not limited to, the assessment of civil penalties, the reduction of fees or other payments under a contract, the requirement of specific actions, or the modification, suspension or rescission of a contract) necessary or appropriate to rectify, prevent, or penalize a violation of a requirement of this part, including a compliance order issued by the Secretary pursuant to this part.

*Safety and health standard* means a standard that addresses a workplace hazard by establishing limits, requiring conditions, or prescribing the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe and healthful workplaces.

*Secretary* means the Secretary of Energy.

*Temporary variance* means a short-term relief for a new safety and health standard when the contractor cannot comply with the requirements by the prescribed date because the necessary construction or alteration of the facility cannot be completed in time or when technical personnel, materials, or equipment are temporarily unavailable.

*Unauthorized discharge* means the discharge of a firearm under circumstances other than: (1) during firearms training with the firearm properly pointed down range (or toward a target), or (2) the intentional firing at hostile parties when deadly force is authorized.

*Under Secretary* means, with respect to a particular situation, the DOE official who serves as the Under Secretary for Science and Energy, or Under Secretary for Management and Performance, or the Under Secretary for Nuclear Security/Administrator for National Nuclear Security Administration who has primary line management responsibility for a contractor.

*Variance* means an exception to compliance with some part of a safety and health standard granted by the Under Secretary to a contractor.

*Worker* means an employee of a DOE contractor person who performs work in furtherance of a DOE mission at a covered workplace.

*Workplace hazard* means a physical, chemical, biological, or safety hazard with any potential to cause illness, injury, or death to a person.

(b) Terms undefined in this part that are defined in the Atomic Energy Act of 1954 must have the same meaning as under that Act.

[71 FR 6931, Feb. 9, 2006, as amended at 80 FR 5008, Jan. 30, 2015]

### § 851.4 Compliance order.

(a) The Secretary may issue to any contractor a Compliance Order that:

(1) Identifies a situation that violates, potentially violates, or otherwise is inconsistent with a requirement of this part;

(2) Mandates a remedy, work stoppage, or other action; and,

(3) States the reasons for the remedy, work stoppage, or other action.

(b) A Compliance Order is a final order that is effective immediately unless the Order specifies a different effective date.

(c) Within 15 calendar days of the issuance of a Compliance Order, the recipient of the Order may request the Secretary to rescind or modify the Order. A request does not stay the effectiveness of a Compliance Order unless the Secretary issues an order to that effect.

(d) A copy of the Compliance Order must be prominently posted, once issued, at or near the location where the violation, potential violation, or

inconsistency occurred until it is corrected.

### § 851.5 Enforcement.

(a) A contractor that is indemnified under section 170d. of the AEA (or any subcontractor or supplier thereto) and that violates (or whose employee violates) any requirement of this part shall be subject to a civil penalty of up to $93,332 for each such violation. If any violation under this subsection is a continuing violation, each day of the violation shall constitute a separate violation for the purpose of computing the civil penalty.

(b) A contractor that violates any requirement of this part may be subject to a reduction in fees or other payments under a contract with DOE, pursuant to the contract's *Conditional Payment of Fee* clause, or other contract clause providing for such reductions.

(c) DOE may not penalize a contractor under both paragraphs (a) and (b) of this section for the same violation of a requirement of this part.

(d) For contractors listed in subsection d. of section 234A of the AEA, 42 U.S.C. 2282a(d), the total amount of civil penalties under paragraph (a) and contract penalties under paragraph (b) of this section may not exceed the total amount of fees paid by DOE to the contractor in that fiscal year.

(e) DOE shall not penalize a contractor under both sections 234A and 234C of the AEA for the same violation.

(f) DOE enforcement actions through civil penalties under paragraph (a) of this section, start on February 9, 2007.

[71 FR 6931, Feb. 9, 2006, as amended at 74 FR 66033, Dec. 14, 2009; 79 FR 20, Jan. 2, 2014; 81 FR 41795, June 28, 2016; 81 FR 96352, Dec. 30, 2016]

### § 851.6 Petitions for generally applicable rulemaking.

(a) *Right to file.* Any person may file a petition for generally applicable rulemaking to amend or interpret provisions of this part.

(b) *How to file.* Any person who wants to file a petition for generally applicable rulemaking pursuant to this section must file by mail or messenger in an envelope addressed to the Office of General Counsel, GC–1, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

(c) *Content of rulemaking petitions.* A petition under this section must:

(1) Be labeled ''Petition for Rulemaking Under 10 CFR 851;''

(2) Describe with particularity the provision of this part to be amended and the text of regulatory language to be added; and

(3) Explain why, if relevant, DOE should not choose to make policy by precedent through adjudication of petitions for assessment of civil penalty.

(d) *Determinations upon rulemaking petitions.* After considering the petition and other information DOE deems relevant, DOE may grant the petition and issue an appropriate rulemaking notice, or deny the petition because the rule being sought:

(1) Would be inconsistent with statutory law;

(2) Would establish a generally applicable policy in a subject matter area that should be left to case-by-case determinations; or

(3) For other good cause.

### § 851.7 Requests for a binding interpretive ruling.

(a) *Right to file.* Any person subject to this part shall have the right to file a request for an interpretive ruling that is binding on DOE with regard to a question as to how the regulations in this part would apply to particular facts and circumstances.

(b) *How to file.* Any person who wants to file a request under this section must file by mail or messenger in an envelop addressed to the Office of General Counsel, GC–1, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

(c) *Content of request for interpretive ruling.* A request under this section must:

(1) Be in writing;

(2) Be labeled ''Request for Interpretive Ruling Under 10 CFR 851;''

(3) Identify the name, address, telephone number, e-mail address, and any designated representative of the person filing the request;

(4) State the facts and circumstances relevant to the request;

(5) Be accompanied by copies of relevant supporting documents if any;

(6) Specifically identify the pertinent regulations and the related question on which an interpretive ruling is sought; and

(7) Include explanatory discussion in support of the interpretive ruling being sought.

(d) *Public comment*. DOE may give public notice of any request for an interpretive ruling and provide an opportunity for public comment.

(e) *Opportunity to respond to public comment*. DOE may provide an opportunity to any person who requests an interpretive ruling to respond to public comments relating to the request.

(f) *Other sources of information*. DOE may:

(1) Conduct an investigation of any statement in a request;

(2) Consider any other source of information in evaluating a request for an interpretive ruling; and

(3) Rely on previously issued interpretive rulings with addressing the same or a related issue.

(g) *Informal conference*. DOE may convene an informal conference with the person requesting the interpretive ruling.

(h) *Effect of interpretive ruling*. Except as provided in paragraph (i) of this section, an interpretive ruling under this section is binding on DOE only with respect to the person who requested the ruling.

(i) *Reliance on interpretive ruling*. If DOE issues an interpretive ruling under this section, then DOE may not subject the person who requested the ruling to an enforcement action for civil penalties for actions reasonably taken in reliance on the ruling, but a person may not act in reliance on an interpretive ruling that is administratively rescinded or modified after opportunity to comment, judicially invalidated, or overruled by statute or regulation.

(j) *Denial of requests for an interpretive ruling*. DOE may deny a request for an interpretive ruling if DOE determines that:

(1) There is insufficient information upon which to base an interpretive ruling;

(2) The interpretive question posed should be treated in a general notice of proposed rulemaking;

(3) There is an adequate procedure elsewhere in this part for addressing the interpretive question such as a petition for variance; or

(4) For other good cause.

(k) *Public availability of interpretive rulings*. For information of interested members of the public, DOE may file a copy of interpretive rulings on a DOE internet web site.

[71 FR 6931, Feb. 9, 2006; 71 FR 36661, June 28, 2006]

### § 851.8 Informal requests for information.

(a) Any person may informally request information under this section as to how to comply with the requirements of this part, instead of applying for a binding interpretive ruling under § 851.7. DOE responses to informal requests for information under this section are not binding on DOE and do not preclude enforcement actions under this part.

(b) Inquiries regarding the technical requirements of the standards required by this part must be directed to the Office of Environment, Health, Safety and Security, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

(c) Information regarding the general statement of enforcement policy in the appendix to this part must be directed to the Office of Enterprise Assessments, Office of Enforcement, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

[71 FR 6931, Feb. 9, 2006, as amended at 71 FR 68733, Nov. 28, 2006; 80 FR 5009, Jan. 30, 2015]

## Subpart B—Program Requirements

### § 851.10 General requirements.

(a) With respect to a covered workplace for which a contractor is responsible, the contractor must:

(1) Provide a place of employment that is free from recognized hazards that are causing or have the potential to cause death or serious physical harm to workers; and

(2) Ensure that work is performed in accordance with:

(i) All applicable requirements of this part; and

(ii)The worker safety and health program for that workplace.

(b) The written worker safety and health program must describe how the contractor complies with the:

(1) Requirements set forth in subpart C of this part that are applicable to the hazards associated with the contractor's scope of work; and

(2) Any compliance order issued by the Secretary pursuant to § 851.4.

[71 FR 6931, Feb. 9, 2006, as amended at 80 FR 5009, Jan. 30, 2015]

### § 851.11 Development and approval of worker safety and health program.

(a) *Preparation and submission of worker safety and health program.* By February 26, 2007, contractors must submit to the appropriate Head of DOE Field Element for approval a written worker safety and health program that provides the methods for implementing the requirements of subpart C of this part.

(1) If a contractor is responsible for more than one covered workplace at a DOE site, the contractor must establish and maintain a single worker safety and health program for the covered workplaces for which the contractor is responsible.

(2) If more than one contractor is responsible for covered workplaces, each contractor must:

(i) Establish and maintain a worker safety and health program for the workplaces for which the contractor is responsible; and

(ii) Coordinate with the other contractors responsible for work at the covered workplaces to ensure that there are clear roles, responsibilities and procedures to ensure the safety and health of workers at multi-contractor workplaces.

(3) The worker safety and health program must describe how the contractor will:

(i) Comply with the requirements set forth in subpart C of this part that are applicable to the covered workplace, including the methods for implementing those requirements; and

(ii) Integrate the requirements set forth in subpart C of this part that are applicable to a covered workplace with other related site-specific worker protection activities and with the integrated safety management system.

(b) *DOE evaluation and approval.* The Head of DOE Field Element must complete a review and provide written approval of the contractor's worker safety and health program, within 90 days of receiving the document. The worker safety and health program and any updates are deemed approved 90 days after submission if they are not specifically approved or rejected by DOE earlier.

(1) Beginning May 25, 2007, no work may be performed at a covered workplace unless an approved worker safety and health program is in place for the workplace.

(2) Contractors must send a copy of the approved program to the Associate Under Secretary for Environment, Health, Safety and Security.

(3) Contractors must furnish a copy of the approved worker safety and health program, upon written request, to the affected workers or their designated representatives.

(c) *Updates.* (1) Contractors must submit an update of the worker safety and health program to the appropriate Head of DOE Field Element, for review and approval whenever a significant change or addition to the program is made, or a change in contractors occurs.

(2) Contractors must submit annually to DOE either an updated worker safety and health program for approval or a letter stating that no changes are necessary in the currently approved worker safety and health program.

(3) Contactors must incorporate in the worker safety and health program any changes, conditions, or workplace safety and health standards directed by DOE consistent with the requirements of this part and DEAR 970.5204–2, Laws, Regulations and DOE Directives (December, 2000) and associated contract clauses.

(d) *Labor Organizations.* If a contractor employs or supervises workers who are represented for collective bargaining by a labor organization, the contractor must:

(1) Give the labor organization timely notice of the development and implementation of the worker safety and

health program and any updates thereto; and

(2) Upon timely request, bargain concerning implementation of this part, consistent with the Federal labor laws.

[71 FR 6931, Feb. 9, 2006, as amended at 71 FR 68733, Nov. 28, 2006; 80 FR 5009, Jan. 30, 2015]

### § 851.12 Implementation.

(a) Contractors must implement the requirements of this part.

(b) Nothing in this part precludes a contractor from taking any additional protective action that is determined to be necessary to protect the safety and health of workers.

### § 851.13 Compliance.

(a) Contractors must achieve compliance with all the requirements of Subpart C of this part, and their approved worker safety and health program no later than May 25, 2007. Contractors may be required to comply contractually with the requirements of this rule before February 9, 2007.

(b) In the event a contractor has established a written safety and health program, an Integrated Safety Management System (ISMS) description pursuant to the DEAR Clause, or an approved Work Smart Standards (WSS) process before the date of issuance of the final rule, the Contractor may use that program, description, or process as the worker safety and health program required by this part if the appropriate Head of the DOE Field Element approves such use on the basis of written documentation provided by the contractor that identifies the specific portions of the program, description, or process, including any additional requirements or implementation methods to be added to the existing program, description, or process, that satisfy the requirements of this part and that provide a workplace as safe and healthful as would be provided by the requirements of this part.

(c) Nothing in this part shall be construed to limit or otherwise affect contractual obligations of a contractor to comply with contractual requirements that are not inconsistent with the requirements of this part.

## Subpart C—Specific Program Requirements

### § 851.20 Management responsibilities and worker rights and responsibilities.

(a) *Management responsibilities.* Contractors are responsible for the safety and health of their workforce and must ensure that contractor management at a covered workplace:

(1) Establish written policy, goals, and objectives for the worker safety and health program;

(2) Use qualified worker safety and health staff (*e.g.*, a certified industrial hygienist, or safety professional) to direct and manage the program;

(3) Assign worker safety and health program responsibilities, evaluate personnel performance, and hold personnel accountable for worker safety and health performance;

(4) Provide mechanisms to involve workers and their elected representatives in the development of the worker safety and health program goals, objectives, and performance measures and in the identification and control of hazards in the workplace;

(5) Provide workers with access to information relevant to the worker safety and health program;

(6) Establish procedures for workers to report without reprisal job-related fatalities, injuries, illnesses, incidents, and hazards and make recommendations about appropriate ways to control those hazards;

(7) Provide for prompt response to such reports and recommendations;

(8) Provide for regular communication with workers about workplace safety and health matters;

(9) Establish procedures to permit workers to stop work or decline to perform an assigned task because of a reasonable belief that the task poses an imminent risk of death, serious physical harm, or other serious hazard to workers, in circumstances where the workers believe there is insufficient time to utilize normal hazard reporting and abatement procedures; and

(10) Inform workers of their rights and responsibility by appropriate means, including posting the DOE-designated Worker Protection Poster in

the workplace where it is accessible to all workers.

(b) *Worker rights and responsibilities.* Workers must comply with the requirements of this part, including the worker safety and health program, which are applicable to their own actions and conduct. Workers at a covered workplace have the right, without reprisal, to:

(1) Participate in activities described in this section on official time;

(2) Have access to:

(i) DOE safety and health publications;

(ii) The worker safety and health program for the covered workplace;

(iii) The standards, controls, and procedures applicable to the covered workplace;

(iv) The safety and health poster that informs the worker of relevant rights and responsibilities;

(v) Limited information on any recordkeeping log (OSHA Form 300). Access is subject to Freedom of Information Act requirements and restrictions; and

(vi) The DOE Form 5484.3 (the DOE equivalent to OSHA Form 301) that contains the employee's name as the injured or ill worker;

(3) Be notified when monitoring results indicate the worker was overexposed to hazardous materials;

(4) Observe monitoring or measuring of hazardous agents and have the results of their own exposure monitoring;

(5) Have a representative authorized by employees accompany the Director or his authorized personnel during the physical inspection of the workplace for the purpose of aiding the inspection. When no authorized employee representative is available, the Director or his authorized representative must consult, as appropriate, with employees on matters of worker safety and health;

(6) Request and receive results of inspections and accident investigations;

(7) Express concerns related to worker safety and health;

(8) Decline to perform an assigned task because of a reasonable belief that, under the circumstances, the task poses an imminent risk of death or serious physical harm to the worker coupled with a reasonable belief that there is insufficient time to seek effective redress through normal hazard reporting and abatement procedures; and

(9) Stop work when the worker discovers employee exposures to imminently dangerous conditions or other serious hazards; provided that any stop work authority must be exercised in a justifiable and responsible manner in accordance with procedures established in the approved worker safety and health program.

### § 851.21 Hazard identification and assessment.

(a) Contractors must establish procedures to identify existing and potential workplace hazards and assess the risk of associated workers injury and illness. Procedures must include methods to:

(1) Assess worker exposure to chemical, physical, biological, or safety workplace hazards through appropriate workplace monitoring;

(2) Document assessment for chemical, physical, biological, and safety workplace hazards using recognized exposure assessment and testing methodologies and using of accredited and certified laboratories;

(3) Record observations, testing and monitoring results;

(4) Analyze designs of new facilities and modifications to existing facilities and equipment for potential workplace hazards;

(5) Evaluate operations, procedures, and facilities to identify workplace hazards;

(6) Perform routine job activity-level hazard analyses;

(7) Review site safety and health experience information; and

(8) Consider interaction between workplace hazards and other hazards such as radiological hazards.

(b) Contractors must submit to the Head of DOE Field Element a list of closure facility hazards and the established controls within 90 days after identifying such hazards. The Head of DOE Field Element, with concurrence by the Cognizant Secretarial Officer, has 90 days to accept the closure facility hazard controls or direct additional actions to either:

(1) Achieve technical compliance; or

(2) Provide additional controls to protect the workers.

(c) Contractors must perform the activities identified in paragraph (a) of this section, initially to obtain baseline information and as often thereafter as necessary to ensure compliance with the requirements in this Subpart.

### § 851.22 Hazard prevention and abatement.

(a) Contractors must establish and implement a hazard prevention and abatement process to ensure that all identified and potential hazards are prevented or abated in a timely manner.

(1) For hazards identified either in the facility design or during the development of procedures, controls must be incorporated in the appropriate facility design or procedure.

(2) For existing hazards identified in the workplace, contractors must:

(i) Prioritize and implement abatement actions according to the risk to workers;

(ii) Implement interim protective measures pending final abatement; and

(iii) Protect workers from dangerous safety and health conditions;

(b) Contractors must select hazard controls based on the following hierarchy:

(1) Elimination or substitution of the hazards where feasible and appropriate;

(2) Engineering controls where feasible and appropriate;

(3) Work practices and administrative controls that limit worker exposures; and

(4) Personal protective equipment.

(c) Contractors must address hazards when selecting or purchasing equipment, products, and services.

### § 851.23 Safety and health standards.

(a) Contractors must comply with the following safety and health standards that are applicable to the hazards at their covered workplace:

(1) Title 10 Code of Federal Regulations (CFR) 850, ''Chronic Beryllium Disease Prevention Program.''

(2) Title 29 CFR, Parts 1904.4 through 1904.11, 1904.29 through 1904.33; 1904.44, and 1904.46, ''Recording and Reporting Occupational Injuries and Illnesses.''

(3) Title 29 CFR, Part 1910, ''Occupational Safety and Health Standards,'' excluding 29 CFR 1910.1096, ''Ionizing Radiation, and 29 CFR 1910.1000, *Beryllium*''

(4) Title 29 CFR, Part 1915, ''Shipyard Employment.''

(5) Title 29 CFR, Part 1917, ''Marine Terminals.''

(6) Title 29 CFR, Part 1918, ''Safety and Health Regulations for Longshoring.''

(7) Title 29 CFR, Part 1926, ''Safety and Health Regulations for Construction.''

(8) Title 29 CFR, Part 1928, ''Occupational Safety and Health Standards for Agriculture.''

(9) American Conference of Governmental Industrial Hygienists (ACGIH), ''Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices,'' (2005) (incorporated by reference, see § 851.27) when the ACGIH Threshold Limit Values (TLVs) are lower (more protective) than permissible exposure limits in 29 CFR 1910. When the ACGIH TLVs are used as exposure limits, contractors must nonetheless comply with the other provisions of any applicable expanded health standard found in 29 CFR 1910.

(10) American National Standards Institute (ANSI) Z88.2, ''American National Standard for Respiratory Protection,'' (1992) (incorporated by reference, see § 851.27).

(11) ANSI Z136.1, ''Safe Use of Lasers,'' (2000) (incorporated by reference, see § 851.27).

(12) ANSI Z49.1, ''Safety in Welding, Cutting and Allied Processes,'' sections 4.3 and E4.3 (1999) (incorporated by reference, see § 851.27).

(13) National Fire Protection Association (NFPA) 70, ''National Electrical Code,'' (2005) (incorporated by reference, see § 851.27).

(14) NFPA 70E, ''Standard for Electrical Safety in the Workplace,'' (2004) (incorporated by reference, see § 851.27).

(b) Nothing in this part must be construed as relieving a contractor from complying with any additional specific safety and health requirement that it

determines to be necessary to protect the safety and health of workers.

[71 FR 6931, Feb. 9, 2006, as amended at 80 FR 69566, Nov. 10, 2015]

### § 851.24 Functional areas.

(a) Contractors must have a structured approach to their worker safety and health program which at a minimum, include provisions for the following applicable functional areas in their worker safety and health program: construction safety; fire protection; firearms safety; explosives safety; pressure safety; electrical safety; industrial hygiene; occupational medicine; biological safety; and motor vehicle safety.

(b) In implementing the structured approach required by paragraph (a) of this section, contractors must comply with the applicable standards and provisions in appendix A of this part, entitled ''Worker Safety and Health Functional Areas.''

### § 851.25 Training and information.

(a) Contractors must develop and implement a worker safety and health training and information program to ensure that all workers exposed or potentially exposed to hazards are provided with the training and information on that hazard in order to perform their duties in a safe and healthful manner.

(b) The contractor must provide:

(1) Training and information for new workers, before or at the time of initial assignment to a job involving exposure to a hazard;

(2) Periodic training as often as necessary to ensure that workers are adequately trained and informed; and

(3) Additional training when safety and health information or a change in workplace conditions indicates that a new or increased hazard exists.

(c) Contractors must provide training and information to workers who have worker safety and health program responsibilities that is necessary for them to carry out those responsibilities.

### § 851.26 Recordkeeping and reporting.

(a) *Recordkeeping*. Contractors must:

(1) Establish and maintain complete and accurate records of all hazard inventory information, hazard assessments, exposure measurements, and exposure controls.

(2) Ensure that the work-related injuries and illnesses of its workers and subcontractor workers are recorded and reported accurately and consistent with DOE Manual 231.1–1A, Environment, Safety and Health Reporting Manual, September 9, 2004 (incorporated by reference, see § 851.27).

(3) Comply with the applicable occupational injury and illness recordkeeping and reporting workplace safety and health standards in § 851.23 at their site, unless otherwise directed in DOE Manual 231.1–1A.

(4) Not conceal nor destroy any information concerning non-compliance or potential noncompliance with the requirements of this part.

(b) *Reporting and investigation*. Contractors must:

(1) Report and investigate accidents, injuries and illness; and

(2) Analyze related data for trends and lessons learned (reference DOE Order 225.1A, Accident Investigations, November 26, 1997).

### § 851.27 Reference sources.

(a) *Materials incorporated by reference*—(1) *General*. The following standards which are not otherwise set forth in part 851 are incorporated by reference and made a part of part 851. The standards listed in this section have been approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) *Availability of standards*. The standards incorporated by reference are available for inspection at:

(i) National Archives and Records Administration (NARA). For more information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*

(ii) U.S. Department of Energy, Office of Environment, Health, Safety and Security, Forrestal Building, 1000 Independence Ave., SW., Washington, DC 20585.

(iii) American National Standards Institute Headquarters, 25 West 43rd

Street, New York, NY 10036. Telephone number: 212–642–4980, or go to: *http://www.ansi.org*.

(iv) National Fire Protection Association, 1 Batterymarch Park, Quincy, MA 02169. Telephone: 617 770–3000, or go to: *http://www.nfpa.org*.

(v) American Conference of Governmental Industrial Hygienist (ACGIH), 1330 Kemper Meadow Drive, Cincinnati, OH 45240. Telephone number 513–742–2020, or go to: *http://www.acgih.org*.

(vi) American Society of Mechanical Engineers (ASME), P.O. Box 2300 Fairfield, NJ 07007. Telephone: 800–843–2763, or got to: *http://www.asme.org*.

(b) *List of standards incorporated by reference*. (1) American National Standards Institute (ANSI) Z88.2, ''American National Standard for Respiratory Protection,'' (1992).

(2) ANSI Z136.1, ''Safe Use of Lasers,'' (2000).

(3) ANSI Z49.1, ''Safety in Welding, Cutting and Allied Processes,'' sections 4.3 and E4.3, (1999).

(4) National Fire Protection Association (NFPA) 70, ''National Electrical Code,'' (2005).

(5) NFPA 70E, ''Standard for Electrical Safety in the Workplace,'' (2004).

(6) American Conference of Governmental Industrial Hygienists, ''Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices,'' (2005).

(7) American Society of Mechanical Engineers (ASME) Boilers and Pressure Vessel Code, sections I through XII including applicable Code Cases, (2004).

(8) ASME B31 (ASME Code for Pressure Piping) as follows:

(i) B31.1—2001—Power Piping, and B31.1a—2002—Addenda to ASME B31.1—2001;

(ii) B31.2—1968—Fuel Gas Piping;

(iii) B31.3—2002—Process Piping;

(iv) B31.4—2002—Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids;

(v) B31.5—2001—Refrigeration Piping and Heat Transfer Components, and B31.5a—2004, Addenda to ASME B31.5—2001;

(vi) B31.8—2003—Gas Transmission and Distribution Piping Systems;

(vii) B31.8S—2001—Managing System Integrity of Gas Pipelines;

(viii) B31.9—1996—Building Services Piping;

(ix) B31.11—2002—Slurry Transportation Piping Systems; and

(x) B31G—1991—Manual for Determining Remaining Strength of Corroded Pipelines.

(9) DOE Manual 231.1–1A, Environment, Safety and Health Reporting Manual, September 9, 2004.

(10) DOE Manual 440.1–1A, DOE Explosives Safety Manual, Contractor Requirements Document (Attachment 2), January 9, 2006.

[71 FR 6931, Feb. 9, 2006, as amended at 71 FR 68733, Nov. 28, 2006; 80 FR 5009, Jan. 30, 2015]

## Subpart D—Variances

### § 851.30 Consideration of variances.

(a) Variances shall be granted by the Under Secretary after considering the recommendation of the Associate Under Secretary for Environment, Health, Safety and Security. The authority to grant a variance cannot be delegated.

(b) The application must satisfy the requirements for applications specified in § 851.31.

[71 FR 6931, Feb. 9, 2006, as amended at 71 FR 68733, Nov. 28, 2006; 80 FR 5009, Jan. 30, 2015]

### § 851.31 Variance process.

(a) *Application*. Contractors desiring a variance from a safety and health standard, or portion thereof, may submit a written application containing the information in paragraphs (c) and (d) of this section to the appropriate CSO.

(1) The CSO may forward the application to the Associate Under Secretary for Environment, Health, Safety and Security.

(2) If the CSO does not forward the application to the Associate Under Secretary for Environment, Health, Safety and Security, the CSO must return the application to the contractor with a written statement explaining why the application was not forwarded.

(3) Upon receipt of an application from a CSO, the Associate Under Secretary for Environment, Health, Safety and Security must review the application for a variance and make a written recommendation to:

(i) Approve the application;

(ii) Approve the application with conditions; or

(iii) Deny the application.

(b) *Defective applications.* If an application submitted pursuant to § 851.31(a) is determined by the Associate Under Secretary for Environment, Health, Safety and Security to be incomplete, the Associate Under Secretary may:

(1) Return the application to the contractor with a written explanation of what information is needed to permit consideration of the application; or

(2) Request the contractor to provide necessary information.

(c) *Content.* All variance applications submitted pursuant to paragraph (a) of this section must include:

(1) The name and address of the contractor;

(2) The address of the DOE site or sites involved;

(3) A specification of the standard, or portion thereof, from which the contractor seeks a variance;

(4) A description of the steps that the contractor has taken to inform the affected workers of the application, which must include giving a copy thereof to their authorized representative, posting a statement, giving a summary of the application and specifying where a copy may be examined at the place or places where notices to workers are normally posted; and

(5) A description of how affected workers have been informed of their right to petition the Associate Under Secretary for Environment, Health, Safety and Security or designee for a conference; and

(6) Any requests for a conference, as provided in § 851.34.

(d) *Types of variances.* Contractors may apply for the following types of variances:

(1) *Temporary variance.* Applications for a temporary variance pursuant to paragraph (a) of this section must be submitted at least 30 days before the effective date of a new safety and health standard and, in addition to the content required by paragraph (c) of this section, must include:

(i) A statement by the contractor explaining the contractor is unable to comply with the standard or portion thereof by its effective date and a detailed statement of the factual basis and representations of qualified persons that support the contractor's statement;

(ii) A statement of the steps the contractor has taken and plans to take, with specific dates if appropriate, to protect workers against the hazard covered by the standard;

(iii) A statement of when the contractor expects to be able to comply with the standard and of what steps the contractor has taken and plans to take, with specific dates if appropriate, to come into compliance with the standard;

(iv) A statement of the facts the contractor would show to establish that:

(A) The contractor is unable to comply with the standard by its effective date because of unavailability of professional or technical personnel or materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date;

(B) The contractor is taking all available steps to safeguard the workers against the hazards covered by the standard; and

(C) The contractor has an effective program for coming into compliance with the standard as quickly as practicable.

(2) *Permanent variance.* An application submitted for a permanent variance pursuant to paragraph (a) of this section must, in addition to the content required in paragraph (c) of this section, include:

(i) A description of the conditions, practices, means, methods, operations, or processes used or proposed to be used by the contractor; and

(ii) A statement showing how the conditions, practices, means, methods, operations, or processes used or proposed to be used would provide workers a place of employment which is as safe and healthful as would result from compliance with the standard from which a variance is sought.

(3) *National defense variance.* (i) An application submitted for a national defense variance pursuant to paragraph (a) of this section must, in addition to the content required in paragraph (c) of this section, include:

(A) A statement by the contractor showing that the variance sought is necessary to avoid serious impairment of national defense; and

(B) A statement showing how the conditions, practices, means, methods, operations, or processes used or proposed to be used would provide workers a safe and healthful place of employment in a manner that, to the extent practical taking into account the national defense mission, is consistent with the standard from which a variance is sought.

(ii) A national defense variance may be granted for a maximum of six months, unless there is a showing that a longer period is essential to carrying out a national defense mission.

[71 FR 6931, Feb. 9, 2006; 71 FR 36661, June 28, 2006, as amended at 71 FR 68733, Nov. 28, 2006; 80 FR 5009, Jan. 30, 2015]

### § 851.32 Action on variance requests.

(a) *Procedures for an approval recommendation.* (1) If the Associate Under Secretary for Environment, Health, Safety and Security recommends approval of a variance application, the Associate Under Secretary must forward to the Under Secretary the variance application and the approval recommendation including a discussion of the basis for the recommendation and any terms and conditions proposed for inclusion as part of the approval.

(2) If the Under Secretary approves a variance, the Under Secretary must notify the Associate Under Secretary for Environment, Health, Safety and Security who must notify the Office of Enforcement and the CSO who must promptly notify the contractor.

(3) The notification must include a reference to the safety and health standard or portion thereof that is the subject of the application, a detailed description of the variance, the basis for the approval and any terms and conditions of the approval.

(4) If the Under Secretary denies a variance, the Under Secretary must notify the Associate Under Secretary for Environment, Health, Safety and Security who must notify the appropriate CSO who must notify the contractor.

(5) The notification must include the grounds for denial.

(b) *Approval criteria.* A variance may be granted if the variance:

(1) Is consistent with section 3173 of the NDAA;

(2) Does not present an undue risk to worker safety and health;

(3) Is warranted under the circumstances;

(4) Satisfies the requirements of § 851.31 of this part for the type of variance requested.

(c) *Procedures for a denial recommendation.* (1) If the Associate Under Secretary for Environment, Health, Safety and Security recommends denial of a variance application, the Associate Under Secretary must notify the CSO of the denial recommendation and the grounds for the denial recommendation.

(2) Upon receipt of a denial recommendation, the CSO may:

(i) Notify the contractor that the variance application is denied on the grounds cited by the Associate Under Secretary for Environment, Health, Safety and Security; or

(ii) Forward to the Under Secretary the variance application, the denial recommendation, the grounds for the denial recommendation, and any information that supports an action different than that recommended by the Associate Under Secretary for Environment, Health, Safety and Security.

(3) If the CSO forwards the application to the Under Secretary, the procedures in paragraphs (a)(2), (3), (4) and (5) of this section apply.

(4) A denial of an application pursuant to this section shall be without prejudice to submitting of another application

(d) *Grounds for denial of a variance.* A variance may be denied if:

(1) Enforcement of the violation would be handled as a *de minimis* violation (defined as a deviation from the requirement of a standard that has no direct or immediate relationship to safety or health, and no enforcement action will be taken);

(2) When a variance is not necessary for the conditions, practice, means, methods, operations, or processes used or proposed to be used by contractor;

(3) Contractor does not demonstrate that the approval criteria are met.

[71 FR 6931, Feb. 9, 2006, as amended at 71 FR 68733, Nov. 28, 2006; 80 FR 5009, Jan. 30, 2015]

### § 851.33 Terms and conditions.

A variance may contain appropriate terms and conditions including, but not limited to, provisions that:

(a) Limit its duration;

(b) Require alternative action;

(c) Require partial compliance; and

(d) Establish a schedule for full or partial compliance.

### § 851.34 Requests for conferences.

(a) Within the time allotted by a notice of the filing of an application, any affected contractor or worker may file with the Associate Under Secretary for Environment, Health, Safety and Security a request for a conference on the application for a variance.

(b) A request for a conference filed pursuant to paragraph (a) of this section must include:

(1) A concise statement explaining how the contractor or worker would be affected by the variance applied for, including relevant facts;

(2) A specification of any statement or representation in the application which is denied, and a concise summary of the evidence that would be adduced in support of each denial; and

(3) Any other views or arguments on any issue of fact or law presented.

(c) The Associate Under Secretary for Environment, Health, Safety and Security, or designee, must respond to a request within fifteen days and, if the request is granted, indicate the time and place of the conference and the DOE participants in the conference.

[71 FR 6931, Feb. 9, 2006, as amended at 71 FR 68733, Nov. 28, 2006; 80 FR 5009, Jan. 30, 2015]

## Subpart E—Enforcement Process

### § 851.40 Investigations and inspections.

(a) The Director may initiate and conduct investigations and inspections relating to the scope, nature and extent of compliance by a contractor with the requirements of this part and take such action as the Director deems necessary and appropriate to the conduct of the investigation or inspection. DOE Enforcement Officers have the right to enter work areas without delay to the extent practicable, to conduct inspections under this subpart.

(b) Contractors must fully cooperate with the Director during all phases of the enforcement process and provide complete and accurate records and documentation as requested by the Director during investigation or inspection activities.

(c) Any worker or worker representative may request that the Director initiate an investigation or inspection pursuant to paragraph (a) of this section. A request for an investigation or inspection must describe the subject matter or activity to be investigated or inspected as fully as possible and include supporting documentation and information. The worker or worker representative has the right to remain anonymous upon filing a request for an investigation or inspection.

(d) The Director must inform any contractor that is the subject of an investigation or inspection in writing at the initiation of the investigation or inspection and must inform the contractor of the general purpose of the investigation or inspection.

(e) DOE shall not disclose information or documents that are obtained during any investigation or inspection unless the Director directs or authorizes the public disclosure of the investigation. Prior to such authorization, DOE must determine that disclosure is not precluded by the Freedom of Information Act, 5 U.S.C. 552 and part 1004 of this title. Once disclosed pursuant to the Director's authorization, the information or documents are a matter of public record.

(f) A request for confidential treatment of information for purposes of the Freedom of Information Act does not prevent disclosure by the Director if the Director determines disclosure to be in the public interest and otherwise permitted or required by law.

(g) During the course of an investigation or inspection, any contractor may submit any document, statement of facts, or memorandum of law for the purpose of explaining the contractor's position or furnish information which the contractor considers relevant to a

matter or activity under investigation or inspection.

(h) The Director may convene an informal conference to discuss any situation that might be a violation of a requirement of this part, its significance and cause, any corrective action taken or not taken by the contractor, any mitigating or aggravating circumstances, and any other information. A conference is not normally open to the public and DOE does not make a transcript of the conference. The Director may compel a contractor to attend the conference.

(i) If facts disclosed by an investigation or inspection indicate that further action is unnecessary or unwarranted, the Director may close the investigation without prejudice.

(j) The Director may issue enforcement letters that communicate DOE's expectations with respect to any aspect of the requirements of this part, including identification and reporting of issues, corrective actions, and implementation of the contractor's safety and health program; provided that an enforcement letter may not create the basis for any legally enforceable requirement pursuant to this part.

(k) The Director may sign, issue and serve subpoenas.

### § 851.41 Settlement.

(a) DOE encourages settlement of a proceeding under this subpart at any time if the settlement is consistent with this part. The Director and a contractor may confer at any time concerning settlement. A settlement conference is not open to the public and DOE does not make a transcript of the conference.

(b) Notwithstanding any other provision of this part, the Director may resolve any issues in an outstanding proceeding under this subpart with a consent order.

(1) The Director and the contractor, or a duly authorized representative thereto, must sign the consent order and indicate agreement to the terms contained therein.

(2) A contractor is not required to admit in a consent order that a requirement of this part has been violated.

(3) DOE is not required to make a finding in a consent order that a contractor has violated a requirement of this part.

(4) A consent order must set forth the relevant facts that form the basis for the order and what remedy, if any, is imposed.

(5) A consent order shall constitute a final order.

### § 851.42 Preliminary notice of violation.

(a) Based on a determination by the Director that there is a reasonable basis to believe a contractor has violated or is continuing to violate a requirement of this part, the Director may issue a preliminary notice of violation (PNOV) to the contractor.

(b) A PNOV must indicate:

(1) The date, facts, and nature of each act or omission upon which each alleged violation is based;

(2) The particular requirement involved in each alleged violation;

(3) The proposed remedy for each alleged violation, including the amount of any civil penalty; and

(4) The obligation of the contractor to submit a written reply to the Director within 30 calendar days of receipt of the PNOV.

(c) A reply to a PNOV must contain a statement of all relevant facts pertaining to an alleged violation.

(1) 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; and

(iv) Furnish full and complete answers to any questions set forth in the preliminary notice.

(2) Copies of all relevant documents must be submitted with the reply.

(d) If a contractor fails to submit a written reply within 30 calendar days of receipt of a PNOV:

(1) The contractor relinquishes any right to appeal any matter in the preliminary notice; and

(2) The preliminary notice, including any proposed remedies therein, constitutes a final order.

(e) A copy of the PNOV must be prominently posted, once final, at or near the location where the violation occurred until the violation is corrected.

### § 851.43 Final notice of violation.

(a) If a contractor submits a written reply within 30 calendar days of receipt of a preliminary notice of violation (PNOV), that presents a disagreement with any aspect of the PNOV and civil penalty, the Director must review the submitted reply and make a final determination whether the contractor violated or is continuing to violate a requirement of this part.

(b) Based on a determination by the Director that a contractor has violated or is continuing to violate a requirement of this part, the Director may issue to the contractor a final notice of violation that states concisely the determined violation and any remedy, including the amount of any civil penalty imposed on the contractor. The final notice of violation must state that the contractor may petition the Office of Hearings and Appeals for review of the final notice in accordance with 10 CFR part 1003, subpart G.

(c) If a contractor fails to submit a petition for review to the Office of Hearings and Appeals within 30 calendar days of receipt of a final notice of violation pursuant to § 851.42:

(1) The contractor relinquishes any right to appeal any matter in the final notice; and

(2) The final notice, including any remedies therein, constitutes a final order.

### § 851.44 Administrative appeal.

(a) Any contractor that receives a final notice of violation may petition the Office of Hearings and Appeals for review of the final notice in accordance with part 1003, subpart G of this title, within 30 calendar days from receipt of the final notice.

(b) In order to exhaust administrative remedies with respect to a final notice of violation, the contractor must petition the Office of Hearings and Appeals for review in accordance with paragraph (a) of this section.

### § 851.45 Direction to NNSA contractors.

(a) Notwithstanding any other provision of this part, the NNSA Administrator, rather than the Director, signs, issues and serves the following actions that direct NNSA contractors:

(1) Subpoenas;

(2) Orders to compel attendance;

(3) Disclosures of information or documents obtained during an investigation or inspection;

(4) Preliminary notices of violations; and

(5) Final notices of violations.

(b) The NNSA Administrator shall act after consideration of the Director's recommendation.

## APPENDIX A TO PART 851—WORKER SAFETY AND HEALTH FUNCTIONAL AREAS

This appendix establishes the mandatory requirements for implementing the applicable functional areas required by § 851.24.

### 1. CONSTRUCTION SAFETY

(a) For each separately definable construction activity (e.g., excavations, foundations, structural steel, roofing) the construction contractor must:

(1) Prepare and have approved by the construction manager an activity hazard analysis prior to commencement of affected work. Such analyses must:

(i) Identify foreseeable hazards and planned protective measures;

(ii) Address further hazards revealed by supplemental site information (e.g., site characterization data, as-built drawings) provided by the construction manager;

(iii) Provide drawings and/or other documentation of protective measures for which applicable Occupational Safety and Health Administration (OSHA) standards require preparation by a Professional Engineer or other qualified professional, and

(iv) Identify competent persons required for workplace inspections of the construction activity, where required by OSHA standards.

(2) Ensure workers are aware of foreseeable hazards and the protective measures described within the activity analysis prior to beginning work on the affected activity.

(3) Require that workers acknowledge being informed of the hazards and protective

measures associated with assigned work activities. Those workers failing to utilize appropriate protective measures must be subject to the construction contractor's disciplinary process.

(b) During periods of active construction (*i.e.*, excluding weekends, weather delays, or other periods of work inactivity), the construction contractor must have a designated representative on the construction worksite who is knowledgeable of the project's hazards and has full authority to act on behalf of the construction contractor. The contractor's designated representative must make frequent and regular inspections of the construction worksite to identify and correct any instances of noncompliance with project safety and health requirements.

(c) Workers must be instructed to report to the construction contractor's designated representative, hazards not previously identified or evaluated. If immediate corrective action is not possible or the hazard falls outside of project scope, the construction contractor must immediately notify affected workers, post appropriate warning signs, implement needed interim control measures, and notify the construction manager of the action taken. The contractor or the designated representative must stop work in the affected area until appropriate protective measures are established.

(d) The construction contractor must prepare a written construction project safety and health plan to implement the requirements of this section and obtain approval of the plan by the construction manager prior to commencement of any work covered by the plan. In the plan, the contractor must designate the individual(s) responsible for on-site implementation of the plan, specify qualifications for those individuals, and provide a list of those project activities for which subsequent hazard analyses are to be performed. The level of detail within the construction project safety and health plan should be commensurate with the size, complexity and risk level of the construction project. The content of this plan need not duplicate those provisions that were previously submitted and approved as required by § 851.11.

2. FIRE PROTECTION

(a) Contractors must implement a comprehensive fire safety and emergency response program to protect workers commensurate with the nature of the work that is performed. This includes appropriate facility and site-wide fire protection, fire alarm notification and egress features, and access to a fully staffed, trained, and equipped emergency response organization that is capable of responding in a timely and effective manner to site emergencies.

(b) An acceptable fire protection program must include those fire protection criteria and procedures, analyses, hardware and systems, apparatus and equipment, and personnel that would comprehensively ensure that the objective in paragraph 2(a) of this section is met. This includes meeting applicable building codes and National Fire Protection Association codes and standards.

3. EXPLOSIVES SAFETY

(a) Contractors responsible for the use of explosive materials must establish and implement a comprehensive explosives safety program.

(b) Contractors must comply with the policy and requirements specified in the DOE Manual 440.1–1A, DOE Explosives Safety Manual, Contractor Requirements Document (Attachment 2), January 9, 2006 (incorporated by reference, see § 851.27). A Contractor may choose a successor version, if approved by DOE.

(c) Contractors must determine the applicability of the explosives safety directive requirements to research and development laboratory type operations consistent with the DOE level of protection criteria described in the explosives safety directive.

4. PRESSURE SAFETY

(a) Contractors must establish safety policies and procedures to ensure that pressure systems are designed, fabricated, tested, inspected, maintained, repaired, and operated by trained and qualified personnel in accordance with applicable and sound engineering principles.

(b) Contractors must ensure that all pressure vessels, boilers, air receivers, and supporting piping systems conform to:

(1) The applicable American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code (2004); sections I through section XII including applicable Code Cases (incorporated by reference, see § 851.27)

(2) The applicable ASME B31 (Code for Pressure Piping) standards as indicated below; and or as indicated in paragraph (b)(3) of this section:

(i) B31.1—2001—Power Piping, and B31.1a—2002—Addenda to ASME B31.1—2001 (incorporated by reference, see § 851.27);

(ii) B31.2—1968—Fuel Gas Piping (incorporated by reference, see § 851.27);

(iii) B31.3—2002—Process Piping (incorporated by reference, see § 851.27);

(iv) B31.4—2002—Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids (incorporated by reference, see § 851.27);

(v) B31.5—2001—Refrigeration Piping and Heat Transfer Components, and B31.5a—2004, Addenda to ASME B31.5—2001 (incorporated by reference, see § 851.27);

(vi) B31.8—2003—Gas Transmission and Distribution Piping Systems (incorporated by reference, see § 851.27);

(vii) B31.8S—2001—Managing System Integrity of Gas Pipelines (incorporated by reference, see § 851.27);

(viii) B31.9—1996—Building Services Piping (incorporated by reference, see § 851.27);

(ix) B31.11—2002—Slurry Transportation Piping Systems (incorporated by reference, see § 851.27); and

(x) B31G—1991—Manual for Determining Remaining Strength of Corroded Pipelines (incorporated by reference, see § 851.27).

(3) The strictest applicable state and local codes.

(c) When national consensus codes are not applicable (because of pressure range, vessel geometry, use of special materials, etc.), contractors must implement measures to provide equivalent protection and ensure a level of safety greater than or equal to the level of protection afforded by the ASME or applicable state or local code. Measures must include the following:

(1) Design drawings, sketches, and calculations must be reviewed and approved by a qualified independent design professional (*i.e.*, professional engineer). Documented organizational peer review is acceptable.

(2) Qualified personnel must be used to perform examinations and inspections of materials, in-process fabrications, non-destructive tests, and acceptance test.

(3) Documentation, traceability, and accountability must be maintained for each unique pressure vessel or system, including descriptions of design, pressure conditions, testing, inspection, operation, repair, and maintenance.

5. FIREARMS SAFETY

(a) A contractor engaged in DOE activities involving the use of firearms must establish firearms safety policies and procedures for security operations, and training to ensure proper accident prevention controls are in place.

(1) Written procedures must address firearms safety, engineering and administrative controls, as well as personal protective equipment requirements.

(2) As a minimum, procedures must be established for:

(i) Storage, handling, cleaning, inventory, and maintenance of firearms and associated ammunition;

(ii) Activities such as loading, unloading, and exchanging firearms. These procedures must address use of bullet containment devices and those techniques to be used when no bullet containment device is available;

(iii) Use and storage of pyrotechnics, explosives, and/or explosive projectiles;

(iv) Handling misfires, duds, and unauthorized discharges;

(v) Live fire training, qualification, and evaluation activities;

(vi) Training and exercises using engagement simulation systems;

(vii) Medical response at firearms training facilities; and

(viii) Use of firing ranges by personnel other than DOE or DOE contractor protective forces personnel.

(b) Contractors must ensure that personnel responsible for the direction and operation of the firearms safety program are professionally qualified and have sufficient time and authority to implement the procedures under this section.

(c) Contractors must ensure that firearms instructors and armorers have been certified by the Safeguards and Security National Training Center to conduct the level of activity provided. Personnel must not be allowed to conduct activities for which they have not been certified.

(d) Contractors must conduct formal appraisals assessing implementation of procedures, personnel responsibilities, and duty assignments to ensure overall policy objectives and performance criteria are being met by qualified personnel.

(e) Contractors must implement procedures related to firearms training, live fire range safety, qualification, and evaluation activities, including procedures requiring that:

(1) Personnel must successfully complete initial firearms safety training before being issued any firearms. Authorization to remain in armed status will continue only if the employee demonstrates the technical and practical knowledge of firearms safety semi-annually;

(2) Authorized armed personnel must demonstrate through documented limited scope performance tests both technical and practical knowledge of firearms handling and safety on a semi-annual basis;

(3) All firearms training lesson plans must incorporate safety for all aspects of firearms training task performance standards. The lesson plans must follow the standards set forth by the Safeguards and Security Central Training Academy's standard training programs;

(4) Firearms safety briefings must immediately precede training, qualifications, and evaluation activities involving live fire and/or engagement simulation systems;

(5) A safety analysis approved by the Head of DOE Field Element must be developed for the facilities and operation of each live fire range prior to implementation of any new training, qualification, or evaluation activity. Results of these analyses must be incorporated into procedures, lesson plans, exercise plans, and limited scope performance tests;

(6) Firing range safety procedures must be conspicuously posted at all range facilities; and

(7) Live fire ranges, approved by the Head of DOE Field Element, must be properly sited to protect personnel on the range, as

well as personnel and property not associated with the range.

(f) Contractors must ensure that the transportation, handling, placarding, and storage of munitions conform to the applicable DOE requirements.

6. INDUSTRIAL HYGIENE

Contractors must implement a comprehensive industrial hygiene program that includes at least the following elements:

(a) Initial or baseline surveys and periodic resurveys and/or exposure monitoring as appropriate of all work areas or operations to identify and evaluate potential worker health risks;

(b) Coordination with planning and design personnel to anticipate and control health hazards that proposed facilities and operations would introduce;

(c) Coordination with cognizant occupational medical, environmental, health physics, and work planning professionals;

(d) Policies and procedures to mitigate the risk from identified and potential occupational carcinogens;

(e) Professionally and technically qualified industrial hygienists to manage and implement the industrial hygiene program; and

(f) Use of respiratory protection equipment tested under the DOE Respirator Acceptance Program for Supplied-air Suits (DOE-Technical Standard-1167–2003) when National Institute for Occupational Safety and Health-approved respiratory protection does not exist for DOE tasks that require such equipment. For security operations conducted in accordance with Presidential Decision Directive 39, U.S. POLICY ON COUNTER TERRORISM, use of Department of Defense military type masks for respiratory protection by security personnel is acceptable.

7. BIOLOGICAL SAFETY

(a) Contractors must establish and implement a biological safety program that:

(1) Establishes an Institutional Biosafety Committee (IBC) or equivalent. The IBC must:

(i) Review any work with biological etiologic agents for compliance with applicable Centers for Disease Control and Prevention (CDC), National Institutes of Health (NIH), World Health Organization (WHO), United States Department of Agriculture Animal and Plant Health Inspection Service (USDA/APHIS), and other international, Federal, State, and local guidelines and assess the containment level, facilities, procedures, practices, and training and expertise of personnel; and

(ii) Review the site's security, safeguards, and emergency management plans and procedures to ensure they adequately consider work involving biological etiologic agents.

(2) Maintains an inventory and status of biological etiologic agents, and provide to the responsible field and area office, through the laboratory IBC (or its equivalent), an annual status report describing the status and inventory of biological etiologic agents and the biological safety program.

(3) Provides for submission to the appropriate Head of DOE Field Element, for review and concurrence before transmittal to the Federal Select Agent Program, each Laboratory Registration/Select Agent Program registration application package (APHIS/CDC Form 1, Application for Registration for Possession, Use, and Transfer of Select Agents and Toxins) requesting registration of (or amendment to a previously approved registration) a laboratory facility for the purpose of possessing, using, or transferring biological select agents and/or toxins.

(4) Provides for submission to the appropriate Head of DOE Field Element, a copy of each APHIS/CDC Form 2, Request to Transfer Select Agents and Toxins, upon initial submission of APHIS/CDC Form 2 to a vendor or other supplier requesting or ordering a biological select agent or toxin for transfer, receipt, and handling in the registered facility; and submission to the appropriate Head of DOE Field Element the completed copy of the APHIS/CDC Form 2, documenting final disposition and/or destruction of the select agent or toxin, within 10 days of completion of the APHIS/CDC Form 2.

(5) Confirms that the site safeguards and security plans and emergency management programs address biological etiologic agents, with particular emphasis on biological select agents.

(6) Establishes an immunization policy for personnel working with biological etiologic agents based on the evaluation of risk and benefit of immunization.

(b) [Reserved]

8. OCCUPATIONAL MEDICINE

(a) Contractors must establish and provide comprehensive occupational medicine services to workers employed at a covered work place who:

(1) Work on a DOE site for more than 30 days in a 12-month period; or

(2) Are enrolled for any length of time in a medical or exposure monitoring program required by this rule and/or any other applicable Federal, State or local regulation, or other obligation.

(b) The occupational medicine services must be under the direction of a graduate of a school of medicine or osteopathy who is licensed for the practice of medicine in the state in which the site is located.

(c) Occupational medical physicians, occupational health nurses, physician's assistants, nurse practitioners, psychologists, employee assistance counselors, and other occupational health personnel providing occupational medicine services must be licensed, registered, or certified as required by Federal or State law where employed.

(d) Contractors must provide the occupational medicine providers access to hazard information by promoting its communication, coordination, and sharing among operating and environment, safety, and health protection organizations.

(1) Contractors must provide the occupational medicine providers with access to information on the following:

(i) Current information about actual or potential work-related site hazards (chemical, radiological, physical, biological, or ergonomic);

(ii) Employee job-task and hazard analysis information, including essential job functions;

(iii) Actual or potential work-site exposures of each employee; and

(iv) Personnel actions resulting in a change of job functions, hazards or exposures.

(2) Contractors must notify the occupational medicine providers when an employee has been absent because of an injury or illness for more than 5 consecutive workdays (or an equivalent time period for those individuals on an alternative work schedule);

(3) Contractors must provide the occupational medicine provider information on, and the opportunity to participate in, worker safety and health team meetings and committees;

(4) Contractors must provide occupational medicine providers access to the workplace for evaluation of job conditions and issues relating to workers' health.

(e) A designated occupational medicine provider must:

(1) Plan and implement the occupation medicine services; and

(2) Participate in worker protection teams to build and maintain necessary partnerships among workers, their representatives, managers, and safety and health protection specialists in establishing and maintaining a safe and healthful workplace.

(f) A record, containing any medical, health history, exposure history, and demographic data collected for the occupational medicine purposes, must be developed and maintained for each employee for whom medical services are provided. All occupational medical records must be maintained in accordance with Executive Order 13335, Incentives for the Use of Health Information Technology.

(1) Employee medical, psychological, and employee assistance program (EAP) records must be kept confidential, protected from unauthorized access, and stored under conditions that ensure their long-term preservation. Psychological records must be maintained separately from medical records and in the custody the designated psychologist in accordance with 10 CFR 712.38(b)(2).

(2) Access to these records must be provided in accordance with DOE regulations implementing the Privacy Act and the Energy Employees Occupational Illness Compensation Program Act.

(g) The occupational medicine services provider must determine the content of the worker health evaluations, which must be conducted under the direction of a licensed physician, in accordance with current sound and acceptable medical practices and all pertinent statutory and regulatory requirements, such as the Americans with Disabilities Act.

(1) Workers must be informed of the purpose and nature of the medical evaluations and tests offered by the occupational medicine provider.

(i) The purpose, nature and results of evaluations and tests must be clearly communicated verbally and in writing to each worker provided testing;

(ii) The communication must be documented in the worker's medical record; and

(2) The following health evaluations must be conducted when determined necessary by the occupational medicine provider for the purpose of providing initial and continuing assessment of employee fitness for duty.

(i) At the time of employment entrance or transfer to a job with new functions and hazards, a medical placement evaluation of the individual's general health and physical and psychological capacity to perform work will establish a baseline record of physical condition and assure fitness for duty.

(ii) Periodic, hazard-based medical monitoring or qualification-based fitness for duty evaluations required by regulations and standards, or as recommended by the occupational medicine services provider, will be provided on the frequency required.

(iii) Diagnostic examinations will evaluate employee's injuries and illnesses to determine work-relatedness, the applicability of medical restrictions, and referral for definitive care, as appropriate.

(iv) After a work-related injury or illness or an absence due to any injury or illness lasting 5 or more consecutive workdays (or an equivalent time period for those individuals on an alternative work schedule), a return to work evaluation will determine the individual's physical and psychological capacity to perform work and return to duty.

(v) At the time of separation from employment, individuals shall be offered a general health evaluation to establish a record of physical condition.

(h) The occupational medicine provider must monitor ill and injured workers to facilitate their rehabilitation and safe return to work and to minimize lost time and its associated costs.

(1) The occupational medicine provider must place an individual under medical restrictions when health evaluations indicate that the worker should not perform certain job tasks. The occupational medicine provider must notify the worker and contractor management when employee work restrictions are imposed or removed.

(i) Occupational medicine provider physician and medical staff must, on a timely basis, communicate results of health evaluations to management and safety and health protection specialists to facilitate the mitigation of worksite hazards.

(j) The occupational medicine provider must include measures to identify and manage the principal preventable causes of premature morbidity and mortality affecting worker health and productivity.

(1) The contractor must include programs to prevent and manage these causes of morbidity when evaluations demonstrate their cost effectiveness.

(2) Contractors must make available to the occupational medicine provider appropriate access to information from health, disability, and other insurance plans (de-identified as necessary) in order to facilitate this process.

(k) The occupational medicine services provider must review and approve the medical and behavioral aspects of employee counseling and health promotional programs, including the following types:

(1) Contractor-sponsored or contractor-supported EAPs;

(2) Contractor-sponsored or contractor-supported alcohol and other substance abuse rehabilitation programs; and

(3) Contractor-sponsored or contractor-supported wellness programs.

(4) The occupational medicine services provider must review the medical aspects of immunization programs, blood-borne pathogens programs, and bio-hazardous waste programs to evaluate their conformance to applicable guidelines.

(5) The occupational medicine services provider must develop and periodically review medical emergency response procedures included in site emergency and disaster preparedness plans. The medical emergency responses must be integrated with nearby community emergency and disaster plans.

### 9. Motor Vehicle Safety

(a) Contractors must implement a motor vehicle safety program to protect the safety and health of all drivers and passengers in Government-owned or -leased motor vehicles and powered industrial equipment (*i.e.*, fork trucks, tractors, platform lift trucks, and other similar specialized equipment powered by an electric motor or an internal combustion engine).

(b) The contractor must tailor the motor vehicle safety program to the individual DOE site or facility, based on an analysis of the needs of that particular site or facility.

(c) The motor vehicle safety program must address, as applicable to the contractor's operations:

(1) Minimum licensing requirements (including appropriate testing and medical qualification) for personnel operating motor vehicles and powered industrial equipment;

(2) Requirements for the use of seat belts and provision of other safety devices;

(3) Training for specialty vehicle operators;

(4) Requirements for motor vehicle maintenance and inspection;

(5) Uniform traffic and pedestrian control devices and road signs;

(6) On-site speed limits and other traffic rules;

(7) Awareness campaigns and incentive programs to encourage safe driving; and

(8) Enforcement provisions.

### 10. Electrical Safety

Contractors must implement a comprehensive electrical safety program appropriate for the activities at their site. This program must meet the applicable electrical safety codes and standards referenced in § 851.23.

### 11. Nanotechnology Safety—Reserved

The Department has chosen to reserve this section since policy and procedures for nanotechnology safety are currently being developed. Once these policies and procedures have been approved, the rule will be amended to include them through a rulemaking consistent with the Administrative Procedure Act.

### 12. Workplace Violence Prevention—Reserved

The Department has chosen to reserve this section since the policy and procedures for workplace violence prevention are currently being developed. Once these policies and procedures have been approved, the rule will be amended to include them through a rulemaking consistent with the Administrative Procedure Act.

[71 FR 6931, Feb. 9, 2006; 71 FR 36661, June 28, 2006; 80 FR 69566, Nov. 10, 2015]

## Appendix B to Part 851—General Statement of Enforcement Policy

### I. Introduction

(a) This policy statement sets forth the general framework through which the U.S.

Department of Energy (DOE) will seek to ensure compliance with its worker safety and health regulations, and, in particular, exercise the civil penalty authority provided to DOE in section 3173 of Public Law 107–314, Bob Stump National Defense Authorization Act for Fiscal Year 2003 (December 2, 2002) (''NDAA''), amending the Atomic Energy Act (AEA) to add section 234C. The policy set forth herein is applicable to violations of safety and health regulations in this part by DOE contractors, including DOE contractors who are indemnified under the Price-Anderson Act, 42 U.S.C. 2210(d), and their subcontractors and suppliers (hereafter collectively referred to as DOE contractors). This policy statement is not a regulation and is intended only to provide general guidance to those persons subject to the regulations in this part. It is not intended to establish a ''cookbook'' approach to the initiation and resolution of situations involving noncompliance with the regulations in this part. Rather, DOE intends to consider the particular facts of each noncompliance in determining whether enforcement sanctions are appropriate and, if so, the appropriate magnitude of those sanctions. DOE may well deviate from this policy statement when appropriate in the circumstances of particular cases. This policy statement is not applicable to activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval Nuclear Propulsion, or otherwise excluded from the scope of the rule.

(b) The DOE goal in the compliance arena is to enhance and protect the safety and health of workers at DOE facilities by fostering a culture among both the DOE line organizations and the contractors that actively seeks to attain and sustain compliance with the regulations in this part. The enforcement program and policy have been developed with the express purpose of achieving safety inquisitiveness and voluntary compliance. DOE will establish effective administrative processes and positive incentives to the contractors for the open and prompt identification and reporting of noncompliances, performance of effective root cause analysis, and initiation of comprehensive corrective actions to resolve both noncompliance conditions and program or process deficiencies that led to noncompliance.

(c) In the development of the DOE enforcement policy, DOE recognizes that the reasonable exercise of its enforcement authority can help to reduce the likelihood of serious incidents. This can be accomplished by placing greater emphasis on a culture of safety in existing DOE operations, and strong incentives for contractors to identify and correct noncompliance conditions and processes in order to protect human health and the environment. DOE wants to facilitate, encourage, and support contractor initiatives for the prompt identification and correction of noncompliances. DOE will give due consideration to such initiatives and activities in exercising its enforcement discretion.

(d) DOE may modify or remit civil penalties in a manner consistent with the adjustment factors set forth in this policy with or without conditions. DOE will carefully consider the facts of each case of noncompliance and will exercise appropriate discretion in taking any enforcement action. Part of the function of a sound enforcement program is to assure a proper and continuing level of safety vigilance. The reasonable exercise of enforcement authority will be facilitated by the appropriate application of safety requirements to DOE facilities and by promoting and coordinating the proper contractor and DOE safety compliance attitude toward those requirements.

## II. Purpose

The purpose of the DOE enforcement program is to promote and protect the safety and health of workers at DOE facilities by:

(a) Ensuring compliance by DOE contractors with the regulations in this part.

(b) Providing positive incentives for DOE contractors based on:

(1) Timely self-identification of worker safety noncompliances;

(2) Prompt and complete reporting of such noncompliances to DOE;

(3) Prompt correction of safety noncompliances in a manner that precludes recurrence; and

(4) Identification of modifications in practices or facilities that can improve worker safety and health.

(c) Deterring future violations of DOE requirements by a DOE contractor.

(d) Encouraging the continuous overall improvement of operations at DOE facilities.

## III. Statutory Authority

The Department of Energy Organization Act, 42 U.S.C. 7101–7385o, the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801–5911, and the Atomic Energy Act of 1954, as amended, (AEA) 42 U.S.C. 2011, require DOE to protect the public safety and health, as well as the safety and health of workers at DOE facilities, in conducting its activities, and grant DOE broad authority to achieve this goal. Section 234C of the AEA makes DOE contractors (and their subcontractors and suppliers thereto) covered by the DOE Price-Anderson indemnification system, subject to civil penalties for violations of the worker safety and health requirements promulgated in this part. 42 U.S.C. 2282c.

IV. RESPONSIBILITIES

(a) The Director, as the principal enforcement officer of the DOE, has been delegated the authority to:

(1) Conduct enforcement inspections, investigations, and conferences;

(2) Issue Notices of Violations and proposed civil penalties, Enforcement Letters, Consent Orders, and subpoenas; and

(3) Issue orders to compel attendance and disclosure of information or documents obtained during an investigation or inspection. The Secretary issues Compliance Orders.

(b) The NNSA Administrator, rather than the Director, signs, issues and serves the following actions that direct NNSA contractors:

(1) Subpoenas;

(2) Orders to compel attendance; and

(3) Determines to disclose information or documents obtained during an investigation or inspection, PNOVs, Notices of Violations, and Final Notices of Violations. The NNSA Administrator acts after consideration of the Director's recommendation.

V. PROCEDURAL FRAMEWORK

(a) Title 10 CFR part 851 sets forth the procedures DOE will use in exercising its enforcement authority, including the issuance of Notices of Violation and the resolution of an administrative appeal in the event a DOE contractor elects to petition the Office of Hearings and Appeals for review.

(b) Pursuant to 10 CFR part 851 subpart E, the Director initiates the enforcement process by initiating and conducting investigations and inspections and issuing a Preliminary Notice of Violation (PNOV) with or without a proposed civil penalty. The DOE contractor is required to respond in writing to the PNOV within 30 days, either: (1) Admitting the violation and waiving its right to contest the proposed civil penalty and paying it; (2) admitting the violation but asserting the existence of mitigating circumstances that warrant either the total or partial remission of the civil penalty; or (3) denying that the violation has occurred and providing the basis for its belief that the PNOV is incorrect. After evaluation of the DOE contractor's response, the Director may determine: (1) That no violation has occurred; (2) that the violation occurred as alleged in the PNOV but that the proposed civil penalty should be remitted in whole or in part; or (3) that the violation occurred as alleged in the PNOV and that the proposed civil penalty is appropriate, notwithstanding the asserted mitigating circumstances. In the latter two instances, the Director will issue a Final Notice of Violation (FNOV) or an FNOV and proposed civil penalty.

(c) An opportunity to challenge an FNOV is provided in administrative appeal provisions. See 10 CFR 851.44. Any contractor that receives an FNOV may petition the Office of Hearings and Appeals for review of the final notice in accordance with 10 CFR part 1003, Subpart G, within 30 calendar days from receipt of the final notice. An administrative appeal proceeding is not initiated until the DOE contractor against which an FNOV has been issued requests an administrative hearing rather than waiving its right to contest the FNOV and proposed civil penalty, if any, and paying the civil penalty. However, it should be emphasized that DOE encourages the voluntary resolution of a noncompliance situation at any time, either informally prior to the initiation of the enforcement process or by consent order before or after any formal proceeding has begun.

VI. SEVERITY OF VIOLATIONS

(a) Violations of the worker safety and health requirements in this part have varying degrees of safety and health significance. Therefore, the relative safety and health risk of each violation must be identified as the first step in the enforcement process. Violations of the worker safety and health requirements are categorized in two levels of severity to identify their relative seriousness. Notices of Violation issued for noncompliance when appropriate, propose civil penalties commensurate with the severity level of the violations involved.

(b) To assess the potential safety and health impact of a particular violation, DOE will categorize the potential severity of violations of worker safety and health requirements as follows:

(1) A Severity Level I violation is a serious violation. A serious violation shall be deemed to exist in a place of employment if there is a potential that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment. A Severity Level I violation would be subject to a base civil penalty of up to 100% of the maximum base civil penalty of $93,332.

(2) A Severity Level II violation is an other-than-serious violation. An other-than-serious violation occurs where the most serious injury or illness that would potentially result from a hazardous condition cannot reasonably be predicted to cause death or serious physical harm to employees but does have a direct relationship to their safety and health. A Severity Level II violation would be subject to a base civil penalty up to 50% of the maximum base civil penalty ($46,666).

(c) De minimis violations, defined as a deviation from the requirement of a standard that has no direct or immediate relationship to safety or health, will not be the subject of formal enforcement action through the issuance of a Notice of Violation.

VII. ENFORCEMENT CONFERENCES

(a) The purpose of the enforcement conference is to:

(1) Assure the accuracy of the facts upon which the preliminary determination to consider enforcement action is based;

(2) Discuss the potential or alleged violations, their significance and causes, and the nature of and schedule for the DOE contractor's corrective actions;

(3) Determine whether there are any aggravating or mitigating circumstances; and

(4) Obtain other information which will help determine whether enforcement action is appropriate and, if so, the extent of that enforcement action.

(b) All enforcement conferences are convened at the discretion of the Director.

(c) The PNOV will normally be issued promptly, before the opportunity for an enforcement conference, following the inspection/investigation. In some cases an enforcement conference may be conducted onsite at the conclusion of an inspection/investigation.

(d) The contractor may request an enforcement conference if they believe additional information pertinent to the enforcement action could best be conveyed through a meeting.

(e) DOE contractors will be informed prior to a meeting when that meeting is considered to be an enforcement conference. Such conferences are informal mechanisms for candid discussions regarding potential or alleged violations and will not normally be open to the public. In circumstances for which immediate enforcement action is necessary in the interest of worker safety and health, such action will be taken prior to the enforcement conference, which may still be held after the necessary DOE action has been taken.

VIII. ENFORCEMENT LETTER

(a) In cases where DOE has decided not to conduct an investigation or inspection or issue a Preliminary Notice of Violation (PNOV), DOE may send an Enforcement Letter, signed by the Director to the contractor. The Enforcement Letter is intended to communicate the basis of the decision not to pursue enforcement action for a noncompliance. The Enforcement Letter is intended to direct contractors to the desired level of worker safety and health performance. It may be used when DOE concludes that the specific noncompliance at issue is not of the level of significance warranted to conduct an investigation or inspection or for issuance of a PNOV. Even where a noncompliance may be significant, the Enforcement Letter may recognize that the contractor's actions may have attenuated the need for enforcement action. The Enforcement Letter will typically recognize how the contractor handled the circumstances surrounding the noncompliance, address additional areas requiring the contractor's attention, and address DOE's expectations for corrective action.

(b) In general, Enforcement Letters communicate DOE's expectations with respect to any aspect of the requirements of this part, including identification and reporting of issues, corrective actions, and implementation of the contractor's safety and health program. DOE might, for example, wish to recognize some action of the contractor that is of particular benefit to worker safety and health that is a candidate for emulation by other contractors. On the other hand, DOE may wish to bring a program shortcoming to the attention of the contractor that, but for the lack of worker safety and health significance of the immediate issue, might have resulted in the issuance of a PNOV. An Enforcement Letter is not an enforcement action.

(c) With respect to many noncompliances, an Enforcement Letter may not be required. When DOE decides that a contractor has appropriately corrected a noncompliance or that the significance of the noncompliance is sufficiently low, it may close out its review simply through an annotation in the DOE Noncompliance Tracking System (NTS). A closeout of a noncompliance with or without an Enforcement Letter may only take place after DOE has confirmed that corrective actions have been completed.

IX. ENFORCEMENT ACTIONS

(a) This section describes the enforcement sanctions available to DOE and specifies the conditions under which each may be used. The basic sanctions are Notices of Violation and civil penalties.

(b) The nature and extent of the enforcement action is intended to reflect the seriousness of the violation. For the vast majority of violations for which DOE assigns severity levels as described previously, a Notice of Violation will be issued, requiring a formal response from the recipient describing the nature of and schedule for corrective actions it intends to take regarding the violation.

*1. Notice of Violation*

(a) A Notice of Violation (either a Preliminary or Final Notice) is a document setting forth the conclusion of DOE and the basis to support the conclusion, that one or more violations of the worker safety and health requirements have occurred. Such a notice normally requires the recipient to provide a written response which may take one of several positions described in section V of this policy statement. In the event that the recipient concedes the occurrence of the violation, it is required to describe corrective steps which have been taken and the results

achieved; remedial actions which will be taken to prevent recurrence; and the date by which full compliance will be achieved.

(b) DOE will use the Notice of Violation as the standard method for formalizing the existence of a violation and, in appropriate cases as described in this section, the Notice of Violation will be issued in conjunction with the proposed imposition of a civil penalty. In certain limited instances, as described in this section, DOE may refrain from the issuance of an otherwise appropriate Notice of Violation. However, a Notice of Violation will virtually always be issued for willful violations, or if past corrective actions for similar violations have not been sufficient to prevent recurrence and there are no other mitigating circumstances.

(c) DOE contractors are not ordinarily cited for violations resulting from matters not within their control, such as equipment failures that were not avoidable by reasonable quality assurance measures, proper maintenance, or management controls. With regard to the issue of funding, however, DOE does not consider an asserted lack of funding to be a justification for noncompliance with the worker safety and health requirements.

(d) DOE expects its contractors to have the proper management and supervisory systems in place to assure that all activities at covered workplaces, regardless of who performs them, are carried out in compliance with all the worker safety and health requirements. Therefore, contractors are normally held responsible for the acts of their employees and subcontractor employees in the conduct of activities at covered workplaces. Accordingly, this policy should not be construed to excuse personnel errors.

(e) The limitations on remedies under section 234C will be implemented as follows:

(1) DOE may assess civil penalties of up to $93,332 per violation per day on contractors (and their subcontractors and suppliers) that are indemnified by the Price-Anderson Act, 42 U.S.C. 2210(d). *See* 10 CFR 851.5(a).

(2) DOE may seek contract fee reductions through the contract's *Conditional Payment of Fee* Clause in the Department of Energy Acquisition Regulation (DEAR). *See* 10 CFR 851.4(b); 48 CFR parts 923, 952, 970. Policies for contract fee reductions are not established by this policy statement. The Director and appropriate contracting officers will coordinate their efforts in compliance with the statute. *See* 10 CFR 851.5(b).

(3) For the same violation of a worker safety and health requirement in this part, DOE may pursue either civil penalties (for indemnified contractors and their subcontractors and suppliers) or a contract fee reduction, but not both. *See* 10 CFR 851.5(c).

(4) A ceiling applies to civil penalties assessed on certain contractors specifically listed in 170d. of the Atomic Energy Act, 42 U.S.C. 2282a(d), for activities conducted at specified facilities. For these contractors, the total amount of civil penalties and contract penalties in a fiscal year may not exceed the total amount of fees paid by DOE to that entity in that fiscal year. *See* 10 CFR 851.5(d).

*2. Civil Penalty*

(a) A civil penalty is a monetary penalty that may be imposed for violations of requirements of this part. *See* 10 CFR 851.5(a). Civil penalties are designed to emphasize the need for lasting remedial action, deter future violations, and underscore the importance of DOE contractor self-identification, reporting, and correction of violations of the worker safety and health requirements in this part.

(b) Absent mitigating circumstances as described below, or circumstances otherwise warranting the exercise of enforcement discretion by DOE as described in this section, civil penalties will be proposed for Severity Level I and II violations.

(c) DOE will impose different base level penalties considering the severity level of the violation. Table A–1 shows the daily base civil penalties for the various categories of severity levels. However, as described below in section IX, paragraph b.3, the imposition of civil penalties will also take into account the gravity, circumstances, and extent of the violation or violations and, with respect to the violator, any history of prior similar violations and the degree of culpability and knowledge.

(d) Enforcement personnel will use risk-based criteria to assist the Director in determining appropriate civil penalties for violations found during investigations and inspections.

(e) Regarding the factor of ability of DOE contractors to pay the civil penalties, it is not DOE's intention that the economic impact of a civil penalty be such that it puts a DOE contractor out of business. Contract termination, rather than civil penalties, is used when the intent is to terminate these activities. The deterrent effect of civil penalties is best served when the amount of such penalties takes this factor into account. However, DOE will evaluate the relationship of affiliated entities to the contractor (such as parent corporations) when the contractor asserts that it cannot pay the proposed penalty.

(f) DOE will review each case on its own merits and adjust the base civil penalty values upward or downward. As indicated below, Table A–1 identifies the daily base civil penalty values for different severity levels. After considering all relevant circumstances, civil penalties may be adjusted up or down

based on the mitigating or aggravating factors described later in this section. In no instance will a civil penalty for any one violation exceed the statutory limit, as periodically adjusted for inflation as required by law, per day. In cases where the DOE contractor had knowledge of a violation and has not reported it to DOE and taken corrective action despite an opportunity to do so, DOE will consider utilizing its per day civil penalty authority. Further, as described in this section, the duration of a violation will be taken into account in adjusting the base civil penalty.

TABLE A–1—SEVERITY LEVEL BASE CIVIL PENALTIES

| Severity level | Base civil penalty amount (Percentage of maximum per violation per day) |
|---|---|
| I | 100 |
| II | 50 |

*3. Adjustment Factors*

(a) DOE may reduce a penalty based on mitigating circumstances or increase a penalty based on aggravating circumstances. DOE's enforcement program is not an end in itself, but a means to achieve compliance with the worker safety and health requirements in this part. Civil penalties are intended to emphasize the importance of compliance and to deter future violations. The single most important goal of the DOE enforcement program is to encourage early identification and reporting of violations of the worker safety and health requirements in this part by the DOE contractors themselves rather than by DOE, and the prompt correction of any violations so identified. DOE believes that DOE contractors are in the best position to identify and promptly correct noncompliance with the worker safety and health requirements in this part. DOE expects that these contractors should have in place internal compliance programs which will ensure the detection, reporting, and prompt correction of conditions that may constitute, or lead to, violations of the worker safety and health requirements in this part, before, rather than after, DOE has identified such violations. Thus, DOE contractors should almost always be aware of worker safety and health noncompliances before they are discovered by DOE. Obviously, worker safety and health is enhanced if noncompliances are discovered (and promptly corrected) by the DOE contractor, rather than by DOE, which may not otherwise become aware of a noncompliance until later, during the course of an inspection, performance assessment, or following an incident at the facility. Early identification of worker safety and health-related noncompliances by DOE contractors has the added benefit of allowing information that could prevent such noncompliances at other facilities in the DOE complex to be shared with other appropriate DOE contractors.

(b) Pursuant to this enforcement philosophy, DOE will provide substantial incentive for the early self-identification, reporting, and prompt correction of conditions which constitute, or could lead to, violations of the worker safety and health requirements. Thus, the civil penalty may be reduced for violations that are identified, reported, and promptly and effectively corrected by the DOE contractor.

(c) On the other hand, ineffective programs for problem identification and correction are aggravating circumstances and may increase the penalty amount. Thus, for example, where a contractor fails to disclose and promptly correct violations of which it was aware or should have been aware, substantial civil penalties are warranted and may be sought, including the assessment of civil penalties for continuing violations on a per day basis.

(d) Further, in cases involving factors of willfulness, repeated violations, death, serious injury, patterns of systemic violations, DOE-identified flagrant violations, repeated poor performance in an area of concern, or serious breakdown in management controls, DOE intends to apply its full statutory enforcement authority where such action is warranted.

(e) Additionally, adjustment to the amount of civil penalty will be dependent, in part, on the degree of culpability of the DOE contractor with regard to the violation. Thus, inadvertent violations will be viewed differently from those in which there is gross negligence, deception, or willfulness. In addition to the severity of the underlying violation and level of culpability involved, DOE will also consider the position, training and experience of those involved in the violation. Thus, for example, a violation may be deemed to be more significant if a senior manager of an organization is involved rather than a foreman or non-supervisory employee.

(f) Other factors that will be considered in determining the civil penalty amount are the duration of the violation (how long the condition has presented a potential exposure to workers), the extent of the condition (number of instances of the violation), the frequency of the exposure (how often workers are exposed), the proximity of the workers to the exposure, and the past history of similar violations.

(g) DOE expects contractors to provide full, complete, timely, and accurate information and reports. Accordingly, the penalty amount for a violation involving either a

failure to make a required report or notification to the DOE or an untimely report or notification, will be based upon the circumstances surrounding the matter that should have been reported. A contractor will not normally be cited for a failure to report a condition or event unless the contractor was aware or should have been aware of the condition or event that it failed to report.

*4. Identification and Reporting*

Reduction of up to 50% of the base civil penalty shown in Table A–1 may be given when a DOE contractor identifies the violation and promptly reports the violation to the DOE. Consideration will be given to, among other things, the opportunity available to discover the violation, the ease of discovery and the promptness and completeness of any required report. No consideration will be given to a reduction in penalty if the DOE contractor does not take prompt action to report the problem to DOE upon discovery, or if the immediate actions necessary to restore compliance with the worker safety and health requirements are not taken.

*5. Self-Identification and Tracking Systems*

(a) DOE strongly encourages contractors to self-identify noncompliances with the worker safety and health requirements before the noncompliances lead to a string of similar and potentially more significant events or consequences. When a contractor identifies a noncompliance, DOE will normally allow a reduction in the amount of civil penalties, unless prior opportunities existed for contractors to identify the noncompliance. DOE will normally not allow a reduction in civil penalties for self-identification if significant DOE intervention was required to induce the contractor to report a noncompliance.

(b) Self-identification of a noncompliance is possibly the single most important factor in considering a reduction in the civil penalty amount. Consideration of self-identification is linked to, among other things, whether prior opportunities existed to discover the violation, and if so, the age and number of such opportunities; the extent to which proper contractor controls should have identified or prevented the violation; whether discovery of the violation resulted from a contractor's self-monitoring activity; the extent of DOE involvement in discovering the violation or in prompting the contractor to identify the violation; and the promptness and completeness of any required report. Self-identification is also considered by DOE in deciding whether to pursue an investigation.

(c) DOE will use the voluntary Noncompliance Tracking System (NTS) which allows contractors to elect to report noncompliances. In the guidance document supporting the NTS, DOE will establish reporting thresholds for reporting noncompliances of potentially greater worker safety and health significance into the NTS. Contractors are expected, however, to use their own self-tracking systems to track noncompliances below the reporting threshold. This self-tracking is considered to be acceptable self-reporting as long as DOE has access to the contractor's system and the contractor's system notes the item as a noncompliance with a DOE safety and health requirement. For noncompliances that are below the NTS reportability thresholds, DOE will credit contractor self-tracking as representing self-reporting. If an item is not reported in NTS but only tracked in the contractor's system and DOE subsequently determines that the noncompliance was significantly mischaracterized, DOE will not credit the internal tracking as representing appropriate self-reporting.

*6. Self-Disclosing Events*

(a) DOE expects contractors to demonstrate acceptance of responsibility for worker safety and health by proactively identifying noncompliances. When the occurrence of an event discloses noncompliances that the contractor could have or should have identified before the event, DOE will not generally reduce civil penalties for self-identification, even if the underlying noncompliances were reported to DOE. In deciding whether to reduce any civil penalty proposed for violations revealed by the occurrence of a self-disclosing event, DOE will consider the ease with which a contractor could have discovered the noncompliance and the prior opportunities that existed to discover the noncompliance. If a contractor simply reacts to events that disclose potentially significant consequences or downplays noncompliances which did not result in significant consequences to worker safety and health, such contractor actions do not constitute the type of proactive behavior necessary to prevent significant events from occurring and thereby to improve worker safety and health.

(b) The key test is whether the contractor reasonably could have detected any of the underlying noncompliances that contributed to the event. Examples of events that provide opportunities to identify noncompliances include, but are not limited to:

(1) Prior notifications of potential problems such as those from DOE operational experience publications or vendor equipment deficiency reports;

(2) Normal surveillance, quality assurance performance assessments, and post-maintenance testing;

(3) Readily observable parameter trends; and

(4) Contractor employee or DOE observations of potential worker safety and health problems.

(c) Failure to utilize these types of events and activities to address noncompliances may result in higher civil penalty assessments or a DOE decision not to reduce civil penalty amounts.

(d) Alternatively, if, following a self-disclosing event, DOE finds that the contractor's processes and procedures were adequate and the contractor's personnel generally behaved in a manner consistent with the contractor's processes and procedures, DOE could conclude that the contractor could not have been reasonably expected to find the single noncompliance that led to the event and thus, might allow a reduction in civil penalties.

*7. Corrective Action To Prevent Recurrence*

The promptness (or lack thereof) and extent to which the DOE contractor takes corrective action, including actions to identify root cause and prevent recurrence, may result in an increase or decrease in the base civil penalty shown in Table A–1. For example, appropriate corrective action may result in DOE's reducing the proposed civil penalty up to 50% from the base value shown in Table A–1. On the other hand, the civil penalty may be increased if initiation of corrective action is not prompt or if the corrective action is only minimally acceptable. In weighing this factor, consideration will be given to, among other things, the appropriateness, timeliness and degree of initiative associated with the corrective action. The comprehensiveness of the corrective action will also be considered, taking into account factors such as whether the action is focused narrowly to the specific violation or broadly to the general area of concern.

*8. DOE's Contribution to a Violation*

There may be circumstances in which a violation of a DOE worker safety and health requirement results, in part or entirely, from a direction given by DOE personnel to a DOE contractor to either take or forbear from taking an action at a DOE facility. In such cases, DOE may refrain from issuing an NOV, or may mitigate, either partially or entirely, any proposed civil penalty, provided that the direction upon which the DOE contractor relied is documented in writing, contemporaneously with the direction. It should be emphasized, however, that pursuant to 10 CFR 851.7, interpretative ruling of a requirement of this part must be issued in accordance with the provisions of 851.7 to be binding. Further, as discussed above in this policy statement, lack of funding by itself will not be considered as a mitigating factor in enforcement actions.

*9. Exercise of Discretion*

Because DOE wants to encourage and support DOE contractor initiative for prompt self-identification, reporting and correction of noncompliances, DOE may exercise discretion as follows:

(a) In accordance with the previous discussion, DOE may refrain from issuing a civil penalty for a violation that meets all of the following criteria:

(1) The violation is promptly identified and reported to DOE before DOE learns of it or the violation is identified by a DOE independent assessment, inspection or other formal program effort.

(2) The violation is not willful or is not a violation that could reasonably be expected to have been prevented by the DOE contractor's corrective action for a previous violation.

(3) The DOE contractor, upon discovery of the violation, has taken or begun to take prompt and appropriate action to correct the violation.

(4) The DOE contractor has taken, or has agreed to take, remedial action satisfactory to DOE to preclude recurrence of the violation and the underlying conditions that caused it.

(b) DOE will not issue a Notice of Violation for cases in which the violation discovered by the DOE contractor cannot reasonably be linked to the conduct of that contractor in the design, construction or operation of the DOE facility involved, provided that prompt and appropriate action is taken by the DOE contractor upon identification of the past violation to report to DOE and remedy the problem.

(c) In situations where corrective actions have been completed before termination of an inspection or assessment, a formal response from the contractor is not required and the inspection report serves to document the violation and the corrective action. However, in all instances, the contractor is required to report the noncompliance through established reporting mechanisms so the noncompliance and any corrective actions can be properly tracked and monitored.

(d) If DOE initiates an enforcement action for a violation, and as part of the corrective action for that violation, the DOE contractor identifies other examples of the violation with the same root cause, DOE may refrain from initiating an additional enforcement action. In determining whether to exercise this discretion, DOE will consider whether the DOE contractor acted reasonably and in a timely manner appropriate to the severity of the initial violation, the comprehensiveness of the corrective action, whether the matter was reported, and whether the additional violation(s) substantially change the significance or character of the concern arising out of the initial violation.

(e) The preceding paragraphs are examples indicating when enforcement discretion may be exercised to forego the issuance of a civil penalty or, in some cases, the initiation of any enforcement action at all. However, notwithstanding these examples, a civil penalty may be proposed or Notice of Violation issued when, in DOE's judgment, such action is warranted.

X. INACCURATE AND INCOMPLETE INFORMATION

(a) A violation of the worker safety and health requirements to provide complete and accurate information to DOE, 10 CFR 851.40, can result in the full range of enforcement sanctions, depending upon the circumstances of the particular case and consideration of the factors discussed in this section. Violations involving inaccurate or incomplete information or the failure to provide significant information identified by a DOE contractor normally will be categorized based on the guidance in section IX, ''Enforcement Actions.''

(b) DOE recognizes that oral information may in some situations be inherently less reliable than written submittals because of the absence of an opportunity for reflection and management review. However, DOE must be able to rely on oral communications from officials of DOE contractors concerning significant information. In determining whether to take enforcement action for an oral statement, consideration will be given to such factors as:

(1) The degree of knowledge that the communicator should have had regarding the matter in view of his or her position, training, and experience;

(2) The opportunity and time available prior to the communication to assure the accuracy or completeness of the information;

(3) The degree of intent or negligence, if any, involved;

(4) The formality of the communication;

(5) The reasonableness of DOE reliance on the information;

(6) The importance of the information that was wrong or not provided; and

(7) The reasonableness of the explanation for not providing complete and accurate information.

(c) Absent gross negligence or willfulness, an incomplete or inaccurate oral statement normally will not be subject to enforcement action unless it involves significant information provided by an official of a DOE contractor. However, enforcement action may be taken for an unintentionally incomplete or inaccurate oral statement provided to DOE by an official of a DOE contractor or others on behalf of the DOE contractor, if a record was made of the oral information and provided to the DOE contractor thereby permitting an opportunity to correct the oral information, such as if a transcript of the communication or meeting summary containing the error was made available to the DOE contractor and was not subsequently corrected in a timely manner.

(d) When a DOE contractor has corrected inaccurate or incomplete information, the decision to issue a citation for the initial inaccurate or incomplete information normally will be dependent on the circumstances, including the ease of detection of the error, the timeliness of the correction, whether DOE or the DOE contractor identified the problem with the communication, and whether DOE relied on the information prior to the correction. Generally, if the matter was promptly identified and corrected by the DOE contractor prior to reliance by DOE, or before DOE raised a question about the information, no enforcement action will be taken for the initial inaccurate or incomplete information. On the other hand, if the misinformation is identified after DOE relies on it, or after some question is raised regarding the accuracy of the information, then some enforcement action normally will be taken even if it is in fact corrected.

(e) If the initial submission was accurate when made but later turns out to be erroneous because of newly discovered information or advances in technology, a citation normally would not be appropriate if, when the new information became available, the initial submission was promptly corrected.

(f) The failure to correct inaccurate or incomplete information that the DOE contractor does not identify as significant normally will not constitute a separate violation. However, the circumstances surrounding the failure to correct may be considered relevant to the determination of enforcement action for the initial inaccurate or incomplete statement. For example, an unintentionally inaccurate or incomplete submission may be treated as a more severe matter if a DOE contractor later determines that the initial submission was in error and does not promptly correct it or if there were clear opportunities to identify the error.

[71 FR 6931, Feb. 9, 2006, as amended at 74 FR 66033, Dec. 14, 2009; 79 FR 20, Jan. 2, 2014; 81 FR 41795, June 28, 2016; 81 FR 96352, Dec. 30, 2016]

# PART 860—TRESPASSING ON DEPARTMENT OF ENERGY PROPERTY

Sec.

860.1 Purpose.
860.2 Scope.
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860.4 Unauthorized introduction of weapons or dangerous materials.
860.5 Violations and penalties.
860.6 Posting.

860.7 Effective date of prohibition on designated locations.
860.8 Applicability of other laws.

AUTHORITY: Sec. 161, 68 Stat. 948, sec. 229, 70 Stat. 1070; (42 U.S.C. 2201; 2278a); sec. 104, 88 Stat. 1237, sec. 105, 88 Stat. 1238 (42 U.S.C. 5814, 5815); sec. 5, Pub. L. 100–185, 101 Stat. 1279 (18 U.S.C. 3559); sec. 6, Pub. L. 100–185, 101 Stat. 1280 (18 U.S.C. 3571); sec. 7041, Pub. L. 100–690, 102 Stat. 4899 (18 U.S.C. 3559).

SOURCE: 58 FR 47985, Sept. 14, 1993, unless otherwise noted.

### § 860.1 Purpose.

The regulations in this part are issued for the protection and security of facilities, installations and real property subject to the jurisdiction or administration, or in the custody of, the Department of Energy.

### § 860.2 Scope.

The regulations in this part apply to all facilities, installations and real property subject to the jurisdiction or administration of the Department of Energy or in its custody which have been posted with a notice of the prohibitions and penalties set forth in this part.

### § 860.3 Trespass.

Unauthorized entry upon any facility, installation or real property subject to this part is prohibited.

### § 860.4 Unauthorized introduction of weapons or dangerous materials.

Unauthorized carrying, transporting, or otherwise introducing or causing to be introduced any dangerous weapon, explosive, or other dangerous instrument or material likely to produce substantial injury or damage to persons or property, into or upon any facility, installation or real property subject to this part, is prohibited.

### § 860.5 Violations and penalties.

(a) Whoever willfully violates either § 860.3 or § 860.4 shall, upon conviction, be guilty of an infraction punishable by a fine of not more than $5,000.

(b) Whoever willfully violates either § 860.3 or § 860.4 with respect to any facility, installation or real property enclosed by a fence, wall, floor, roof, or other structural barrier shall upon conviction, be guilty of a Class A misdemeanor punishable by a fine not to exceed $100,000 or imprisonment for not more than one year, or both.

### § 860.6 Posting.

Notices stating the pertinent prohibitions of §§ 860.3 and 860.4 and penalties of § 860.5 will be conspicuously posted at all entrances of each designated facility, installation or parcel of real property and at such intervals along the perimeter as will provide reasonable assurance of notice to persons about to enter.

### § 860.7 Effective date of prohibition on designated locations.

The prohibitions in §§ 860.3 and 860.4 shall take effect as to any facility, installation or real property on publication in the FEDERAL REGISTER of the notice designating the facility, installation or real property and posting in accordance with § 860.6.

### § 860.8 Applicability of other laws.

Nothing in this part shall be construed to affect the applicability of the provisions of State or other Federal laws.

## PART 861—CONTROL OF TRAFFIC AT NEVADA TEST SITE

Sec.
861.1 Purpose.
861.2 Scope.
861.3 Definitions.
861.4 Use of site streets.
861.5 Penalties.
861.6 Posting and distribution.
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APPENDIX A TO PART 861—PERIMETER DESCRIPTION OF DOE'S NEVADA TEST SITE

AUTHORITY: 42 U.S.C. 2201.

SOURCE: 41 FR 56788, Dec. 30, 1976, unless otherwise noted.

### § 861.1 Purpose.

The regulations in this part are designed to facilitate the control of traffic at the Nevada Test Site.

### § 861.2 Scope.

This part applies to all persons who use the streets of the Nevada Test Site.

### § 861.3 Definitions.

As used in this part:

(a) *DOE* means the Department of Energy.

(b) *Nevada Test Site* means DOE's Nevada Test Site located in Nye County, Nev. A perimeter description is attached as Appendix A to this part.

(c) *Nevada Test Site Traffic Regulations* means the traffic directives promulgated by the Manager of the Nevada Site Office pursuant to § 861.4.

(d) *Person* means every natural person, firm, trust partnership, association or corporation.

(e) *Street* means the entire width between the boundary lines of every way when any part thereof is open to the use of those admitted to the Nevada Test Site for purposes of vehicular travel.

(f) *Traffic* means pedestrians, ridden or herded animals, vehicles, and other conveyances, either singly or together, while using any roadway for purposes of travel.

(g) *Vehicle* means every device in, upon or by which any person or property is or may be transported or drawn upon a roadway, excepting devices moved by human power or used exclusively upon stationary rails or tracks.

[41 FR 56788, Dec. 30, 1976, as amended at 71 FR 68734, Nov. 28, 2006]

### § 861.4 Use of site streets.

All persons using the streets of the Nevada Test Site shall do so in a careful and safe manner.

(a) The Nevada Test Site Traffic Regulations supplement this section by identifying the specific traffic requirements relating to such matters as:

(1) Enforcement and obedience to Traffic Regulations, including the authority of police officers and traffic regulations, and responsibility to report accidents.

(2) Traffic signs, signals, and markings, including required compliance with traffic lanes and traffic control devices, and prohibitions on display of unauthorized traffic signs, signals, or marking or interference with authorized traffic control devices.

(3) Speeding or driving under the influence of intoxicating liquor or drugs, including prohibitions on reckless driving, and promulgation of maximum permissible speeds.

(4) Turning movements, including required position and method of turning at intersections, limitations on turning around, and obedience to turning markers and no-turn signs.

(5) Stopping and yielding, including obedience to stop and yield signs, requirements, when entering stop or yield intersections, emerging from alleys, driveways, or buildings, operation of vehicles on approach of authorized emergency vehicles and stops when traffic is obstructed.

(6) Pedestrians' rights and duties, including pedestrian's right-of-way in crosswalks, when a pedestrian must yield, required use or right half of crosswalks and requirements concerning walking along roadways and prohibited pedestrian crossings.

(7) Parking, stopping, and standing, specifying when parking, stopping, and standing are prohibited, including special provisions applicable to buses, requirements that parking not obstruct traffic and be close to curb, and concerning lamps on parked vehicles.

(8) Privileges of drivers of authorized emergency vehicles, including exemptions from parking and standing, stopping, speeding and turning limitations, under specified circumstances and within specified limitations.

(9) Miscellaneous driving rules, including requirements for convoys, and limitations on backing, opening and closing vehicle doors, following fire apparatus, crossing a fire hose, driving through a safety zone, through convoys, on sidewalks or shoulders of roadways, boarding or alighting from vehicles, passing a bus on the right, and unlawful riding.

(b) The Nevada Test Site Traffic Regulations, when posted and distributed as specified in § 861.6, shall have the same force and effect as if made a part hereof.

### § 861.5 Penalties.

Any person doing any act forbidden or failing to do any act required by the Nevada Test Site Traffic Regulations shall, upon conviction, be punishable by a fine of not more than $50 or imprisonment for not more than 30 days, or both.

### § 861.6 Posting and distribution.

Notices including the provisions of the Nevada Test Site Traffic Regulations will be conspicuously posted at the Nevada Test Site. Such other distribution of the Nevada Test Site Regulations will be made by the Manager as will provide reasonable assurance of notice to persons subject to the regulations.

### § 861.7 Applicability of other laws.

Nothing in this part shall be construed to affect the applicability of the provisions of State laws or of other Federal laws.

APPENDIX A TO PART 861—PERIMETER DESCRIPTION OF DOE'S NEVADA TEST SITE

The Nevada Test Site, containing approximately 858,764 acres located in Nye County, Nev., is described as follows:

Beginning at the northwesterly corner of the tract of land hereinafter described, said corner being at latitude 37°20′45″, longitude 116°34′20″;

Thence easterly approximately 6.73 miles, to a point at latitude 37°20′45″ longitude 116°27′00″;

Thence northeasterly approximately 4.94 miles to a point at latitude 37°23′07″, longitude 116°22′30″;

Thence easterly approximately 4.81 miles to a point at latitude 37°23′07″, longitude 116°17′15″;

Thence southeasterly approximately 6.77 miles to a point at latitude 37°19′47″, longitude 116°11′10″;

Thence southerly approximately 5.27 miles to a point at latitude 37°15′12.043″, longitude 116°11′10″;

Thence easterly approximately 14.21 miles to a point at latitude 37°15′07.268″, longitude 115°55′42.268″;

Thence southerly approximately 39.52 miles to a point at latitude 36°40′43.752″, longitude 115°55′37.687″;

Thence westerly approximately 2.87 miles to a point at latitude 36°40′40.227″, longitude 115°58′43.956″;

Thence southerly approximately 5.23 miles to a point at latitude 36°36′07.317″, longitude 115°58′41.227″;

Thence southwesterly along a perimeter distance approximately 5.82 miles to a point at latitude 36°34′39.754″, longitude 116°04′11.167″;

Thence northerly approximately 3.20 miles to a point at latitude 36°37′26.804″, longitude 116°04′11.355″;

Thence northwesterly approximately 5.16 miles to a point at latitude 36°40′28.854″, longitude 116°08′17.749″;

Thence westerly approximately 8.63 miles to a point at latitude 36°40′23.246″, longitude 116°17′37.466″;

Thence southerly approximately 0.19 mile to a point at latitude 36°40′13.330″, longitude 116°17′37.461″;

Thence westerly approximately 8.49 miles to a point at latitude 36°40′13.666″, longitude 116°26′47.915″;

Thence northerly approximately 32.87 miles to a point at latitude 37°08′50″, longitude 116°26′44.125″;

Thence northwesterly approximately 15.37 miles to a point at latitude 37°20′45″, longitude 116°34′20″, the point of beginning herein.

[41 FR 56788, Dec. 30, 1978, as amended at 44 FR 37939, June 29, 1979]

## PART 862—RESTRICTIONS ON AIRCRAFT LANDING AND AIR DELIVERY AT DEPARTMENT OF ENERGY NUCLEAR SITES

Sec.
862.1 Purpose.
862.2 Scope.
862.3 Definitions.
862.4 Prohibitions and penalties.
862.5 Procedures for removal of downed aircraft.
862.6 Voluntary minimum altitude.
862.7 Designation of sites.

AUTHORITY: 42 U.S.C. 2201(b), 2201(i) and 2278(a).

SOURCE: 52 FR 29838, Aug. 12, 1987, unless otherwise noted.

### § 862.1 Purpose.

The purpose of this part is to set forth Department of Energy, hereinafter ''DOE'', security policy regarding aircraft and air delivery on nuclear sites under the jurisdiction of DOE pursuant to the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*).

### § 862.2 Scope.

(a) This part applies to all persons or aircraft entering or otherwise within or above areas within the boundaries of lands or waters subject to the jursidiction, administration, or in the custody of the DOE at sites designated by DOE.

(b) This part is not applicable to:

(1) Aircraft operating pursuant to official business of the Federal Government;

(2) Aircraft over-flying or in the process of landing pursuant to official business of a state or local law enforcement authority with prior notification to DOE; or

(3) Aircraft in the process of landing on a DOE site due to circumstances beyond the control of the operator and with prior notification to DOE, if possible.

(c) Aircraft in paragraphs (b)(2) and (b)(3) of this section are within the scope of this part upon landing at a DOE designated site.

### § 862.3 Definitions.

(a) *Air delivery*. Delivering or retrieving a person or object by airborne means, including but not limited to, aircraft.

(b) *Aircraft*. A manned a unmanned device or any portion thereof, that is commonly used or intended to be used for flight in the air, including powerless flight. Such devices include but are not limited to any parachute, hovercraft, helicopter, glider, airplane or lighter than air vehicle.

(c) *Boundary*. A delineation on a map of Federal interest in land or water utilized by DOE pursuant to the Atomic Energy Act of 1954, as amended:

(1) Authorized by Congress, or

(2) Published pursuant to law in the FEDERAL REGISTER, or

(3) Filed or recorded with a State or political subdivision in accordance with applicable law.

(d) *Designated site*. An area of land or water identified in accordance with § 862.7 of this part.

(e) *Downed aircraft*. An aircraft that is on a designated site due to emergency landing or for any other reason.

(f) *Manager of Operations*. The manager of a DOE field office, the Manager of the Pittsburgh Naval Reactors Office, the Manager of the Schnectady Naval Reactors Office and, for designated sites administered directly by DOE Headquarters, the Chief Health, Safety and Security Officer.

[52 FR 29838, Aug. 12, 1987, as amended at 71 FR 68734, Nov. 28, 2006]

### § 862.4 Prohibitions and penalties.

(a) The following activities are prohibited by his part:

(1) Operation or use of aircraft on lands or waters of designated sites.

(2) Air delivery to or from designated sites.

(3) Removal or movement of downed aircraft, or participation in the removal or movement of downed aircraft, from or on a designated site unless prior authorization is obtained pursuant to § 862.5 of this part.

(4) Failure to remove a downed aircraft from a designated site in accordance with an order issued by the cognizant DOE Manager of Operations under § 862.5 of this part.

(5) Violation of Federal Aviation Administration regulations regarding minimum altitudes and prohibited flight maneuvers over a designated site.

(b) A person willfully engaging in activities prohibited by this part may be subject to the imposition of criminal penalties set forth in sections 223 and 229 of the Atomic Energy Act, as amended (42 U.S.C. 2273 and 2278(a)).

### § 862.5 Procedures for removal of downed aircraft.

(a) An aircraft on or brought on to a designated site, except as provided in § 862.2 (b)(1), shall not be moved within or removed from such areas except as provided for in this section. All such aircraft are subject to full inspection by DOE security personnel upon landing upon order of the Manager of Operations or his designee. Any attempt to depart or remove the aircraft from a designated site without clearance obtained pursuant to this section, may be assumed to be indicative of hostile intent by security forces at such sites.

(b)(1) The cognizant DOE Manager of Operations for a designated site may, on his own initiative, issue a written order to the owner or operator of a downed aircraft to require the removal of that aircraft from the site within 20 days of this notice. Such an order shall specify:

(i) The date upon which removal operations must be completed;

(ii) The times and means of access to and from the downed aircraft to be removed;

(iii) The manner of removal; and

(iv) An estimate of the cost of removal to DOE for which the owner or operator will be held liable if removal is accomplished by DOE.

(2) The owner or operator of the downed aircraft may file a written petition, supported by affidavits, to the cognizant Manager of Operations requesting that the order be modified or set aside. The petition may be granted by the Manager of Operations for good cause shown, upon a finding that it is clearly consistent with the national security, public safety, and federal property interests. Such petition must be filed at least 10 days prior to the date upon which removal is to be initiated, as specified in the order. The written decision of the Manager of Operations shall be a final agency action.

(c)(1) The owner of a downed aircraft may petition the cognizant Manager of Operations of permission to move or remove the downed aircraft from or within a designated site. The petition must provide assurances that the owner will fully compensate DOE for all costs incurred or damages experienced as a result of landing or removal through a contact for services. The Manager of Operations may, for good cause shown, waive part or all of the compensation which might otherwise be due DOE.

(2) The Manager of Operations may deny such petition in whole or part and prohibit removal of a downed aircraft upon finding that:

(i) The removal of a downed aircraft would create an unacceptable safety or security risk;

(ii) The removal of a downed aircraft would result in excessive resource loss of property damage or an unacceptable disruption of federal activities;

(iii) The removal of downed aircraft is impracticable or impossible;

(iv) The owner has failed to provide adequate assurances that all costs incurred or damages experienced by DOE due to landing or removal of aircraft will be fully paid immediately upon removal by the owner under a contract for services;

(v) An inspection of the aircraft has not been conducted by DOE security personnel.

(3) In the event that such petition is granted in whole or part, the cognizant Manager of Operations may issue an order, as set forth in (b)(1) (i) through (iv) of this section. In the event that a petition is denied in whole or part, the Manager of Operations shall issue a written decision which shall set forth the reasons for such denial.

(d) Failure to comply with an order issued by the Manager of Operations pursuant to this section is basis for DOE to consider the downed aircraft to be abandoned property. DOE may take whatever measures it deems necessary when it determines that downed aircraft is abandoned property.

(e) Notwithstanding paragraphs (b) and (c) of this section, the Manager of Operations may move or remove a downed aircraft from such an area upon oral or written notification to the owner or operator of such aircraft upon a finding that national security or operational requirements necessitate expedited movement or removal. The owner or operator may be held jointly and separately liable for all expenses incurred by DOE in the movement or removal of such aircraft. Such expenses shall be deemed to be incurred through an implied contract at law for services.

### § 862.6 Voluntary minimum altitude.

In addition to complying with all applicable FAA prohibitions or restrictions, aircraft are requested to maintain a minimum altitude of 2,000 feet above the terrain of a designated site. Applicable FAA prohibitions or restrictions take precedence over this voluntary minimum altitude.

### § 862.7 Designation of sites.

(a) DOE shall designate sites covered by this part as deemed necessary, consistent with the national security and public safety, through notice in the FEDERAL REGISTER.

(b) This part shall be effective as to any facility, installation, or real property on publication in the FEDERAL REGISTER of the notice designating the site.

(c) Upon designation of a site, the cognizant Manager of Operations may inform the public of such designation through press release or posting of notice at airfields in the vicinity of the designated site.

# PART 871—AIR TRANSPORTATION OF PLUTONIUM

Sec.
871.1 National security exemption.
871.2 Public health and safety exemption.
871.3 Records.
871.4 Limitation on redelegation of authority.

AUTHORITY: Pub. L. 94–187, 88 Stat. 1077, 1078 (42 U.S.C. 2391 *et seq.*); Energy Reorganization Act, Pub. L. 93–438, 88 Stat. 1233 (42 U.S.C. 5801 *et seq.*); secs. 2, 3, 91, 123, and 161 of the Atomic Energy Act of 1954, as amended.

SOURCE: 42 FR 48332, Sept. 23, 1977, unless otherwise noted.

## § 871.1 National security exemption.

(a) The following DOE air shipments of plutonium are considered as being made for the purposes of national security within the meaning of section 502(2) of Public Law 94–187:

(1) Shipments made in support of the development, production, testing, sampling, maintenance, repair, modification, or retirement of atomic weapons or devices;

(2) Shipments made pursuant to international agreements for cooperation for mutual defense purposes; and

(3) Shipments necessary to respond to an emergency situation involving a possible threat to the national security.

(b) The Deputy Administrator for Defense Programs may authorize air shipments falling within paragraph (a)(1) of this section, on a case-by-case basis: *Provided*, That the Deputy Administrator for Defense Programs determines that such shipment is required to be made by aircraft either because:

(1) The delay resulting from using ground transportation methods would have serious adverse impact upon a national security requirement;

(2) Safeguards or safety considerations dictate the use of air transportation;

(3) The nature of the item to be shipped necessitates the use of air transportation in order to avoid possible damage which may be expected from other available transportation environments; or

(4) The nature of the item being shipped necessitates rapid shipment by air in order to preserve the chemical, physical, or isotopic properties of the item.

The Deputy Administrator for Defense Programs may also authorize air shipments falling within paragraph (a)(2) of this section in all cases since the inherent time delays of surface transportation for such shipments are considered unacceptable. The Deputy Administrator for Defense Programs may also authorize air shipments falling within paragraph (a)(3) of this section in cases where failure to make shipments by air could jeopardize the national security of the United States.

[42 FR 48332, Sept. 23, 1977, as amended at 71 FR 68734, Nov. 28, 2006]

## § 871.2 Public health and safety exemption.

The Deputy Administrator for Defense Programs may authorize, on a case-by-case basis, DOE air shipments of plutonium where the Deputy Administrator determines that rapid shipment by air is required to respond to an emergency situation involving possible loss of life, serious personal injuries, considerable property damage, or other significant threat to the public health and safety.

[42 FR 48332, Sept. 23, 1977, as amended at 71 FR 68734, Nov. 28, 2006]

## § 871.3 Records.

Determinations made by the Deputy Administrator for Defense Programs pursuant to these rules shall be matters of record. Such authorizations shall be reported to the Administrator of the National Nuclear Security Administration within twenty-four hours after authorization is granted.

[42 FR 48332, Sept. 23, 1977, as amended at 71 FR 68734, Nov. 28, 2006]

## § 871.4 Limitation on redelegation of authority.

The authority delegated in this part may not be redelegated without the prior approval of the Administrator of the National Nuclear Security Administration.

[42 FR 48332, Sept. 23, 1977, as amended at 71 FR 68734, Nov. 28, 2006]

# PART 900—COORDINATION OF FEDERAL AUTHORIZATIONS FOR ELECTRIC TRANSMISSION FACILITIES

Sec.
900.1 Purpose.
900.2 Applicability.
900.3 Definitions.
900.4 Integrated Interagency Pre-application (IIP) process.
900.5 Selection of NEPA lead agency.
900.6 IIP Process administrative file.

AUTHORITY: 16 U.S.C. 824p(h).

SOURCE: 81 FR 66507, Sept. 28, 2016, unless otherwise noted.

## § 900.1 Purpose.

This part provides a process for the timely coordination of information needed for Federal authorizations for proposed electric transmission facilities pursuant to section 216(h) of the Federal Power Act (FPA) (16 U.S.C. 824p(h)). This part seeks to ensure electric transmission projects are consistent with the nation's environmental laws, including laws that protect endangered and threatened species, critical habitats and historic properties. This part provides a framework called the Integrated Interagency Pre-Application (IIP) Process by which the U.S. Department of Energy (DOE) cooperates with applicable Federal and Non-Federal entities for the purpose of early coordination and information sharing for permitting and environmental reviews required under Federal law to site qualified electric transmission facilities prior to submission of required Federal request(s). The IIP Process provides for timely and focused pre-application meetings with key Federal and Non-Federal entities, as well as for early identification of potential siting constraints or opportunities, and seeks to promote thorough and consistent stakeholder outreach or engagement by a project proponent during its transmission line planning efforts. The IIP Process occurs before any application or request for authorization is submitted to Federal entities. This part improves the siting process by facilitating the early submission, compilation, and documentation of information needed for subsequent coordinated environmental review of a qualifying project or approved other project by Federal entities under the National Environmental Policy Act (NEPA) following the submission of an application or request for authorization. This part also provides an opportunity for Non-Federal entities to coordinate their non-Federal permitting and environmental reviews with the reviews of the Federal entities.

## § 900.2 Applicability.

(a) The regulations under this part apply to qualifying projects. At the discretion of the Assistant Secretary (OE–1) the provisions of part 900 may also apply to Other Projects.

(b) *Other Projects.* (1) Persons seeking DOE assistance in the Federal authorization process for Other Projects must file a request for coordination with the OE–1. The request must contain:

(i) The legal name of the requester; its principal place of business; whether the requester is an individual, partnership, corporation, or other entity; citations to the state laws under which the requester is organized or authorized; and the name, title, and mailing address of the person or persons to whom communications concerning the request for coordination are to be addressed;

(ii) A concise general description of the proposed other project sufficient to explain its scope and purpose;

(iii) A list of all potential Federal entities involved in the proposed Other Project; and

(iv) A list of anticipated Non-Federal entities involved in the proposed Other Project, including any agency serial or docket numbers for pending applications.

(2) Within thirty (30) calendar days of receiving this request, the OE–1, in consultation with the affected Federal entities with jurisdiction, will determine if the other project should be treated as a qualifying project under this part and will notify the project proponent of one of the following:

(i) If accepted for processing under this rule, the project will be treated as a qualifying project and the project proponent must submit an initiation request as set forth under § 900.5; or

(ii) If not accepted for processing under this rule, the project proponent must follow the standard procedures of Federal entities that will have jurisdiction over the project.

(c) This part does not apply to Federal authorizations for electric transmission facilities wholly located within the Electric Reliability Council of Texas interconnection.

(d) This part does not apply to electric transmission facilities in a DOE-designated National Interest Electric Transmission Corridor where a project proponent seeks a construction or modification permit from the Federal Energy Regulatory Commission (FERC) under section 216(b) of the Federal Power Act (16 U.S.C. 824p(b)).

(e) This part does not affect any requirements of Federal law. Participation or non-participation in the IIP Process does not waive any requirements to obtain necessary Federal authorizations for electric transmission facilities. This part shall not alter or diminish any responsibilities of the Federal entities to consult under applicable law.

(f) This part complements, and does not supplant, the Federal entities' pre-application procedures for a Federal authorization. Participation in the IIP Process does not guarantee issuance of any required Federal authorization for a proposed qualifying project or selection of the project proponent's proposed study corridors and proposed routes as a range of reasonable alternatives or the preferred alternative for NEPA purposes.

(g) DOE, in exercising its responsibilities under this part, will communicate regularly with the FERC, electric reliability organizations and electric transmission organizations approved by FERC, other Federal entities, and project proponents. DOE will use information technologies to provide opportunities for Federal entities to participate remotely.

(h) DOE, in exercising its responsibilities under this part, will to the maximum extent practicable and consistent with Federal law, coordinate the IIP Process with any Non-Federal entities. DOE will use information technologies to provide opportunities for Non-Federal entities to participate remotely.

**§ 900.3 Definitions.**

As used in this part:

*Affected landowner* means an owner of real property interests who is usually referenced in the most recent county or city tax records, and whose real property:

(1) Is located within either 0.25 miles of a proposed study corridor or route of a qualifying project or at a minimum distance specified by state law, whichever is greater; or

(2) Contains a residence within 3000 feet of a proposed construction work area for a qualifying project.

*DOE* means the United States Department of Energy.

*Early identification of project issues* refers to an early and open stakeholder participation process carried out by a project proponent as a part of its project development activities to identify potential environmental issues Federal and Non-Federal entities' may consider for further study, issues of concern to the affected public and stakeholders, and potential project alternatives.

*Federal authorization* means any authorization required under Federal law to site an electric transmission facility, including permits, rights-of-way, special use authorizations, certifications, opinions, or other approvals. This term includes those authorizations that may involve determinations under Federal law by either Federal or Non-Federal entities.

*Federal entity* means any Federal agency with jurisdictional interests that may have an effect on a proposed qualifying project, that is responsible for issuing a Federal authorization for the proposed qualifying project or attendant facilities, has relevant expertise with respect to environmental and other issues pertinent to or that are potentially affected by the proposed qualifying project or its attendant facilities, or provides funding for the proposed qualifying project or its attendant facilities. Federal entities include those with either permitting or non-permitting authority; for example, those entities with which consultation or review must be completed before a

project may commence, such as the Department of Defense for an examination of military test, training or operational impacts.

*FPA* means the Federal Power Act (16 U.S.C. 791 through 828c).

*IIP process administrative file* means the information assembled and maintained by DOE as the Lead section 216(h) Agency. The IIP Process Administrative File will include the IIP Initiation Request, which includes a Summary of Qualifying Project, Affected Environmental Resources and Impacts Summary, associated Maps, Geospatial Information and Data (provided in electronic format), and a Summary of Early Identification of Project Issues. The IIP Process Administrative File will also include IIP Meeting Summaries, an IIP Resources Report, and other documents, including but not limited to maps, publicly-available data, and other supporting documentation submitted by the project proponent as part of the IIP Process that inform the Federal entities.

*IIP resources report* means the resource summary information provided by the project proponent as a part of the IIP Process that meets the content requirements pursuant to § 900.4 of this part. The IIP Resource Report contains the environmental information used by a project proponent to plan a qualifying project.

*Indian tribe* has the same meaning as provided for in 25 U.S.C. 450b(e).

*Lead 216(h) agency* means the Department of Energy, which section 216(h) of the FPA (16 U.S.C. 824p(h)) makes responsible for timely coordination of Federal authorization requests for proposed electric transmission facilities.

*MOU principals* means the heads of each of the MOU signatory agencies.

*MOU signatory agency* means a signatory of the Interagency MOU executed on October 23, 2009, entitled, ''Memorandum of Understanding among the United States (U.S.) Department of Agriculture (USDA), the Department of Commerce, Department of Defense (DoD), Department of Energy (DOE), Environmental Protection Agency (EPA), the Council on Environmental Quality (CEQ), the Federal Energy Regulatory Commission (FERC), the Advisory Council on Historic Preservation (ACHP), and Department of the Interior (DOI), regarding Coordination in Federal Agency Review of Electric Transmission Facilities on Federal Lands.''

*NEPA* means the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*)

*NEPA lead agency* means the Federal agency or agencies preparing or having primary responsibility for preparing an environmental impact statement or environmental assessment as defined in 40 CFR 1508.16 and in accordance with 40 CFR 1501.5(c).

*Non-federal entity* means an Indian Tribe, multistate governmental entity, or state and local government agency with relevant expertise and/or jurisdiction within the project area, that is responsible for conducting permitting and environmental reviews of the proposed qualifying project or its attendant facilities, that has special expertise with respect to environmental and other issues pertinent to or that are potentially affected by the proposed qualifying project or its attendant facilities, or provides funding for the proposed qualifying project or its attendant facilities. Non-Federal entities may include those with either permitting or non-permitting authority, *e.g.*, entities such as State Historic Preservation Offices, with whom consultation must be completed in accordance with section 106 of the National Historic Preservation Act, 54 U.S.C. 306108, before a project can commence.

*OE–1* means the Assistant Secretary for DOE's Office of Electricity Delivery and Energy Reliability.

*Other projects* mean electric transmission facilities that are not qualifying projects. Other Projects may include facilities for the transmission of electric energy in interstate commerce for the sale of electric energy at wholesale that do not meet the 230 kV or above qualification, or are not otherwise identified as regionally or nationally significant with attendant facilities, in which all or part of a proposed transmission line—

(1) Crosses jurisdictions administered by more than one Federal entity; or

(2) Crosses jurisdictions administered by a Federal entity and is considered

for Federal financial assistance from a Federal entity.

*Project area* means the geographic area considered when the project proponent develops study corridors and then potential routes for environmental review and potential project siting as a part of the project proponent's planning process for a qualifying project. It is an area located between the two end points of the project (*e.g.*, substations), including their immediate surroundings within at least one-mile of that area, as well as any proposed intermediate substations. The size of the project area should be sufficient to allow for the evaluation of various potential alternative routes with differing environmental, engineering, and regulatory constraints. The project area does not necessarily coincide with ''permit area,'' ''area of potential effect,'' ''action area,'' or other defined terms of art that are specific to types of regulatory review.

*Project proponent* means a person or entity who initiates the IIP Process in anticipation of seeking Federal authorizations for a qualifying project or Other Project.

*Qualifying project* means a non-marine high voltage electric transmission line (230 kV or above) and its attendant facilities, or other regionally or nationally significant non-marine electric transmission line and its attendant facilities, in which:

(1) All or part of the proposed electric transmission line is used for the transmission of electric energy in interstate commerce for sale at wholesale, and

(2) All or part of the proposed electric transmission line crosses jurisdictions administered by more than one Federal entity or crosses jurisdictions administered by a Federal entity and is considered for Federal financial assistance from a Federal entity. qualifying projects do not include those for which a project proponent seeks a construction or modification permit from the FERC for electric transmission facilities in a DOE-designated National Interest Electric Transmission Corridor under section 216(b) of the FPA (16 U.S.C. 824p(b)).

*Regional mitigation approach* means an approach that applies the mitigation hierarchy (first seeking to avoid, then minimize impacts, then, when necessary, compensate for residual impacts) when developing mitigation measures for impacts to resources from qualifying projects at scales relevant to the resource, however narrow or broad, necessary to sustain, or otherwise achieve established goals for those resources. The approach identifies the needs and baseline conditions of targeted resources, potential impacts from the qualifying projects, cumulative impacts of past and likely projected disturbance to those resources, and future disturbance trends. The approach then uses such information to identify priorities for avoidance, minimization, and compensatory mitigation measures across that relevant area to provide the maximum benefit to the impacted resources.

*Regional mitigation strategies or plans* mean documents developed through or external to the NEPA process that apply a Regional Mitigation Approach to identify appropriate mitigation measures in advance of potential impacts to resources from qualifying projects.

*Route* means a linear area within which a qualifying project could be sited. It should be wide enough to allow minor adjustments in the alignment of the qualifying project so as to avoid sensitive features or to accommodate potential engineering constraints but narrow enough to allow detailed study.

*Stakeholder* means any Non-Federal entity, any non-governmental organization, Affected Landowner, or other person potentially affected by a proposed qualifying project.

*Study corridor* means a contiguous area (but not to exceed one-mile) in width within the project area where alternative routes may be considered for further study.

### § 900.4 Integrated Interagency Pre-application (IIP) process.

(a) The IIP Process is intended for a project proponent who has identified potential study corridors and/or potential routes within an established project area and the proposed locations of any intermediate substations for a qualifying project. The IIP Process is also intended to accommodate qualifying projects that have been selected

in a regional electric transmission plan for purposes of cost allocation or a similar process where an electric transmission plan has been identified and the permitting and siting phase must commence. While the IIP Process is optional, the early coordination provided by DOE between Federal entities, Non-Federal entities, and the project proponent ensures that the project proponent fully understands application and permitting requirements, including data potentially necessary to satisfy application requirements for all permitting entities. The two-meeting structure of the IIP process also allows for early interaction between the project proponents, Federal entities, and Non-Federal entities in order to enhance early understanding by those having an authorization or consultation related to the qualifying project. The IIP process is expected to provide Federal entities and Non-Federal entities with a clear description of a qualifying project, the project proponent's siting process, and the environmental and community setting being considered by the project proponent for siting the transmission line, as well as facilitate the Early Identification of Project Issues.

(b) A project proponent electing to utilize the IIP Process must submit an initiation request to DOE to start the IIP Process. The timing of the submission of the initiation request for IIP Process is determined by the project proponent. The initiation request must include, based on best available information, a Summary of qualifying project, Affected Environmental Resources and Impacts Summary, associated Maps, Geospatial Information, and Studies (provided in electronic format), and a Summary of Early Identification of Project Issues. The initiation request must adhere to the page limits established by this part.

(c) Summary of the qualifying project is limited to a maximum length of ten (10) pages, single-spaced and must include:

(1) A statement that the project proponent requests to use the IIP Process;

(2) Primary contact information for the project proponent, including a primary email address;

(3) The legal information for the project proponent: Legal name; principal place of business; whether the requester is an individual, partnership, corporation, or other entity; the state laws under which the requester is organized or authorized; and if the project proponent resides or has its principal office outside the United States, documentation related to designation by irrevocable power of attorney of an agent residing within the United States;

(4) A description of the project proponent's financial and technical capability to construct, operate, maintain, and decommission the qualifying project;

(5) A statement of the project proponent's interests and objectives;

(6) To the extent available, regional electric transmission planning documents, including status of regional reliability studies, regional congestion or other related studies where applicable, and interconnection requests;

(7) A brief description of the evaluation criteria and methods used by the project proponent to identify and develop the potential study corridors or potential Routes for the proposed qualifying project;

(8) A brief description of the proposed qualifying project, including endpoints, voltage, ownership, justification for the line, intermediate substations if applicable, and, to the extent known, any information about constraints or flexibility with respect to the qualifying project;

(9) Project proponent's proposed schedule, including timeframe for filing necessary Federal and state applications, construction start date, and planned in-service date if the qualifying project receives needed Federal authorizations and approvals by Non-Federal entities; and

(10) A list of potentially affected Federal and Non-Federal entities.

(d) *Affected Environmental Resources and Impacts Summary*. The Affected Environmental Resources and Impacts Summary is limited to a maximum length of twenty (20), single-spaced pages, not including associated maps, and must include concise descriptions, based on existing, relevant, and reasonably-available information, of the

known existing environment, and major site conditions in project area, including:

(1) An overview of topographical and resource features that are relevant to the siting of electric transmission lines present;

(2) Summary of known land uses, including Federal lands, Tribal lands, and state public lands of various types (*e.g.*, parks and monuments), associated land ownership, where appropriate, and any land use restrictions;

(3) Summary of known or potential adverse effects to cultural and historic resources;

(4) Summary of known or potential conflicts with or adverse impacts on military activities;

(5) Summary of known or potential impacts on the U.S. aviation system, including FAA restricted airspace;

(6) Summary of known or potential impacts on the U.S. marine transportation system, including impacts on waterways under jurisdiction of the U.S. Coast Guard;

(7) Summary of known information about Federal- and state-protected avian, aquatic, and terrestrial species, and critical habitat or otherwise protected habitat, that may be present, as well as other biological resources information that is necessary for an environmental review;

(8) Summary of the aquatic habitats (to include estuarine environments, and water bodies, including wetlands, as well as any known river crossings and potential constraints caused by impacts to navigable waters of the United States considered for the qualifying project);

(9) Summary of known information about the presence of low-income communities and minority populations that could be affected by the qualifying project;

(10) Identification of existing or proposed qualifying project facilities or operations in the project area;

(11) Summary of the proposed use of previously-disturbed lands, existing, agency-designated corridors, including but not limited to corridors designated under section 503 of the Federal Land Policy and Management Act and section 368 of the Energy Policy Act of 2005, transportation rights-of-way, and the feasibility for co-location of the qualifying project with existing facilities or location in existing corridors and transportation rights-of-way; and

(12) Summary of potential avoidance, minimization, and conservation measures, such as compensatory mitigation (onsite and offsite), developed through the use of Regional Mitigation Approach or, where available, Regional Mitigation Strategies or Plans, and considered by the project proponent to reduce the potential impacts of the proposed qualifying project to resources warranting or requiring mitigation.

(e) *Maps, Geospatial Information, and Studies.* Maps, Geopspatial Information and Studies in support of the information provided in the summary descriptions for the known existing environmental, cultural, and historic resources in the project area under paragraph (d) in this section must be included, and do not contribute to the overall page length of the IIP initiation request. Project proponents must provide maps as electronic data files that may be readily accessed by Federal entities and Non-Federal entities, including:

(1) A map of the project area showing the locations of potential study corridors or potential routes;

(2) Detailed maps that accurately show information supporting summaries of the known existing environmental resources within the potential study corridors or potential routes;

(3) Electronic access to existing data or studies relevant to the summary information provided as part of paragraphs (a) through (d) of this section; and

(4) Citations identifying sources, data, and analyses used to develop the IIP Process initiation request materials.

(f) *Summary of Early Identification of Project Issues.* The Summary of Early Identification of Project Issues must not exceed ten (10), single-spaced pages in length and is intended to provide a summary of stakeholder outreach or interactions conducted for the qualifying project prior to submission of the initiation request and to inform the development of issues and project alternatives for study in an environmental

review document. The Summary of Early Identification of Project Issues must also:

(1) Discuss the specific tools and actions used by the project proponent to facilitate stakeholder communications and public information, including an existing, current project proponent Web site for the proposed qualifying project, where available, and a readily-accessible, easily-identifiable, single point of contact for the project proponent;

(2) Identify how and when meetings on the location of potential study corridors or potential routes have been and would be publicized prior to the submission of applications for Federal authorization, as well as where and when those meetings were held and how many more meetings may be planned during the IIP Process;

(3) Identify known stakeholders and how stakeholders are identified;

(4) Briefly explain how the project proponent responds to requests for information from stakeholders, as well as records stakeholder requests, information received, and project proponent responses to stakeholders;

(5) Provide the type of location (for example, libraries, community reading rooms, or city halls) in each county potentially affected by the proposed qualifying project, where the project proponent has provided publicly-available copies of documents and materials related to the proposed qualifying project;

(6) Describe the evaluation criteria being used by the project proponent to identify and develop the potential study corridors or potential routes and that are presented by the project proponent to stakeholders during its project planning outreach efforts prior to submission of applications for Federal authorizations or non-Federal permits or authorizations;

(7) Provide information collected as a result of the project proponent's stakeholder outreach efforts; and

(8) Include a summary of issues identified, differing project alternative Corridors or routes, and revisions to routes developed as a result of issues identified by stakeholders during the project proponent's stakeholder outreach efforts for the qualifying project.

(g) Within fifteen (15) calendar days of receiving the initiation request, DOE shall notify by email all Federal entities and Non-Federal entities with an authorization potentially necessary to site the qualifying project that:

(1) Based on its initial review of information submitted by the project proponent in response to requirements in paragraphs (a) through (f) of this section, DOE has identified the contacted Federal entities or Non-Federal entities as potentially having an authorization or consultation responsibility or other relevant expertise related to the qualifying project;

(2) Federal and Non-Federal entities notified by DOE should participate in the IIP Process for the qualifying project with DOE's rationale for that determination provided; and

(3) Federal and Non-Federal entities notified by DOE will provide DOE with a name and information for a point of contact, and any initial questions or concerns, including supporting rationale, about their level of participation in the IIP Process based on DOE's justification in writing to DOE within fifteen (15) calendar days of receiving DOE's notification.

(h) Within thirty (30) calendar days of receiving the initiation request, DOE shall notify the project proponent that:

(1) The initiation request meets the requirements in paragraphs (a) through (f) of this section, including whether the project constitutes a qualifying project; or

(2) The initiation request does not meet the requirements in paragraphs (a) through (f) in this section. DOE will provide the reasons for that finding and a description of how the project proponent may, if applicable, address any deficiencies through supplementation of the information contained in the initiation request so that DOE may re-consider its determination.

(i) DOE shall provide Federal and Non-Federal entities with access to an electronic copy of the initiation request and associated maps, geospatial data, and studies that meet the requirements in paragraphs (a) through (f) of this section, at the same time that DOE provides notice to the project proponent.

(j) *IIP Initial Meeting*. DOE, in consultation with the identified Federal entities, shall convene the IIP Initial Meeting with the project proponent and all Federal entities and Non-Federal entities notified by DOE as having an authorization or consultation related to the qualifying project as soon as practicable and no later than forty-five (45) calendar days after notifying the project proponent and Federal and Non-Federal entities that the initiation request meets the requirements in paragraphs (a) through (f) of this section. The Initial Meeting shall be convened in the area or region where the proposed qualifying project is located. Federal and Non-Federal entities shall have at least thirty (30) calendar days to review the information provided by the project proponent as part of the initiation request prior to the meeting. Federal entities identified by DOE as having a Federal authorization related to the qualifying project are expected to participate in the Initial Meeting. DOE also shall invite Non-Federal entities identified by DOE as having an authorization or consultation related to the qualifying project to participate in the Initial Meeting. During the Initial Meeting:

(1) DOE and the Federal entities shall discuss the IIP Process and any cost recovery requirements, where applicable, with the project proponent;

(2) The project proponent shall describe the proposed qualifying project and the contents of its initiation request; and

(3) The Federal entities shall, to the extent possible and based on agency expertise and experience, review the information provided by the project proponent, and publicly-available information, and preliminarily identify the following and other reasonable criteria for adding, deleting, or modifying preliminary Routes from further consideration within the identified study corridors, including:

(i) Potential environmental, visual, historic, cultural, economic, social, or health effects or harm based on the potential project or proposed siting, and anticipated constraints;

(ii) Potential cultural resources and historic properties of concern;

(iii) Areas under special protection by Federal statute, or other Federal entity or Non-Federal entity decision that could potentially increase the time needed for project evaluation and potentially foreclose approval of siting a transmission line route through such areas. Such areas may include, but are not limited to, properties or sites which may be of traditional or cultural importance to Indian Tribe(s), National Scenic and Historic Trails, National Landscape Conservation system units managed by the Bureau of Land Management (BLM), National Wildlife Refuges, units of the National Park System, national marine sanctuaries, or marine national monuments;

(iv) Opportunities to site routes through designated corridors, previously disturbed lands, and lands with existing infrastructure as a means of potentially reducing impacts and known conflicts as well as the time needed for affected Federal land managers to evaluate an application for a Federal authorization if the route is sited through such areas (*e.g.*, co-location with existing infrastructure or location on previously disturbed lands or in energy corridors designated by the DOI or USDA under Section 503 of the Federal Land Policy and Management Act or Section 368 of the Energy Policy Act of 2005, an existing right-of-way, or a utility corridor identified in a land management plan);

(A) Potential constraints caused by impacts on military test, training, and operational missions, including impacts on installations, ranges, and airspace;

(B) Potential constraints caused by impacts on the United States' aviation system;

(C) Potential constraints caused by impacts to navigable waters of the United States;

(D) Potential avoidance, minimization, and conservation measures, such as compensatory mitigation (onsite and offsite), developed through the use of a Regional Mitigation Approach or, where available, Regional Mitigation Strategies or Plans to reduce the potential impact of the proposed qualifying project to resources requiring mitigation; and

(E) Based on available information provided by the project proponent, biological (including threatened, endangered, or otherwise protected avian, aquatic, and terrestrial species and aquatic habitats), visual, cultural, historic, and other surveys and studies that may be required for preliminary proposed routes.

(v) Such information and feedback to the project proponent does not constitute a commitment by Federal entities to approve or deny any Federal authorization request. Moreover, no agency will determine that the project proponent's proposed preliminary routes presented or discussed during the IIP Process constitute a range of reasonable alternatives for NEPA purposes or that the environmental information provided during the IIP Process would satisfy the entirety of information needs for purposes of compliance with NEPA or other applicable laws and regulations. The IIP Process does not limit agency discretion regarding NEPA review. Participating Non-Federal entities are encouraged to identify risks and benefits of siting the proposed qualifying project within the preliminary proposed routes.

(vi) DOE shall record key issues, information gaps, and data needs identified by Federal and Non-Federal entities during the Initial Meeting, and shall convey a summary of the meeting discussions, key issues, and information gaps and requests to the project proponent, all Federal entities, and any Non-Federal entities that participate in the IIP Process in a draft Initial Meeting Summary within fifteen (15) calendar days after the meeting. Participating Federal entities and Non-Federal entities, and the project proponent will then have fifteen (15) calendar days following its receipt of the IIP Process Meeting Summary to review the IIP Process Meeting Summary and provide corrections to DOE for resolution in a final Initial Meeting Summary, as appropriate. Thirty (30) calendar days following the close of the 15-day review period, DOE will incorporate the final Initial Meeting Summary into the IIP Process Administrative File for the qualifying project, and, at the same time, provide all Federal and Non-Federal entities and the project proponent an electronic copy of a final IIP Initial Meeting Summary.

(k) *IIP Close-Out Meeting Request.* A project proponent electing to utilize the IIP Process pursuant to this section must submit a Close-Out Meeting Request to DOE to complete the IIP Process. The timing of the submission of the Close-Out Meeting Request for the IIP Process is determined by the project proponent but may only be submitted no less than forty-five (45) calendar days following the Initial Meeting. The Close-Out Meeting Request shall include:

(1) A statement that the project proponent is requesting the Close-Out Meeting for the IIP Process;

(2) A summary table of changes made to the qualifying project during the IIP Process, including potential environmental and community benefits from improved siting or design;

(3) Maps of updates to potential proposed routes within study corridors, including the line, substations and other infrastructure, which include at least as much detail as required for the Initial Meeting described above and as modified in response to early stakeholder input and outreach and agency feedback documented as a part of the IIP Initial Meeting Summary;

(4) An updated summary of all project-specific biological (including threatened, endangered or otherwise protected avian, aquatic, and terrestrial species, and aquatic habitats), visual, cultural, historic or other surveys sponsored by the project proponent;

(5) If known, a schedule for completing upcoming field resource surveys;

(6) An updated summary of all known or potential adverse impacts to natural resources;

(7) An updated summary of any known or potential adverse effects to cultural and historic resources;

(8) A conceptual plan for potential implementation and monitoring of mitigation measures, including avoidance, minimization, and conservation measures, such as compensatory mitigation (offsite and onsite), developed through the use of a Regional Mitigation Approach or, where available, Regional Mitigation Strategies or Plans to reduce the potential impact of the

proposed qualifying project to resources warranting or requiring mitigation;

(9) An estimated time of filing its requests for Federal authorizations for the proposed qualifying project; and

(10) An estimated time of filing its requests for all other authorizations and consultations with Non-Federal entities.

(l) *Close-Out Meeting*. The IIP Process Close-Out Meeting shall result in a description by Federal entities of the remaining issues of concern, identified information gaps or data needs, and potential issues or conflicts that could impact the time it will take affected Federal entities to process applications for Federal authorizations for the proposed qualifying project. The Non-Federal entities shall also be encouraged to provide a description of remaining issues of concern, information needs, and potential issues or conflicts. The IIP Process Close-Out Meeting will also result in the identification of a potential NEPA Lead Agency pursuant to § 900.6 described.

(1) Within fifteen (15) calendar days of receiving the Close-Out Meeting Request, DOE shall notify by email the appropriate POCs of all Federal entities and Non-Federal entities with a known or potential authorization necessary to site the qualifying project.

(2) Within thirty (30) calendar days of receiving a Close-Out Meeting Request, DOE shall determine whether the Close-Out Meeting Request meets the requirements in paragraph (k) of this section and inform the project proponent of its acceptance, and provide Federal entities and Non-Federal entities with Close-Out Meeting Request materials, including map, geospatial data, and surveys in electronic format, via electronic means.

(3) Within sixty (60) calendar days of making a determination that the Close-Out Meeting Request meets the requirements of this section, DOE shall convene the Close-Out Meeting in the same region or location as the Initial Meeting with the project proponent and all Federal entities. All Non-Federal entities participating in the IIP Process shall also be invited to attend. During the Close-Out Meeting:

(i) The project proponent's updates to the siting process to date shall be discussed, including stakeholder outreach activities, resultant stakeholder input, and project proponent response to stakeholder input;

(ii) Based on information provided by the project proponent to date, the Federal entities shall discuss key issues of concern and potential mitigation measures identified for the proposed qualifying project;

(iii) Led by DOE, all Federal entities shall discuss statutory and regulatory standards that must be met to make decisions for Federal authorizations required for the proposed qualifying project;

(iv) Led by DOE, all Federal entities shall describe the process and estimated time to complete for required Federal authorizations and, where possible, the anticipated cost (*e.g.*, processing and monitoring fees and land use fees);

(v) Led by DOE, all affected Federal entities shall describe their expectations for a complete application for a Federal authorization for the proposed qualifying project;

(vi) After the close out meeting, DOE shall prepare a Final IIP Resources Report for inclusion in the IIP Process Administrative File. The Final IIP Resources Report provides a description of the proposed qualifying project, including stakeholder outreach activities and feedback, summary information on environmental resources, and potential impacts (with electronic access to associated maps, geospatial data and/or survey data), potential issues, and identification of constraints by Federal entities and Non-Federal entities for the proposed qualifying project;

(vii) DOE shall recommend that participating Federal entities use the Final IIP Resources Report to inform the NEPA process for the proposed qualifying project. For example, Federal entities could use the Final IIP Resources Report during scoping for an EIS and identifying potential routes, to explain why certain alternatives were eliminated from further consideration, and to preliminarily identify impacts, potential avoidance, minimization, and conservation measures, such as compensatory mitigation (onsite

and offsite), developed through the use of a Regional Mitigation Approach or, where available, Regional Mitigation Strategies or Plans and considered by the project proponent to reduce the potential impacts of the proposed qualifying project to resources requiring mitigation; and

(viii) All participating Federal and Non-Federal entities shall identify a preliminary schedule for authorizations for the proposed qualifying project contingent upon timely filing of applications and related materials by the project proponent.

### § 900.5 Selection of the NEPA lead agency.

DOE, in consultation with the Federal entities, shall coordinate the selection of a potential NEPA Lead Agency responsible for preparing an environmental review document under NEPA for proposed qualifying projects. Determination and responsibilities of the NEPA Lead Agency for preparing the EIS shall be in compliance with applicable law, including the National Environmental Policy Act of 1969 and CEQ implementing regulations at 40 CFR part 1500, and each agency's respective NEPA implementing regulations and procedures. However:

(a) For proposed qualifying projects that cross lands administered by both DOI and USDA, DOI and USDA shall consult and jointly determine within thirty (30) calendar days of receiving the initiation request information from DOE which Department has a greater land management interest in the proposed qualifying project and which Department should therefore assume the role of NEPA Lead Agency.

(b) DOI and USDA shall notify DOE of their determination regarding the NEPA Lead Agency in writing within thirty (30) calendar days of making the determination.

(c) Unless DOE notifies DOI and USDA in writing of its objection to that determination within ten (10) calendar days of the DOI/USDA notification, the determination shall be deemed accepted and final. In deciding whether to object to the determination, DOE shall consider the CEQ regulations pertaining to selection of the Lead Agency, including 40 CFR 1501.5(c).

(d) For proposed qualifying projects that do not cross lands administered by both DOI and USDA, DOE and the Federal entities that will likely constitute the cooperating agencies for an environmental review document under NEPA, shall consult and jointly recommend a potential NEPA Lead Agency within 45 calendar days of receiving an IIP Process Close-Out Meeting Request. If DOE and the Federal entities are unable to agree on a recommendation for a NEPA Lead Agency, the Federal entities shall request CEQ to make a final determination by the Close-Out Meeting. No determination of a Federal entity as the potential NEPA Lead Agency under this part shall be made absent that Federal entity's consent.

### § 900.6 IIP Process administrative file.

(a) When communicating with the project proponent during the IIP Process, Federal entities are expected to include DOE in all communications related to the IIP Process for the project proponent's proposed qualifying project.

(b) DOE shall maintain all information, including documents and communications, it disseminates or receives from the project proponent, Federal entities, and Non-Federal entities during the IIP Process in an IIP Process Administrative File for future use in reviewing any applications for required Federal authorizations for the proposed qualifying project. DOE will process any requests for information from the public in accordance with Freedom of Information Act requirements. DOE will share the IIP Process Administrative File with the selected or potential NEPA Lead Agency.

(c) DOE shall document the list of issues identified during the IIP Process for a proposed qualifying project and any updates to information provided as part of the Close-Out Meeting discussion in a Final IIP Resources Report for the IIP Process Administrative File.

(d) Each Federal entity is strongly encouraged to maintain the documents and communications developed in the IIP Process subject to each Federal entity's administrative record policies

and, as appropriate and applicable, those documents and communications should become part of that Federal entity's administrative record for granting or denying a Federal authorization for each qualifying project.

# PART 903—POWER AND TRANSMISSION RATES

## Subpart A—Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions for the Alaska, Southeastern, Southwestern, and Western Area Power Administrations

Sec.
903.1 Purpose and scope; application.
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903.15 Public information forums.
903.16 Public comment forums.
903.17 Informal public meetings for minor rate adjustments.
903.18 Revision of proposed rates.
903.21 Completion of rate development; provisional rates.
903.22 Final rate approval.
903.23 Rate extensions.

AUTHORITY: Secs. 301(b), 302(a), and 644 of Department of Energy Organization Act, Pub. L. 95–91 (42 U.S.C. 7101 *et seq.*); sec. 5 of the Flood Control Act of 1944 (16 U.S.C. 825s); the Reclamation Act of 1902 (43 U.S.C. 372 *et seq.*), as amended and supplemented by subsequent enactments, particularly sec. 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)); and the Acts specifically applicable to individual projects or power systems.

SOURCE: 50 FR 37837, Sept. 18, 1985, unless otherwise noted.

## Subpart A—Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions for the Alaska, Southeastern, Southwestern, and Western Area Power Administrations

### § 903.1 Purpose and scope; application.

(a) Except as otherwise provided herein, these regulations establish procedures for the development of power and transmission rates by the Administrators of the Alaska, Southeastern, Southwestern, and Western Area Power Administrations; for the providing of opportunities for interested members of the public to participate in the development of such rates; for the confirmation, approval, and placement in effect on an interim basis by the Deputy Secretary of the Department of Energy of such rates; and for the submission of such rates to the Federal Energy Regulatory Commission with or without prior interim approval. These regulations supplement Delegation Order No. 0204–108 of the Secretary of Energy, which was published in the FEDERAL REGISTER and became effective on December 14, 1983 (48 FR 55664), with respect to the activities of the Deputy Secretary and the Administrators.

(b) These procedures shall apply to all power and transmission rate adjustment proceedings for the Power Marketing Administrations (PMAs) which are commenced after these regulations become effective or were in process on the effective date of these regulations, but for which the FERC had not issued any substantive orders on or before December 14, 1983. These procedures supersede ''Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions for the Alaska, Southeastern, Southwestern, and Western Area Power Administrations'' published in 45 FR 86983 (December 31, 1980) and amended at 46 FR 6864 (January 22, 1981) and 46 FR 25427 (May 7, 1981).

(c) Except to the extent deemed appropriate by the Administrator in accordance with applicable law, these procedures do not apply to rates for short term sales of capacity, energy, or transmission service.

[50 FR 37837, Sept. 18, 1985; 50 FR 48075, Nov. 21, 1985]

### § 903.2 Definitions.

As used herein—

(a) *Administrator* means the Administrator of the PMA whose rate is involved in the rate adjustment, or anyone acting in such capacity.

(b) *Department* means the Department of Energy, including the PMAs but excluding the Federal Energy Regulatory Commission.

(c) *Deputy Secretary* means the Deputy Secretary of the Department of Energy, or anyone acting in such capacity.

(d) *FERC* means the Federal Energy Regulatory Commission.

(e) *Major rate adjustment* means a rate adjustment other than a minor rate adjustment.

(f) *Minor rate adjustment* means a rate adjustment which (1) will produce less than 1 percent change in the annual revenues of the power system or (2) is for a power system which has either annual sales normally less than 100 million kilowatt hours or an installed capacity of less than 20,000 kilowatts.

(g) *Notice* means the statement which informs customers and the general public of Proposed Rates or proposed rate extensions, opportunities for consultation and comment, and public forums. The Notice shall be by and effective on the date of publication in the FEDERAL REGISTER. Whenever a time period is provided, the date of publication in the FEDERAL REGISTER shall determine the commencement of the time period, unless otherwise provided in the Notice. The Notice shall include the name, address, and telephone number of the person to contact if participation or further information is sought.

(h) *Power Marketing Administration* or *PMA* means the Alaska Power Administration, Southeastern Power Administration, Southwestern Power Administration, or Western Area Power Administration.

(i) *Power system* means a powerplant or a group of powerplants and related facilities, including transmission facilities, or a transmission system, that the PMA treats as one unit for the purposes of establishing rates and demonstrating repayment.

(j) *Proposed Rate* means a rate revision or a rate for a new service which is under consideration by the Department on which public comment is invited.

(k) *Provisional Rate* means a rate which has been confirmed, approved, and placed in effect on an interim basis by the Deputy Secretary.

(l) *Rate* means the monetary charge or the formula for computing such a charge for any electric service provided by the PMA, including but not limited to charges for capacity (or demand), energy, or transmission service; however, it does not include leasing fees, service facility charges, or other types of facility use charges. A rate may be set forth in a rate schedule or in a contract.

(m) *Rate adjustment* means a change in an existing rate or rates, or the establishment of a rate or rates for a new service. It does not include a change in rate schedule provisions or in contract terms, other than changes in the price per unit of service, nor does it include changes in the monetary charge pursuant to a formula stated in a rate schedule or a contract.

(n) *Rate schedule* means a document identified as a ''rate schedule,'' ''schedule of rates,'' or ''schedule rate'' which designates the rate or rates applicable to a class of service specified therein and may contain other terms and conditions relating to the service.

(o) *Short term sales* means sales that last for no longer than one year.

(p) *Substitute Rate* means a rate which has been developed in place of the rate that was disapproved by the FERC.

[50 FR 37837, Sept. 18, 1985; 50 FR 48075, Nov. 21, 1985]

### § 903.11 Advance announcement of rate adjustment.

The Administrator may announce that the development of rates for a new service or revised rates for an existing service is under consideration. The announcement shall contain pertinent information relevant to the rate adjustment. The announcement may be through direct contact with customers, at public meetings, by press release, by newspaper advertisement, and/or by FEDERAL REGISTER publication. Written comments relevant to rate policy and design and to the rate adjustment process may be submitted by interested parties in response to the announcement. Any comments received shall be considered in the development of Proposed Rates.

### § 903.13 Notice of proposed rates.

(a) The Administrator shall give Notice that Proposed Rates have been prepared and are under consideration. The Notice shall include:

(1) The Proposed Rates;

(2) An explanation of the need for and derivation of the Proposed Rates;

(3) The locations at which data, studies, reports, or other documents used in developing the Proposed Rates are available for inspection and/or copying;

(4) The dates, times, and locations of any initially scheduled public forums; and

(5) Address to which written comments relative to the Proposed Rates and requests to be informed of FERC actions concerning the rates may be submitted.

(b) Upon request, customers of the power system and other interested persons will be provided with copies of the principal documents used in developing the Proposed Rates.

### § 903.14 Consultation and comment period.

All interested persons will have the opportunity to consult with and obtain information from the PMA, to examine backup data, and to make suggestions for modification of the Proposed Rates for a period ending (a) 90 days in the case of major rate adjustments, or 30 days in the case of minor rate adjustments, after the Notice of Proposed Rates is published in the FEDERAL REGISTER, except that such periods may be shortened for good cause shown; (b) 15 days after any answer which may be provided pursuant to § 903.15(b) hereof; (c) 15 days after the close of the last public forum; or (d) such other time as the Administrator may designate; whichever is later. At anytime during this period, interested persons may submit written comments to the PMA regarding the Proposed Rates. The Administrator may also provide additional time for the submission of written rebuttal comments. All written comments shall be available at a designated location for inspection, and copies also will be furnished on request for which the Administrator may assess a fee. Prior to the action described in § 903.21, the Administrator may, by appropriate announcement postpone any procedural date or make other procedural changes for good cause shown at the request of any party or on the Administrator's own motion. The Administrator shall maintain, and distribute on request, a list of interested persons.

### § 903.15 Public information forums.

(a) One or more public information forums shall be held for major rate adjustments, except as otherwise provided in paragraph (c) of this section, and may be held for minor adjustments, to explain, and to answer questions concerning, the Proposed Rates and the basis of and justification for proposing such rates. The number, dates, and locations of such forums will be determined by the Administrator in accordance with the anticipated or demonstrated interest in the Proposed Rates. Notice shall be given in advance of such forums. A public information forum may be combined with a public comment forum held in accordance with § 903.16.

(b) The Administrator shall appoint a forum chairperson. Questions raised at the forum concerning the Proposed Rates and the studies shall be answered by PMA representatives at the forum, at a subsequent forum, or in writing at least 15 days before the end of the consultation and comment period. However, questions that involve voluminous data contained in the PMA records may be answered by providing an opportunity for consultation and for a review of the records at the PMA offices. As a minimum, the proceedings of the forum held at the principal location shall be transcribed. Copies of all documents introduced, and of questions and written answers shall be available at a designated location for inspection and copies will be furnished by the Administrator on request, for which a fee may be assessed. Copies of the transcript may be obtained from the transcribing service.

(c) No public information forum need be held for major rate adjustments if, after the Administrator has given Notice of a scheduled forum, no person indicates in writing by a prescribed date an intent to appear at such public forum.

### § 903.16 Public comment forums.

(a) One or more public comment forums shall be held for major rate adjustments, except as otherwise provided in paragraph (c) of this section,

and may be held for minor rate adjustments, to provide interested persons an opportunity for oral presentation of views, data, and arguments regarding the Proposed Rates. The number, dates, and locations of such forums will be determined by the Administrator in accordance with the anticipated or demonstrated interest in the Proposed Rates. Notice shall be given at least 30 days in advance of the first public comment forum at each location and shall include the purpose, date, time, place, and other information relative to the forum, as well as the locations where pertinent documents are available for examination and/or copying.

(b) The Administrator shall designate a forum chairperson. At the forum, PMA representatives may question those persons making oral statements and comments. The chairperson shall have discretion to establish the sequence of, and the time limits for, oral presentations and to determine if the comments are relevant and noncumulative. Forum proceedings shall be transcribed. Copies of all documents introduced shall be available at a designated location for inspection, and copies shall be furnished on request for which the Administrator may assess a fee. Copies of the transcript may be obtained from the transcribing service.

(c) No public comment forum need be held for major rate adjustments if, after the Administrator has given notice of a scheduled forum, no person indicates in writing by a prescribed date an intent to appear at such public forum.

### § 903.17 Informal public meetings for minor rate adjustments.

In lieu of public information or comment forums in conjunction with a minor rate adjustment, informal public meetings may be held if deemed appropriate by the Administrator. Such informal meetings will not require a Notice or a transcription.

### § 903.18 Revision of proposed rates.

During or after the consultation and comment period and review of the oral and written comments on the Proposed Rates, the Administrator may revise the Proposed Rates. If the Administrator determines that further public comment should be invited, the Administrator shall afford interested persons an appropriate period to submit further written comments to the PMA regarding the revised Proposed Rates. The Administrator may convene one or more additional public information and/or public comment forums. The Administrator shall give Notice of any such additional forums.

### § 903.21 Completion of rate development; provisional rates.

(a) Following completion of the consultation and comment period and review of any oral and written comments on the Proposed Rates, the Administrator may: (1) Withdraw the proposal; (2) develop rates which in the Administrator's and the Deputy Secretary's judgment should be confirmed, approved, and placed into effect on an interim basis (Provisional Rates); or (3) develop rates which in the Administrator's judgment should be confirmed, approved, and placed into effect by the FERC on a final basis without being placed into effect on an interim basis. A statement shall be prepared and made available to the public setting forth the principal factors on which the Deputy Secretary's or the Administrator's decision was based. The statement shall include an explanation responding to the major comments, criticisms, and alternatives offered during the comment period. The Administrator shall certify that the rates are consistent with applicable law and that they are the lowest possible rates to customers consistent with sound business principles. The rates shall be submitted promptly to the FERC for confirmation and approval on a final basis.

(b) The Deputy Secretary shall set the effective date for Provisional Rates. The effective date shall be at least 30 days after the Deputy Secretary's decision except that the effective date may be sooner when appropriate to meet a contract deadline, to avoid financial difficulties, to provide a rate for a new service, or to make a minor rate adjustment.

(c) The effective date may be adjusted by the Administrator to coincide with the beginning of the next billing period following the effective

date set by the Deputy Secretary for the Provisional Rates.

(d) Provisional Rates shall remain in effect on an interim basis until: (1) They are confirmed and approved on a final basis by the FERC; (2) they are disapproved and the rates last previously confirmed and approved on a final basis become effective; (3) they are disapproved and higher Substitute Rates are confirmed and approved on a final basis and placed in effect by the FERC; (4) they are disapproved and lower Substitute Rates are confirmed and approved on a final basis by the FERC; or (5) they are superseded by other Provisional Rates placed in effect by the Deputy Secretary, whichever occurs first.

**§ 903.22 Final rate approval.**

(a) Any rate submitted to the FERC for confirmation and approval on a final basis shall be accompanied with such supporting data, studies, and documents as the FERC may require, and also with the transcripts of forums, written answers to questions, written comments, the Administrator's certification, and the statement of principal factors leading to the decision. The FERC shall also be furnished a listing of those customers and other participants in the rate proceeding who have requested they be informed of FERC action concerning the rates.

(b) If the FERC confirms and approves Provisional Rates on a final basis, such confirmation and approval shall be effective as of the date such rates were placed in effect by the Deputy Secretary, as such date may have been adjusted by the Administrator. If the FERC confirms and approves on a final basis rates submitted by the Administrator without interim approval, such confirmation and approval shall be effective on a date set by the FERC.

(c) If the FERC disapproves Provisional Rates or other submitted rates, the Administrator shall develop Substitute Rates which take into consideration the reasons given by the FERC for its disapproval. If, in the Administrator's judgment, public comment should be invited upon proposed Substitute Rates, the Administrator may provide for a public consultation and comment period before submitting the Substitute Rates. Whether or not such public consultation and comment periods are provided, the Administrator will, upon request, provide customers of the power system and other interested persons with copies of the principal documents used in the development of the Substitute Rates. Within 120 days of the date of FERC disapproval of submitted rates, including Substitute Rates, or such additional time periods as the FERC may provide, the Administrator will submit the Substitute Rates to the FERC. A statement explaining the Administrator's decision shall accompany the submission.

(d) A Provisional Rate that is disapproved by the FERC shall remain in effect until higher or lower rates are confirmed and approved by the FERC on a final basis or are superseded by other rates placed into effect by the Deputy Secretary on an interim basis: Provided, That if the Administrator does not file a Substitute Rate within 120 days of the disapproval or such greater time as the FERC may provide, and if the rate has been disapproved because the FERC determined that it would result in total revenues in excess of those required by law, the rate last previously confirmed and approved on a final basis will become effective on a date and for a period determined by the FERC and revenues collected in excess of such rate during such period will be refunded in accordance with paragraph (g) of this section.

(e) If a Substitute Rate confirmed and approved on a final basis by the FERC is higher than the provisional rate which was disapproved, the Substitute Rate shall become effective on a subsequent date set by the FERC, unless a subsequent Provisional Rate even higher than the Substitute Rate has been put into effect. FERC confirmation and approval of the higher Substitute Rate shall constitute final confirmation and approval of the lower disapproved Provisional Rate during the interim period that it was in effect.

(f) If a Substitute Rate confirmed and approved by the FERC on a final basis is lower than the disapproved provisional rate, such lower rate shall be effective as of the date the higher disapproved rate was placed in effect.

(g) Any overpayment shall be refunded with interest unless the FERC determines that the administrative cost of a refund would exceed the amount to be refunded, in which case no refund will be required. The interest rate applicable to any refund will be determined by the FERC.

(h) A rate confirmed and approved by the FERC on a final basis shall remain in effect for such period or periods as the FERC may provide or until a different rate is confirmed, approved and placed in effect on an interim or final basis: *Provided,* That the Deputy Secretary may extend a rate on an interim basis beyond the period specified by the FERC.

### § 903.23 Rate extensions.

(a) The following regulations shall apply to the extension of rates which were previously confirmed and approved by the FERC or the Federal Power Commission, or established by the Secretary of the Interior, and for which no adjustment is comtemplated:

(1) The Administrator shall give Notice of the proposed extension at least 30 days before the expiration of the prior confirmation and approval, except that such period may be shortened for good cause shown.

(2) The Administrator may allow for consultation and comment, as provided in these procedures, for such period as the Administrator may provide. One or more public information and comment forums may be held, as provided in these procedures, at such times and locations and with such advance Notice as the Administrator may provide.

(3) Following notice of the proposed extension and the conclusion of any consultation and comment period, the Deputy Secretary may extend the rates on an interim basis.

(b) Provisional Rates and other existing rates may be extended on a temporary basis by the Deputy Secretary without advance notice or comment pending further action pursuant to these regulations or by the FERC. The Deputy Secretary shall publish notice in the FEDERAL REGISTER of such extension and shall promptly advise the FERC of the extension.

# PART 904—GENERAL REGULATIONS FOR THE CHARGES FOR THE SALE OF POWER FROM THE BOULDER CANYON PROJECT

## Subpart A—Power Marketing

Sec.
904.1 Purpose.
904.2 Scope.
904.3 Definitions.
904.4 Marketing responsibilities.
904.5 Revenue requirements.
904.6 Charge for capacity and firm energy.
904.7 Base charge.
904.8 Lower basin development fund contribution charge.
904.9 Excess capacity.
904.10 Excess energy.
904.11 Lay off of energy.
904.12 Payments to contractors.
904.13 Disputes.
904.14 Future regulations.

AUTHORITY: Reclamation Act of 1902 (32 Stat. 388); Boulder Canyon Project Act of 1928 (43 U.S.C. 617 *et seq.*); Boulder Canyon Project Adjustment Act of 1940 (43 U.S.C. 618 *et seq.*); Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*); Colorado River Storage Project Act of 1956 (43 U.S.C. 620 *et seq.*); Colorado River Basin Project Act of 1968 (43 U.S.C. 1501 *et seq.*); and Hoover Power Plant Act of 1984 (98 Stat. 1333 (43 U.S.C. 619 *et seq.*)).

SOURCE: 51 FR 43154, Nov. 28, 1986, unless otherwise noted.

## Subpart A—Power Marketing

### § 904.1 Purpose.

(a) The Secretary of Energy, acting by and through the Administrator of the Western Area Power Administration (Administrator), is authorized and directed to promulgate charges for the sale of power generated at the Boulder Canyon Project powerplant, and also to promulgate such general regulations as the Secretary finds necessary and appropriate in accordance with the power marketing authorities in the Reclamation Act of 1902 (32 Stat. 388) and all acts amendatory thereof and supplementary thereto, and the Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*).

(b) In accordance with the Boulder Canyon Project Act of 1928 (43 U.S.C. 617 *et seq.*), as amended and supplemented (Project Act); the Boulder Canyon Project Adjustment Act of 1940 (43

U.S.C. 618 *et seq.*), as amended and supplemented (Adjustment Act); the Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*); and the Hoover Power Plant Act of 1984 (98 Stat. 1333 (43 U.S.C. 619 *et seq.*)) (Hoover Power Plant Act); the Western Area Power Administration (Western) promulgates these General Regulations for the Charges for the Sale of Power From the Boulder Canyon Project (General Regulations) defining the methodology to be used in the computation of the charges for the sale of power from the Boulder Canyon Project.

**§ 904.2 Scope.**

These General Regulations are effective June 1, 1987, and shall apply as the basis for computation of all charges applicable to any sale of power from the Boulder Canyon Project after May 31, 1987. ''General Regulations for Power Generation, Operation, Maintenance, and Replacement at the Boulder Canyon Project, Arizona/Nevada'' are the subject of a separate rulemaking of the Department of the Interior under 43 CFR part 431. The ''General Regulations for Generation and Sale of Power in Accordance with the Boulder Canyon Project Adjustment Act'' (1941 General Regulations) dated May 20, 1941, and the ''General Regulations for Lease of Power'' dated April 25, 1930, terminate May 31, 1987.

**§ 904.3 Definitions.**

The following terms wherever used herein shall have the following meanings:

(a) *Billing Period* shall mean the service period beginning on the first day and extending through the last day of any calendar month.

(b) *Boulder City Area Projects* shall mean the Boulder Canyon Project, the Parker-Davis Project, and the United States entitlement in the Navajo Generating Station (a feature of the Central Arizona Project).

(c) *Capacity* shall mean the aggregate of contingent capacity specified in section 105(a)(1)(A) and the contingent capacity specified in section 105(A)(1)(B) of the Hoover Power Plant Act (43 U.S.C. 619).

(d) *Central Arizona Project* shall mean those works as described in section 1521(a) of the Colorado River Basin Project Act of 1968 (43 U.S.C. 1501 *et seq.*), as amended.

(e) *Colorado River Dam Fund* or *Fund* shall mean that special fund established by section 2 of the Project Act and which is to be used only for the purposes specified in the Project Act, the Adjustment Act, the Colorado River Basin Project Act of 1968, and the Hoover Power Plant Act.

(f) *Contract* shall mean any contract for the sale of Boulder Canyon Project capacity and energy for delivery after May 31, 1987, between Western and any contractor.

(g) *Contractor* shall mean the entities entering into contracts with Western for electric service pursuant to the Hoover Power Plant Act.

(h) *Excess Capacity* shall mean capacity which is in excess of the lesser of: (1) Capacity that Hoover Powerplant is capable of generating with all units in service at a net effective head of 498 feet, or (2) 1,951,000 kW.

(i) *Excess Energy* shall mean energy obligated from the Project pursuant to section 105(a)(1)(C) of the Hoover Power Plant Act (43 U.S.C. 619).

(j) *Firm Energy* shall mean energy obligated from the Project pursuant to section 105(a)(1)(A) and section 105(a)(1)(B) of the Hoover Power Plant Act (43 U.S.C. 619).

(k) *Overruns* shall mean the use of capacity or energy, without the approval of Western, in amounts greater than Western's contract delivery obligation in effect for each type of service provided for in the Contract.

(l) *Project* or *Boulder Canyon Project* shall mean all works authorized by the Project Act, the Hoover Power Plant Act, and any future additions authorized by Congress, to be constructed and owned by the United States, but exclusive of the main canal and appurtenances authorized by the Project Act, now known as the All-American Canal.

(m) *Replacements* shall mean such work, materials, equipment, or facilities as determined by the United States to be necessary to keep the Project in good operating condition, but shall not include (except where used in conjunction with the word ''emergency'' or the phrase ''however

necessitated'') work, materials, equipment, or facilities made necessary by any act of God, or of the public enemy, or by any major catastrophe.

(n) *Uprating Program* shall mean the program authorized by section 101(a) of the Hoover Power Plant Act (43 U.S.C. 619(a)) for increasing the capacity of existing generating equipment and appurtenances at the Hoover Powerplant, as generally described in the report of the Department of the Interior, Bureau of Reclamation, entitled ''Hoover Powerplant Uprating, Special Report,'' issued in May 1980, as supplemented in the report entitled, ''January 1985 Supplement (revised September 1985) to Hoover Powerplant Uprating, Special Report-May 1980.''

### § 904.4 Marketing responsibilities.

(a) Capacity and energy available from the Project will be marketed by Western under terms of the Conformed General Consolidated Power Marketing Criteria or Regulations for Boulder City Area Projects (Conformed Criteria) published in the FEDERAL REGISTER (49 FR 50582) on December 28, 1984. Western shall dispose of capacity and energy from the Project in accordance with section 105(a)(1) of the Hoover Power Plant Act (43 U.S.C. 619(a)(1)), these General Regulations, and the Contracts between the Contractors and Western.

(b) Procedures for the scheduling and delivery of capacity and energy shall be provided for in the Contracts between the Contractors and Western.

### § 904.5 Revenue requirements.

(a) Western shall collect all electric service revenues from the Project in accordance with applicable statutes and regulations and deposit such revenues into the Colorado River Dam Fund. All receipts from the Project shall be available for payment of the costs and financial obligations associated with the Project. The Secretary of the Interior is responsible for the administration of the Colorado River Dam Fund.

(b) The electric service revenue of the Project shall be collected through a charge, computed to be sufficient, together with other net revenues from the Project, to recover the following costs and financial obligations associated with the Project over the appropriate repayment periods set out in paragraph (c) of this section:

(1) Annual costs of operation and maintenance;

(2) Annual interest on unpaid investments in accordance with appropriate statutory authorities;

(3) Annual repayment of funds, and all reasonable costs incurred in obtaining such funds, advanced by non-Federal Contractors to the Secretary of the Interior for the Uprating Program;

(4) The annual payment of $300,000 to each of the States of Arizona and Nevada provided for in section 618(c) of the Adjustment Act and section 1543(c)(2) of the Colorado River Basin Project Act (43 U.S.C. 1501 *et seq.*) (Basin Act), as amended or supplemented;

(5) Capital costs of investments and Replacements, including amounts readvanced from the United States Treasury (Treasury);

(6) Repayment to the Treasury of the advances to the Colorado River Dam Fund for the Project made prior to May 31, 1987, for which payment was deferred because of a deficiency in firm energy generation due to a shortage of available water, as provided for in article 14(a) of the 1941 General Regulations and section 8 of the Boulder City Act of 1958 (72 Stat. 1726), as shown on the books of accounts of Reclamation as of May 31, 1987;

(7) Repayment to the Treasury of the first $25,000,000 of advances made to the Colorado River Dam Fund deemed to be allocated to flood control by section 617a(b) of the Project Act as provided by section 618f of the Adjustment Act; and

(8) Any other financial obligations of the Project imposed in accordance with law.

(c) The Project repayment period shall extend to the final year allowed under applicable cost recovery criteria. The revenue for the costs and financial obligations set out in paragraph (b) of this section shall be collected over the following repayment periods:

(1) The repayment period for advances made to the Colorado River Dam Fund from funds advanced to the

Secretary of the Interior by non-Federal entities for the Uprating Program and associated work shall be the period commencing with the first day of the month following completion of each segment of the Uprating Program, or June 1, 1987, whichever is later, and ending September 30, 2017;

(2) The repayment period for the payments to the Treasury of the advances to the Colorado River Dam Fund for the Project which were payable prior to May 31, 1987, but which were deferred pursuant to article 14(a) of the 1941 General Regulations and section 8 of the Boulder City Act of 1958, shall be the power contract period beginning June 1, 1987, and ending September 30, 2017. Such repayment period is based on a 50-year repayment period beginning June 1, 1937, adjusted for the periods the initial payments were deferred;

(3) The repayment period for the payment to the Treasury of the first $25,000,000 of advances made to the Colorado River Dam Fund deemed to be allocated to flood control by section 617a(b) of the Project Act and deferred by section 618(f) of the Adjustment Act shall be the 50-year period beginning June 1, 1987;

(4) The repayment period for advances to the Colorado River Dam Fund for the Project made on or after June 1, 1937, and prior to June 1, 1987, shall be the 50-year period beginning June 1 immediately following the year of operation in which the funds were advanced;

(5) The repayment period for investments, other than for the visitor facilities authorized by section 101(a) of the Hoover Power Plant Act (43 U.S.C. 619(a)), made from Federal appropriations on or after June 1, 1987, shall be a 50-year period beginning with the first day of the fiscal year following the fiscal year the investment is placed in service; and

(6) The repayment period for the visitor facilities authorized by section 101(a) of the Hoover Power Plant Act (43 U.S.C. 619(a)) shall be the 50-year period beginning June 1, 1987, or when substantially completed, as determined by the Secretary of the Interior, if later.

(d) Annual costs for operation and maintenance and payments to States as set out in paragraph (b) of this section shall be collected as long as revenues accrue from the operation of the Project.

(e) Surplus revenues will also be collected for transfer from the Colorado River Dam Fund for contribution to the Lower Colorado River Basin Development Fund pursuant to section 1543(c)(2) of the Basin Act as amended by the Hoover Power Plant Act to provide revenue for the purposes of sections 1543(f) and 1543(g) of the Basin Act.

(f) All annual costs will be calculated based on a Federal fiscal year. To accommodate the transition from the pre-1987 operating year of June 1 to May 31 to a fiscal year, there will be a 4-month transition period beginning June 1, 1987, and ending September 30, 1987.

(g) If integrated operation of the Boulder Canyon Project with other Boulder City Area Projects and other Federal projects on the Colorado River, as provided in § 904.9 of these General Regulations, confers a direct power benefit upon such other Boulder City Area Projects and such other Federal projects, or if a direct power benefit is conferred by other Boulder City Area Projects or other Federal projects on the Colorado River upon the Boulder Canyon Project, Western shall equitably apportion such benefits and appropriate charges among the Boulder Canyon Project, other Boulder City Area Projects, and other Federal projects on the Colorado River.

### § 904.6 Charge for capacity and firm energy.

The charge for Capacity and Firm Energy from the Project shall be composed of two separate charges; a charge to provide for the basic revenue requirements, as identified in paragraphs (b), (c), and (d) of § 904.5 of these General Regulations (Base Charge), and a charge to provide the surplus revenue for the Lower Colorado River Basin Development Fund contribution, as identified in paragraph (e) of § 904.5 of these General Regulations (Lower Basin Development Fund Contribution Charge).

**§ 904.7 Base charge.**

(a) The Base Charge shall be developed by the Administrator and promulgated in accordance with appropriate DOE regulations. The Base Charge shall be composed of a capacity component and an energy component.

(b) The capacity component of the Base Charge shall be a dollar per kilowattmonth amount determined by (1) multiplying the estimated average annual revenue requirement developed pursuant to paragraphs (b), (c), and (d) of § 904.5 of these General Regulations by 50 percent, and (2) dividing the results of that multiplication by the estimated average annual kW rating of the Project, and (3) dividing the quotient by 12. The total estimated kW rating will be based on the powerplant output capability with all units in service at 498 feet of net effective head or 1,951,000 kW, whichever is less. The capacity component of the Base Charge shall be applied each billing period to each kW of rated output to which each Contractor is entitled by Contract. Adjustments to the application of the capacity component shall be made during outages which cause significant reductions in capacity as provided by the Contract.

(c) The energy component of the Base Charge shall be a mills per kWh amount determined by (1) multiplying the estimated average annual revenue requirements developed pursuant to paragraphs (b), (c), and (d) of § 904.5 of these General Regulations by 50 percent and (2) dividing the results of that multiplication by the average annual kWh estimated to be available from the Project. The energy component of the Base Charge shall be applied to each kWh made available to each Contractor, as provided for by Contract, except for the energy purchased by Western, at the request of a Contractor, to meet that Contractor's deficiency in Firm Energy pursuant to section 105(a)(2) of the Hoover Power Plant Act (43 U.S.C. 619(a)(2)) and section F of the Conformed Criteria, and that Contractor's Uprating Program credit carry forward, as provided by Contract.

(d) Application of the Base Charge to capacity and energy overruns will be provided for by Contract. The capacity component and the energy component of the Base Charge shall be applied each billing period for each Contractor.

(e) The Base Charge shall be reviewed annually. The Base Charge shall be adjusted either upward or downward, when necessary and administratively feasible, to assure sufficient revenues to effect payment of all costs and financial obligations associated with the Project pursuant to paragraphs (b), (c), and (d) of § 904.5 of these General Regulations. The Administrator shall provide all Contractors an opportunity to comment on any proposed adjustment to the Base Charge pursuant to the DOE's power rate adjustment procedures then in effect.

**§ 904.8 Lower basin development fund contribution charge.**

(a) The Lower Basin Development Fund Contribution Charge will be developed by the Administrator of Western on the basis that the equivalent of 4½ mills or 2½ mills per kWh, as appropriate, required to be included in the rates charged to purchasers pursuant to section 1543(c)(2) of the Basin Act, as amended by the Hoover Power Plant Act, shall be collected from the energy sales of the Project.

(b) The Lower Basin Development Fund Contribution Charge shall be applied to each kWh made available to each Contractor, as provided for by Contract, except for the energy purchased by Western at the request of a Contractor to meet:

(1) That Contractor's deficiency in Firm Energy, pursuant to section 105(a)(2) of the Hoover Power Plant Act (43 U.S.C. 619(a)(2)) and section F of the Conformed Criteria; and

(2) That Contractor's Uprating Program credit carry forward as provided by Contract. A 4½ mills per kWh charge shall be applied to each kWh made available to an Arizona Contractor, and a 2½ mills per kWh charge shall be applied to each kWh made available to a California or Nevada Contractor; provided, that after the repayment period of the Central Arizona Project, a 2½ mills per kWh charge shall be applied to each kWh made available to the Arizona, California, and Nevada Contractors. The Lower Basin Development Fund Contribution

Charge shall be applied to energy overruns. The Lower Basin Development Fund Contribution Charge shall be applied each billing period for each Contractor.

### § 904.9 Excess capacity.

(a) If the Uprating Program results in Excess Capacity, Western shall be entitled to such Excess Capacity to integrate the operation of the Boulder City Area Projects and other Federal Projects on the Colorado River. Specific criteria for the use of Excess Capacity by Western will be provided by Contract. All Excess Capacity not required by Western for the purposes specified by Contract will be available to all Contractors at no additional cost on a pro rata basis based on the ratio of each Contractor's Capacity allocation to the total Capacity allocation.

(b) Credits for benefits resulting from project integration shall be determined by Western and such benefits shall be apportioned in accordance with paragraph (9) of § 904.5 of these General Regulations.

### § 904.10 Excess energy.

(a) If excess Energy is determined by the United States to be available, it shall be made available to the Contractors, in accordance with the priority entitlement of section 105(a)(1)(C) of the Hoover Power Plant Act (43 U.S.C. 619(a)(1)(c)). After the annual first- and second-priority entitlement to excess energy has been obligated for delivery, Western will make available one-third of the third-priority excess energy to the Arizona Power Authority, one-third to the Colorado River Commission of Nevada, and one-third to the California Contractors.

(b) Western will make available third-priority excess energy to the California Contractors based on the following formula:

$F = \frac{1}{2} (A/B + C/D) (E)$; Where:

A = Contractor's allocated Capacity
B = Total California allocated Capacity
C = Contractor's allocated Firm Energy
D = Total California allocated Firm Energy
E = Third-priority Excess Energy available to California
F = Contractor's third-priority Excess Energy

(c) The charge for all Excess Energy shall be the charge for Boulder Canyon Project Firm Energy existing at the time the Excess Energy is made available to the Contractor, including the appropriate Lower Basin Development Fund Contribution Charge.

### § 904.11 Lay off of energy.

(a) If any Contractor determines that it is temporarily unable to utilize Firm Energy or Excess Energy, Western will, at the Contractor's request, attempt to lay off the Firm Energy or Excess Energy the Contractor declares to be available for lay off, pursuant to the provisions for lay off of energy specified in the Contract.

(b) If Western is unable to lay off such energy, or if the Contractor fails to request Western to attempt to lay off the energy, the Contractor will be billed for the Firm Energy or Excess Energy that was available to the Contractor but could not be delivered to the Contractor or sold to another customer.

(c) In the event that Western must lay off the Firm Energy or Excess Energy at a rate lower than the effective Firm Energy rate, the Contractor will be billed for the difference between the amount that Western would have received at the then existing Firm Energy rate, including the appropriate Lower Basin Development Fund Contribution Charge, and the amount actually received.

### § 904.12 Payments to contractors.

(a) Funds advanced to the Secretary of the Interior for the Uprating Program and costs reasonably incurred by the Contractor in advancing such funds, as approved by Western, shall be returned to the Contractor advancing the funds during the Contract period through credits on that Contractor's power bills. Appropriate credits will be developed and applied pursuant to terms and conditions agreed to by contract or agreement.

(b) All other obligations of the United States to return funds to a Contractor shall be repaid to such Contractor through credits on power bills, with or without interest, pursuant to terms and conditions agreed to by contract or agreement.

**§ 904.13 Disputes.**

(a) All actions by the Secretary of Energy, acting by and through the Administrator of Western, shall be binding unless or until reversed or modified in accordance with provisions contained herein.

(b) Any disputes or disagreements as to interpretation or performance of the provisions of these General Regulations under the responsibility of Western shall first be presented to and decided by the Administrator. The Administrator shall be deemed to have denied the Contractor's contention or claim if it is not acted upon within ninety (90) days of its having been presented.

(c) The decision of the Administrator shall be final unless, within thirty (30) days from the date of such decision, a written request for arbitration is received by the Administrator. The Administrator shall have ninety (90) days from the date of receipt of a request for arbitration either to concur in or deny in writing the request for such arbitration. Failure by the Administrator to take any action within the ninety (90) day period shall be deemed a denial of the request for arbitration. In the event of a denial of a request for arbitration, the decision of the Administrator shall become final. Upon a decision becoming final, the disputing Contractor's remedy lies with the appropriate Federal court. Any claim that a final decision of the Administrator violates any right accorded the Contractor under the Project Act, the Adjustment Act, or Title I of the Hoover Power Plant Act is barred unless suit asserting such claim is filed in a Federal court of competent jurisdiction within one (1) year after final refusal by the Administrator to correct the action complained of, in accordance with section 105(h) of the Hoover Power Plant Act.

(d) When a timely request for arbitration is received by the Administrator and the Administrator concurs in writing, the disputing Contractor and the Administrator shall, within thirty (30) days after receipt of notice of such concurrence, each name one arbitrator to the panel of arbitrators which will decide the dispute. All arbitrators shall be skilled and experienced in the field pertaining to the dispute. In the event there is more than one disputing Contractor, the disputing Contractors shall collectively name one arbitrator to the panel of arbitrators. In the event of their failure collectively to name such an arbitrator within fifteen (15) days after their first meeting, that arbitrator shall be named as provided in the Commercial Arbitration Rules of the American Arbitration Association. The two arbitrators thus selected shall name a third arbitrator within thirty (30) days of their first meeting. In the event of their failure to so name such third arbitrator, that arbitrator shall be named as provided in the Commercial Arbitration Rules of the American Arbitration Association. The third arbitrator shall act as chairperson of the panel. The arbitration shall be governed by the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall be limited to the issue submitted. The panel of arbitrators shall not rewrite, change, or amend these General Regulations or the Contracts of any of the parties to the dispute. The panel of arbitrators shall render a final decision in this dispute within sixty (60) days after the date of the naming of the third arbitrator. A decision of any two of the three arbitrators named to the panel shall be final and binding on all parties involved in the dispute.

**§ 904.14 Future regulations.**

(a) Western may from time to time promulgate such additional or amendatory regulations as deemed necessary for the administration of the Project in accordance with applicable law; *Provided,* That no right under any Contract shall be impaired or obligation thereunder be extended thereby.

(b) Any modification, extension, or waiver of any provision of these General Regulations granted for the benefit of any one or more Contractors shall not be denied to any other Contractor.

(c) Western reserves the right to terminate, modify, or extend these regulations, either partially or in their entirety, to the extent permitted by law or existing contract.

# PART 905—ENERGY PLANNING AND MANAGEMENT PROGRAM

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AUTHORITY: 42 U.S.C. 7152, 7191; 42 U.S.C. 7275–7276c.

SOURCE: 60 FR 54174, Oct. 20, 1995, unless otherwise noted.

## Subpart A—General Provisions

SOURCE: 65 FR 16795, Mar. 30, 2000, unless otherwise noted.

### § 905.1 What are the purposes of the Energy Planning and Management Program?

The purposes of the Energy Planning and Management Program (EPAMP) are to meet the objectives of Section 114 of the Energy Policy Act of 1992 (EPAct) and to extend long-term firm power resource commitments while supporting customer integrated resource planning (IRP); demand-side management (DSM), including energy efficiency, conservation, and load management; and the use of renewable energy. Subpart B, Integrated Resource Planning, allows customers of the Western Area Power Administration (Western) to meet the objectives of section 114 of EPAct through integrated resource planning or by other means, such as attaining a minimum level of investment in energy efficiency and/or renewable energy, collecting a charge to support defined public benefits, or complying with a mandated energy efficiency and/or renewable energy reporting requirement.

### § 905.2 What are the key definitions of this part?

*Administrator* means Western's Administrator.

*Customer* means any entity that purchases firm capacity, with or without energy, from Western under a long-term firm power contract. The term also includes a member-based association (MBA) and its distribution or user members that receive direct benefit from Western's power, regardless of which holds the contract with Western.

*Energy efficiency and/or renewable energy (EE/RE) report* means the report documenting energy efficiency and/or renewable energy activities imposed by a State, Tribal, or the Federal Government upon a State, Tribal, or Federal

end-use customer within its jurisdiction.

*Integrated resource planning* means a planning process for new energy resources that evaluates the full range of alternatives, including new generating capacity, power purchases, energy conservation and efficiency, cogeneration and district heating and cooling applications, and renewable energy resources, to provide adequate and reliable service to a customer's electric consumers.

*Integrated resource planning cooperative (IRP cooperative)* means a group of Western's customers and/or their distribution or user members with geographic, resource supply, or other similarities that have joined together, with Western's approval, to complete an IRP.

*Member-based association (MBA)* means:

(1) An entity composed of member utilities or user members, or

(2) An entity that acts as an agent for, or subcontracts with, but does not assume power supply responsibility for its principals or subcontractors, who are its members.

*Minimum investment report* means the report documenting a mandatory minimum level of financial or resource investment in demand-side management (DSM) initiatives, including energy efficiency and load management, and/or renewable energy activities, such as investment of a set minimum percentage of the utility's gross revenues in renewable energy, which is imposed by State, Tribal, or Federal law upon a customer under its jurisdiction. For the purposes of this part, the minimum investment report includes reports about public benefits charges, as well.

*Public benefits charge* means a mandatory financial charge imposed by State, Tribal, or Federal law upon a customer under its jurisdiction to support one or more of the following: energy efficiency, conservation, or demand-side management; renewable energy; efficiency or alternative energy-related research and development; low-income energy assistance; and/or other similar programs defined by applicable State, Tribal, or Federal law. This term is also known as a public goods or system benefit charge in the utility industry.

*Region* means a Western regional office or management center, and the geographic territory served by that regional office or management center: the Desert Southwest Customer Service Region, the Rocky Mountain Customer Service Region, the Sierra Nevada Customer Service Region, the Upper Great Plains Customer Service Region, or the Colorado River Storage Project Management Center.

*Renewable energy* means any source of electricity that is self-renewing, including plant-based biomass, waste-based biomass, geothermal, hydropower, ocean thermal, solar (active and passive), and wind.

*Small customer* means a utility customer with total annual sales and usage of 25 gigawatthours (GWh) or less, as averaged over the previous 5 years, which is not a member of a joint-action agency or generation and transmission cooperative with power supply responsibility; or any end-use customer.

*Western* means the Western Area Power Administration.

## Subpart B—Integrated Resource Planning

SOURCE: 65 FR 16796, Mar. 30, 2000, unless otherwise noted.

### § 905.10 Who must comply with the integrated resource planning and reporting regulations in this subpart?

(a) *Integrated resource plans (IRP) and alternatives.* Each Western customer must address its power resource needs in an IRP prepared and submitted to Western as described in this subpart. Alternatively, Western customers may submit a small customer plan, minimum investment report or EE/RE report as provided in this subpart.

(b) *Rural Utility Service and state utility commission reports.* For customers subject to IRP filings or other electrical resource use reports from the Rural Utilities Service or a state utility commission, nothing in this part requires a customer to take any action inconsistent with those requirements.

**§ 905.11 What must an IRP include?**

(a) *General.* Integrated resource planning is a planning process for new energy resources that evaluates the full range of alternatives, including new generating capacity, power purchases, energy conservation and efficiency, cogeneration and district heating and cooling applications, and renewable energy resources, to provide adequate and reliable service to a customer's electric consumers. An IRP supports customer-developed goals and schedules. The plan must take into account necessary features for system operation, such as diversity, reliability, dispatchability, and other risk factors; must take into account the ability to verify energy savings achieved through energy efficiency and the projected durability of such savings measured over time; and must treat demand and supply resources on a consistent and integrated basis.

(b) *IRP criteria.* IRPs must consider electrical energy resource needs and may consider, at the customer's option, water, natural gas, and other energy resources. Each IRP submitted to Western must include:

(1) *Identification of resource options.* Identification and comparison of resource options is an assessment and comparison of existing and future supply-and demand-side resource options available to a customer based upon its size, type, resource needs, geographic area, and competitive situation. Resource options evaluated by the specific customer must be identified. The options evaluated should relate to the resource situation unique to each Western customer as determined by profile data (such as service area, geographical characteristics, customer mix, historical loads, projected growth, existing system data, rates, and financial information) and load forecasts. Specific details of the customer's resource comparison need not be provided in the IRP itself. They must, however, be made available to Western upon request.

(i) Supply-side options include, but are not limited to, purchased power contracts and conventional and renewable generation options.

(ii) Demand-side options alter the customer's use pattern to provide for an improved combination of energy services to the customer and the ultimate consumer.

(iii) Considerations that may be used to develop potential options include cost, market potential, consumer preferences, environmental impacts, demand or energy impacts, implementation issues, revenue impacts, and commercial availability.

(iv) The IRP discussion of resource options must describe the options chosen by the customer, clearly demonstrating that decisions were based on a reasonable analysis of the options. The IRP may strike a balance among the applicable resource evaluation factors.

(2) *Action plan.* IRPs must include an action plan describing specific actions the customer will take to implement its IRP.

(i) The IRP must state the time period that the action plan covers, and the action plan must be updated and resubmitted to Western when this time period expires. The customer may submit a revised action plan with the annual IRP progress report discussed in § 905.14.

(ii) For those customers not experiencing or anticipating load growth, the action plan requirement for the IRP may be satisfied by a discussion of current actions and procedures in place to periodically reevaluate the possible future need for new resources. The action plan must include a summary of:

(A) Actions the customer expects to take in accomplishing the goals identified in the IRP;

(B) Milestones to evaluate accomplishment of those actions during implementation; and

(C) Estimated energy and capacity benefits for each action planned.

(3) *Environmental effects.* To the extent practical, the customer must minimize adverse environmental effects of new resource acquisitions and document these efforts in the IRP. Customers are neither precluded from nor required to include a quantitative analysis of environmental externalities as part of the IRP process. IRPs must include a qualitative analysis of environmental effects in summary format.

(4) *Public participation.* The customer must provide ample opportunity for

full public participation in preparing and developing an IRP (or any IRP revision or amendment). The IRP must include a brief description of public involvement activities, including how the customer gathered information from the public, identified public concerns, shared information with the public, and responded to public comments. Customers must make additional documentation identifying or supporting the full public process available to Western upon request.

(i) As part of the public participation process for an MBA, the governing body of an MBA must approve the IRP in accordance with the MBA's by-laws, confirming that all requirements have been met. To indicate approval in the case of an individual IRP submitted by an entity with a board of directors or city council, a responsible official must sign the IRP submitted to Western or the customer must document passage of an approval resolution by the appropriate governing body included or referred to in the IRP.

(ii) For Western customers that do not purchase electricity for resale, such as some State, Tribal, and Federal agencies, the customer can satisfy the public participation requirement by having a top management official with resource acquisition responsibility review and concur on the IRP. The customer must note this concurrence in the IRP.

(5) *Load forecasting*. An IRP must include a statement that the customer conducted load forecasting. Load forecasting should include data that reflects the size, type, resource conditions, and demographic nature of the customer using an accepted load forecasting method, including but not limited to the time series, end-use, and econometric methods. The customer must make the load forecasting data available to Western upon request.

(6) *Measurement strategies*. The IRP must include a brief description of measurement strategies for options identified in the IRP to determine whether the IRP's objectives are being met. These validation methods must include identification of the baseline from which a customer will measure the benefits of its IRP implementation. A reasonable balance may be struck between the cost of data collection and the benefits resulting from obtaining exact information. Customers must make performance validation and evaluation data available to Western upon request.

(c) *IRP criteria for certain customers not qualifying for ''small customer'' status*. Customers with limited economic, managerial, and resource capability and total annual sales and usage of 25 gigawatthours (GWh) or less who are members of joint-action agencies and generation and transmission cooperatives with power supply responsibility are eligible for the criteria specified in paragraphs (c)(1) and (c)(2) of this section.

(1) Each IRP submitted by a customer under paragraph (c) of this section must:

(i) Consider all reasonable opportunities to meet future energy service requirements using DSM techniques, renewable energy resources, and other programs; and

(ii) Minimize, to the extent practical, adverse environmental effects.

(2) Each IRP submitted by a customer under paragraph (c) of this section must include, in summary form:

(i) Customer name, address, phone number, email and Website if applicable, and contact person;

(ii) Customer type;

(iii) Current energy and demand profiles, and data on total annual energy sales and usage for the past 5 years, which Western will use to verify that customers qualify for these criteria;

(iv) Future energy services projections;

(v) How items in paragraphs (c)(1)(i) and (c)(1)(ii) of this section were considered; and

(vi) Actions to be implemented over the customer's planning timeframe.

[65 FR 16795, Mar. 30, 2000, as amended at 73 FR 35062, June 20, 2008]

### § 905.12 How must IRPs be submitted?

(a) *Number of IRPs submitted*. Except as provided in paragraph (c) of this section, one IRP is required per customer, regardless of the number of long-term firm power contracts between the customer and Western.

(b) *Method of submitting IRPs.* Customers must submit IRPs to Western under one of the following options:

(1) Customers may submit IRPs individually.

(2) MBAs may submit IRPs for each of their members or submit one IRP on behalf of all or some of their members. An IRP submitted by an MBA must specify the responsibilities and participation levels of individual members and the MBA. Any member of an MBA may submit an individual IRP to Western instead of being included in an MBA IRP.

(3) Customers may submit IRPs as regional/IRP cooperatives when previously approved by Western. Western encourages customers to prepare ''regional'' IRPs. Regional IRPs are voluntary and participants need not be members of an MBA or a Western customer. Regional/IRP cooperatives may also submit small customer plans, minimum investment reports, and EE/RE reports on behalf of eligible IRP cooperative members.

(c) *Alternatives to submitting individual IRPs.* Customers with Western approval to submit small customer plans, minimum investment or EE/RE reports may substitute the applicable plan or report instead of an IRP. Each customer that intends to seek approval for IRP cooperative, small customer, minimum investment report or EE/RE report status must provide advance written notification to Western. A new customer must provide this notification to the Western Regional Manager of the Region in which the customer is located within 30 days from the time it becomes a customer. Any customer may resubmit an IRP or notify Western of its plan to change its compliance method at any time so long as there is no period of noncompliance.

[65 FR 16795, Mar. 30, 2000, as amended at 73 FR 35062, June 20, 2008]

### § 905.13 When must IRPs be submitted?

(a) *Submitting the initial IRP.* Except as provided in paragraph (c) of this section, customers that have not previously had an IRP approved by Western must submit the initial IRP to the appropriate Regional Manager no later than 1 year after May 1, 2000, or after becoming a customer, whichever is later.

(b) *Updates and amendments to IRPs.* Customers must submit updated IRPs to the appropriate Regional Manager every 5 years after Western's approval of the initial IRP. Customers that complied with Western's IRP regulations in effect before May 1, 2000 must maintain their submission and resubmission schedules previously in effect. Customers may submit amendments and revisions to IRPs at any time.

(c) *IRP cooperatives.* Customers with geographic, resource supply, and other similarities may join together and request, in writing, Western's approval to become an IRP cooperative. Western will respond to IRP cooperative status requests within 30 days of receiving a request. If Western disapproves a request for IRP cooperative status, the requesting participants must maintain their currently applicable integrated resource or small customer plans, or submit the initial IRPs no later than 1 year after the date of the disapproval letter. Western's approval of IRP cooperative status will not be based on any potential participant's contractual status with Western. Each IRP cooperative must submit an IRP for its participants within 18 months after Western approves IRP cooperative status.

### § 905.14 Does Western require annual IRP progress reports?

Yes, customers must submit IRP progress reports each year within 30 days of the anniversary date of the approval of the currently applicable IRP. The reports must describe the customer's accomplishments achieved under the action plan, including projected goals and implementation schedules, and energy and capacity benefits and renewable energy developments achieved as compared to those anticipated. Western prefers measured values, but will accept reasonable estimates if measurement is infeasible or not cost-effective. Instead of a separate progress report, the customer may use any other annual report that the customer submits to Western or another entity, at the customer's discretion, if that report contains all required data for the previous full year and is submitted within 30 days of the approval

anniversary date of the currently applicable IRP. With Western's approval, customers may submit reports outside of the 30-day anniversary date window.

### § 905.15 What are the requirements for the small customer plan alternative?

(a) *Requesting small customer status.* Small customers may submit a request to prepare a small customer plan instead of an IRP. Requests for small customer status from electric utilities must include data on total annual energy sales and usage for the 5 years prior to the request. Western will average this data to determine overall annual energy sales and usage so that uncontrollable events, such as extreme weather, do not distort levelized energy sales and usage. Requests from end-use customers must only document that the customer does not purchase electricity for resale. Western will respond to small customer status requests within 30 days of receiving the request. If Western disapproves a request, the customer must maintain its currently applicable IRP, or submit the initial IRP no later than 1 year after the date of the disapproval letter. Alternatively, the customer may submit a request for minimum investment report or EE/RE report status, as appropriate.

(b) *Small customer plan contents.* Small customer plans must:

(1) Consider all reasonable opportunities to meet future energy service requirements using demand-side management techniques, renewable energy resources, and other programs that provide retail consumers with electricity at reasonable cost;

(2) Minimize, to the extent practical, adverse environmental effects; and

(3) Present in summary form the following information:

(i) Customer name, address, phone number, email and Website if applicable, and contact person;

(ii) Type of customer;

(iii) Current energy and demand profiles and data on total annual energy sales and usage for the previous 5 years for utility customers, or current energy and demand use for end-use customers;

(iv) Future energy services projections;

(v) How items in paragraphs (b)(1) and (b)(2) of this section were considered; and

(vi) Actions to be implemented over the customer's planning timeframe.

(c) *When to submit small customer plans.* Small customers must submit the first small customer plan to the appropriate Western Regional Manager within 1 year after Western approves the request for small customer status. Small customers must submit, in writing, a small customer plan every 5 years.

(d) *Maintaining small customer status.* (1) Every year on the anniversary of Western's approval of the plan, small customers must submit a letter to Western verifying that either their annual energy sales and usage is 25 GWh or less averaged over the previous 5 years, or they continue to be end-use customers. The letter must also identify their achievements against targeted action plans, as well as the revised summary of actions if the previous summary of actions has expired.

(2) Western will use the letter for overall program evaluation and comparison with the customer's plan, and for verification of continued small customer status. Customers may submit annual update letters outside of the anniversary date if previously agreed to by Western so long as the letter contains all required data for the previous full year.

(e) *Losing eligibility for small customer status.* (1) A customer ceases to be a small customer if it:

(i) Is a utility customer and exceeds total annual energy sales and usage of 25 GWh, as averaged over the previous 5 years; or

(ii) Is no longer an end-use customer.

(2) Western will work with a customer that loses small customer status to develop an appropriate schedule for submitting an IRP or other report required under this subpart.

### § 905.16 What are the requirements for the minimum investment report alternative?

(a) *Request to submit the minimum investment report.* Customers may submit

a request to prepare a minimum investment report instead of an IRP. Minimum investment reports may be submitted by MBAs on behalf of the MBA or its members, and by IRP cooperatives on behalf of its participants. Requests to submit minimum investment reports must include data on:

(1) The source of the minimum investment requirement (number, title, date, and jurisdiction of law);

(2) The initial, annual, and other reporting requirement(s) of the mandate, if any; and

(3) The mandated minimum level of investment or public benefits charge for DSM and/or renewable energy.

(b) *Minimum investment requirement.* The minimum investment must be either:

(1) A mandatory set percentage of customer gross revenues or other specific minimum investment in DSM and/or renewable energy mandated by a State, Tribal, or Federal Government with jurisdictional authority; or

(2) A required public benefits charge, including charges to be collected for and spent on DSM; renewable energy; efficiency and alternative energy-related research and development; low-income energy assistance; and any other applicable public benefits category, mandated by a State, Tribal, or Federal Government with jurisdictional authority. Participation in a public benefits program requires either a mandatory set percentage of customer gross revenues or other specific charges to be applied toward the programs as determined by the applicable State, Tribal, or Federal authority. The revenues from the public benefits charge may be expended directly by the customer, or by another entity on behalf of the customer as determined by the applicable State, Tribal, or Federal authority.

(c) *Multi-state entities.* For those customers with service territories lying in more than one State or Tribal jurisdiction, and where at least one of the States or Tribal jurisdictions has a mandated minimum investment requirement, to meet this alternative customers must use the highest requirement from the State or Tribe within the customer's service territory and additionally apply it to all members in those States or Tribal jurisdictions in which there is no requirement. Alternatively, if each State or Tribe has a requirement, customers may satisfy Western's requirement by reporting on compliance with each applicable minimum investment requirement. Western will work with multi-state entities to ensure the most effective, and least burdensome, compliance mechanism.

(d) *Western's response to minimum investment report requests.* Western will respond to requests to accept minimum investment reports within 30 days of receiving the request. If Western disapproves a request to allow use of the minimum investment report, the customer must maintain its currently applicable IRP or small customer plan, or submit its initial IRP no later than 1 year after the date of the disapproval letter. Alternatively, the customer may submit a request for small customer plan or EE/RE report status, as appropriate.

(e) *Minimum investment report contents.* Reports documenting compliance with a minimum level of investment in DSM and/or renewable energy must include:

(1) Customer name, address, phone number, email and Website if applicable, and contact person;

(2) Authority or requirement to undertake a minimum investment, including the source of the minimum investment requirement (number, title, date, and jurisdiction of law or regulation); and

(3) A description of the minimum investment, including:

(i) Minimum percentage or other minimum requirement for DSM and/or renewable energy, including any charges to be collected for and spent on DSM, renewable energy, efficiency or alternative energy-related research and development, low-income energy assistance, and any other applicable public benefits categories;

(ii) Actual or estimated energy and/or capacity savings resulting from minimum investments in DSM, if known;

(iii) Actual or estimated energy and/or capacity resulting from minimum investments in renewable energy, if known; and

(iv) A description of the DSM and/or renewable energy activities to be undertaken over the next 2 years as a result of the requirement for minimum investment, if known.

(f) *Minimum investment report approval.* Western will approve the minimum investment report when it meets the requirements in paragraph (e) of this section.

(g) *When to submit the minimum investment report.* The customer must submit the first minimum investment report to the appropriate Western Regional Manager within 1 year after Western approves the request to accept the minimum investment report. Customers choosing this option must maintain IRP or small customer plan compliance with Western's IRP regulations in effect before May 1, 2000, including submitting annual progress reports or update letters, until submitting the first minimum investment report, to ensure there is no gap in complying with section 114 of EPAct. Customers must submit, in writing, a minimum investment report every 5 years.

(h) *Maintaining minimum investment reports.* (1) Every year on the anniversary of Western's approval of the first minimum investment report, customers choosing this option must submit a letter to Western verifying that they remain in compliance with the minimum investment requirement. The letter must also contain summary information identifying annual energy and capacity savings associated with minimum investments in DSM, if known, and energy and capacity associated with minimum investments in renewable energy, if known. The letter must also include a revised description of customer DSM and/or renewable energy activities if the description from the minimum investment report has changed or expired.

(2) Western will use the letter for overall program evaluation and to ensure customers remain in compliance. Customers may submit letters outside of the anniversary date if previously agreed to by Western, and if the letter contains all required data for the previous full year. Instead of a separate letter, a customer choosing this option may submit the State, Tribal, or Federal required annual report documenting the minimum investment and associated DSM and/or renewable energy savings and/or use, if known.

(i) *Loss of eligibility to submit the minimum investment report.* (1) A customer ceases to be eligible to submit a minimum investment report if:

(i) A State, Tribal, or Federal mandate no longer applies to the customer, or

(ii) The customer does not comply with the minimum level of investment in applicable State, Tribal, or Federal law.

(2) Western will work with a customer no longer eligible to submit a minimum investment report to develop an appropriate schedule to submit an IRP or other plan or report required under this subpart.

### § 905.17 What are the requirements for the energy efficiency and/or renewable energy report (EE/RE report) alternative?

(a) *Requests to submit an EE/RE report.* End-use customers may submit a request to prepare an EE/RE report instead of an IRP. Requests to submit EE/RE reports must include data on:

(1) The source of the EE/RE reporting requirement (number, title, date, and jurisdiction of law or regulation);

(2) The initial, annual, and other reporting requirement(s) of the report; and

(3) A summary outline of the EE/RE report's required data or components, including any requirements for documenting customer energy efficiency and renewable energy activities.

(b) *EE/RE report requirement.* The EE/RE report is based on a mandate by a State, Tribal, or Federal Government to implement energy efficiency and/or renewable energy activities within a specified timeframe, for which there is also an associated reporting requirement. The EE/RE report may include only electrical resource use and energy efficiency and/or renewable energy activities, or may additionally include other resource information, such as water and natural gas data. At a minimum, the EE/RE report must annually document energy efficiency and/or renewable energy activities undertaken by the end-use customer.

(c) *Western's response to EE/RE report requests.* Western will respond to requests to accept EE/RE reports within 30 days of receiving the request. If Western disapproves a request to allow use of the EE/RE report, the customer must maintain its currently applicable IRP or small customer plan, or submit its initial IRP no later than 1 year after the date of the disapproval letter. Alternatively, the customer may submit a request for small customer plan or minimum investment report, as appropriate, within 30 days after the date of the disapproval letter.

(d) *EE/RE report contents.* EE/RE reports must include:

(1) Customer name, address, phone number, email and Website if applicable, and contact person;

(2) Authority or requirement to complete the EE/RE report, including the source of the requirement (number, title, date, and jurisdiction of law); and

(3) A description of the customer's required energy efficiency and/or renewable energy activities, including:

(i) Level of investment or expenditure in energy efficiency and/or renewable energy, and quantifiable energy savings or use goals, if defined by the EE/RE reporting requirement;

(ii) Annual actual or estimated energy and/or capacity savings, if any, associated with energy efficiency and resulting from the EE/RE reporting requirement;

(iii) Actual or estimated energy and/or capacity, if any, associated with renewable energy and resulting from the EE/RE reporting requirement;

(iv) A description of the energy efficiency and/or renewable energy activities to be undertaken over the next 2 years as a result of the EE/RE reporting requirement.

(e) *EE/RE report approval.* Western will approve the EE/RE report when the report meets the requirements in paragraph (d) of this section.

(f) *When to submit the EE/RE report.* The customer must submit the first EE/RE report to the appropriate Western Regional Manager within 1 year after Western approves the request to accept the EE/RE report. Customers choosing this option must maintain IRP or small customer plan compliance with Western's IRP regulations in effect before May 1, 2000, including submitting annual progress reports or update letters, until submitting the first EE/RE report to ensure there is no gap in complying with section 114 of EPAct. Customers must submit, in writing, an EE/RE report every 5 years.

(g) *Maintaining EE/RE reports.* (1) Every year on the anniversary of Western's approval of the first EE/RE report, customers choosing this option must submit an annual EE/RE letter to Western. The letter must contain summary information identifying customer annual energy and capacity savings associated with energy efficiency, if any, and annual customer energy and capacity associated with renewable energy, if any. The letter must also verify that the customer remains in compliance with the EE/RE reporting requirement. Additionally, the letter must include a revised description of customer DSM and/or renewable energy activities if the description from the EE/RE report has changed or expired. If this information is contained in an EE/RE report sent to another authority, the customer may submit that report instead of a separate letter.

(2) Customers may submit annual EE/RE letters outside of the anniversary date if previously agreed to by Western if the letter contains all required data for the previous full year.

(h) *Loss of eligibility to submit the EE/RE report.* (1) A customer ceases to be eligible to submit a EE/RE report if:

(i) The EE/RE reporting requirement no longer applies to the customer, or

(ii) The customer does not comply with the EE/RE reporting requirements in applicable State, Tribal, or Federal law.

(2) Western will work with a customer no longer eligible to submit an EE/RE report to develop an appropriate schedule to submit a small customer plan or other plan or report required under this subpart.

### § 905.18 What are the criteria for Western's approval of submittals?

(a) *Approval criteria.* Western will approve all plans and reports based upon:

(1) Whether the plan or report satisfactorily addresses the criteria in the regulations in this subpart; and

(2) The reasonableness of the plan or report given the size, type, resource needs, geographic area, and competitive situation of the customer.

(b) *Review of resource choices.* Western will review resource choices using section 114 of EPAct and this subpart. Western will disapprove plans and reports if Western deems that they do not meet the reasonableness criteria in paragraph (a)(2) of this section or the provisions of section 114 of EPAct.

(c) *Accepting plans and reports under other initiatives.* If a customer or group of customers implements integrated resource planning under a program responding to other Federal, Tribal, or State initiatives, Western will accept and approve the plan or report as long as it substantially complies with the requirements of this subpart.

(d) *Water-based plans and reports.* In evaluating a plan or report, Western will consider water planning, efficiency improvements, and conservation in the same manner it considers energy planning and efficiencies. Customers that provide water utility services and customers that service irrigation load as part of their overall load may include water conservation activities in their plans or reports. To the extent practical, customers should convert reported water savings to energy values.

### § 905.19 How are plans and reports reviewed and approved?

Western will review all plans and reports submitted under this subpart and notify the submitting entity of the plan's or report's acceptability within 120 days after receiving it. If a plan or report submittal is insufficient, Western will provide a notice of deficiencies to the entity that submitted the plan or report. Western, working together with the entity, will determine the time allowable for resubmitting the plan or report. However, the time allowed for resubmittal will not be greater than 9 months after the disapproval date, unless otherwise provided by applicable contract language.

### § 905.20 When are customers in noncompliance with the regulations in this subpart, and how does Western ensure compliance?

(a) *Good faith effort to comply.* If it appears that a customer's activities may be inconsistent with the applicable IRP, small customer plan, minimum investment report or EE/RE report, Western will notify the customer and offer the customer 30 days to provide evidence of its good faith effort to comply. If the customer does not correct the specified deficiency or submit such evidence, or if Western finds, after receiving information from the customer, that a good faith effort has not been made, Western will impose a penalty.

(b) *Penalties for noncompliance.* Western will impose a penalty on long-term firm power customers for failing to submit or resubmit an acceptable IRP and action plan, small customer plan, minimum investment report or EE/RE report as required by this subpart. Western will also impose a penalty when the customer's activities are not consistent with the applicable plan or report unless Western finds that a good faith effort has been made to comply with the approved plan or report.

(c) *Written notification of penalty.* Western will provide written notice of a penalty to the customer, and to the MBA or IRP cooperative when applicable. The notice will specify the reasons for the penalty.

(d) *Penalty options.* (1) Beginning with the first full billing period following the notice specified in paragraph (c) of this section, Western will impose a surcharge of 10 percent of the monthly power charges until the deficiency specified in the notice is cured, or until 12 months pass. However, Western will not immediately impose a penalty if the customer or its MBA or IRP cooperative requests reconsideration by filing a written appeal under § 905.21.

(2) The surcharge increases to 20 percent for the second 12 months and to 30 percent per year thereafter until the deficiency is cured.

(3) After the first 12 months of the surcharge and instead of imposing any further surcharge, Western may impose a penalty that would reduce the resource delivered under a customer's

long-term firm power contract(s) by 10 percent. Western may impose this resource reduction either:

(i) When it appears to be more effective to ensure customer compliance, or

(ii) When such reduction may be more cost-effective for Western.

(4) The penalty provisions in existing contracts will continue to be in effect and administered and enforced according to applicable contract provisions.

(e) *Assessing and ceasing penalties.* Western will assess the surcharge on the total charges for all power obtained by a customer from Western and will not be limited to surcharges on only firm power sales. When a customer resolves the deficiencies, Western will cease imposing the penalty, beginning with the first full billing period after compliance is achieved.

(f) *Penalties on MBAs and IRP cooperatives.* In situations involving a plan or report submitted by an MBA on behalf of its members where a single member does not comply, Western will impose a penalty upon the MBA on a pro rata basis in proportion to that member's share of the total MBA's power received from Western. In situations involving noncompliance by a participant of an IRP cooperative, Western will impose any applicable penalty directly upon that participant if it has a firm power contract with Western. If the IRP cooperative participant does not have a firm power contract with Western, then Western will impose a penalty upon the participant's MBA on a pro rata basis in proportion to that participant's share of the total MBA's power received from Western.

### § 905.21 What is the administrative appeal process?

(a) *Filing written appeals with Western.* If a customer disagrees with Western's decision on the acceptability of its IRP, small customer plan, minimum investment report or EE/RE report submittal, its compliance with an approved plan or report, or any other compliance issue, the customer may request reconsideration by filing a written appeal with the appropriate Regional Manager. Customers may submit appeals any time such disagreements occur and should be specific as to the nature of the issue, the reasons for the disagreement, and any other pertinent facts the customer believes should be brought to Western's attention. The Regional Manager will respond within 45 days of receiving the appeal. If resolution is not achieved at the Regional Office level, the customer may appeal to the Administrator, who will respond within 30 days of receiving the appeal.

(b) *Alternative dispute resolution.* Upon request, Western will agree to use mutually agreeable alternative dispute resolution procedures, to the extent allowed by law, to resolve issues or disputes relating to compliance with the regulations in this subpart.

(c) *Penalties during appeal.* Western will not impose a penalty while an appeal process is pending. However, if the appeal is unsuccessful for the customer, Western will impose the penalty retroactively from the date the penalty would have been assessed if an appeal had not been filed.

(d) *Meeting other requirements during appeal process.* A written appeal or use of alternative dispute resolution procedures does not suspend other reporting and compliance requirements.

### § 905.22 How does Western periodically evaluate customer actions?

(a) *Periodic review of customer actions.* Western will periodically evaluate customer actions to determine whether they are consistent with the approved IRP or minimum investment report. Small customer plans and EE/RE reports are not subject to this periodic review.

(b) *Reviewing representative samples of plans and reports.* Western will periodically review a representative sample of IRPs and minimum investment reports, and the customer's implementation of the applicable plan or report from each of Western's Regions. The samples will reflect the diverse characteristics and circumstances of the customers that purchase power from Western. These reviews will be in addition to, and separate and apart from, the review of initial and updated IRPs and minimum investment reports to ensure compliance with this subpart.

(c) *Scope of periodic reviews.* Periodic reviews may consist of any combination of review of the customer's annual

IRP progress reports, minimum investment letters, telephone interviews, or on-site visits. Western will document these periodic reviews and may report on the results of the reviews in Western's annual report.

### § 905.23 What are the opportunities for using the Freedom of Information Act to request plan and report data?

IRPs, small customer plans, minimum investment reports and EE/RE reports and associated data submitted to Western are subject to the Freedom of Information Act (FOIA) and may be made available to the public upon request. IRPs must be posted on a customer's publicly available Web site or on Western's Web site. Customers posting their IRPs on their own Web site must notify Western of this decision when they submit their IRP. A hotlink on Western's Web site to IRPs posted on customer Web sites gives interested parties ready access to those IRPs. Western will post on its Web site the IRPs of customers that do not post on their own Web sites. Prior to posting, Western will provide the customer the opportunity to submit its views on whether information contained in the IRP is exempt from the FOIA's mandatory public disclosure requirements. Customers may request confidential treatment of all or part of a submitted document consistent with FOIA exemptions. Western will determine whether particular information is exempt from public access. Western will not disclose to the public information it has determined to be exempt, recognizing that certain competition-related customer information may be proprietary.

[73 FR 35062, June 20, 2008]

### § 905.24 Will Western conduct reviews of this program?

Yes, Western may periodically initiate a public process to review the regulations in this subpart to determine whether they should be revised to reflect changes in technology, needs, or other developments.

## Subpart C—Power Marketing Initiative

### § 905.30 Purpose and applicability.

(a) The Power Marketing Initiative (PMI) provides a framework for marketing Western's long-term firm hydroelectric resources. For covered projects, Western will make a major portion of the resources currently under contract available to existing long-term firm power customers for a period of time beyond the expiration date of their current contracts.

(b) The Western projects covered by this subpart are the Pick-Sloan Missouri Basin Program—Eastern Division and the Loveland Area Projects (LAP). The PMI applies to covered projects to the extent it is consistent with other contractual and legal rights, and subject to any applicable project-specific environmental requirements.

### § 905.31 Term.

Western will extend resource commitments for 20 years from the date existing contracts expire to existing customers with long-term firm power contracts from projects identified in section 905.30(b).

### § 905.32 Resource extensions and resource pool size.

(a) Western will extend a project-specific percentage of the marketable resource, determined to be available at the time future resource extensions begin, to existing customers with long-term firm power contracts. The remaining unextended power will be used to establish project-specific resource pools. An initial level of 96 percent of the marketable resource will be extended for the Pick-Sloan Missouri Basin Program—Eastern Division and the Loveland Area Projects.

(b) At two 5-year intervals after the effective date of the extension to existing customers, Western shall create a project-specific resource pool increment of up to an additional 1 percent of the long-term marketable resource under contract at the time. The size of the additional resource pool increment shall be determined by Western based on consideration of the actual fair-share needs of eligible new customers and other appropriate purposes.

(c) The initial pool percentages shall be applied to the marketable resource determined to be available at the time future resource extensions begin. Subsequent percentages shall be applied to the resource under contract at the time.

(d) The additional resource pool increments shall be established by pro rata withdrawals, on 2 years' notice, from then-existing customers. Withdrawals could be mitigated or delayed if good water conditions exist.

(e) Once the extensions for existing customers and allocations to new customers from the resource pool have been made, additional power resources may become available for various reasons. Any additional available resources will be used as follows:

(1) If power is reserved for new customers but not allocated, or resources are offered but not placed under contract, this power will be offered on a pro rata basis to customers that contributed to the resource pool through application of the extension formula in § 905.33.

(2) If power resources become available as a result of the enhancement of existing generation, project-use load efficiency upgrades, the development of new resources, or resources turned back to Western, Western may elect to use this power to reduce the need to acquire firming resources, retain the power for operational flexibility, sell these resources on a short-term basis, or allocate the power.

(3) If resources become available due to imposition of penalties pursuant to § 905.17, Western may make such resources available within the marketing area to existing customers that are in compliance with subpart B, subject to withdrawal.

### § 905.33 Extension formula.

(a) The amount of power to be extended to an existing customer shall be determined according to this formula:

Customer Contract Rate of Delivery (CROD) today/total project CROD under contract today × project-specific percentage × marketable resource determined to be available at the time future resource extensions begin = CROD extended.

(b) Where contract rates of delivery vary by season, the formula shall be used on a seasonal basis to determine the extended power resource. A similar pro rata approach shall be used for energy extensions.

(c) Determination of the amount of resource available after existing contracts expire, if significantly different from existing resource commitments, shall take place only after an appropriate public process.

(d) The formula set forth in paragraph (a) of this section also should be used to determine the amounts of firm power subject to withdrawal at 5-year intervals after the effective date of the extension to existing customers, except that the percentage used would be up to 1 percent for each of the two withdrawal opportunities, and the formula would use the customer CROD, project CROD and the resource under contract at the time.

### § 905.34 Adjustment provisions.

Western reserves the right to adjust marketable resources committed to all customers with long-term firm power contracts only as required to respond to changes in hydrology and river operations, except as otherwise expressly provided in these regulations. Under contracts that extend resources under this PMI, existing customers shall be given at least 5 years' notice before adjustments are made. New customers may receive less notice. The earliest that any notice under this section shall become effective is the date that existing contractual commitments expire. Any adjustment shall only take place after an appropriate public process. Withdrawals to serve project use and other purposes provided for by contract shall continue to take place based on existing contract/marketing criteria principles.

### § 905.35 New customer eligibility.

(a) Allocations to new customers from the project-specific resource pools established under § 905.32 shall be determined through separate public processes in each project's marketing area. New customers receiving an allocation must execute a long-term firm power contract to receive the allocated power and are required to comply with the

IRP requirements in this part. Contracts with new customers shall expire on the same date as firm power contracts with all other customers of a project.

(b) To be eligible for an allocation, a potential new customer must be a preference entity, as defined in Reclamation law, within the currently established marketing area for a project.

(c) Entities that desire to purchase power from Western for resale to consumers, including municipalities, cooperatives, public utility districts and public power districts, must have utility status. Native American tribes are not subject to this requirement. Utility status means that the entity has responsibility to meet load growth, has a distribution system, and is ready, willing, and able to purchase power from Western on a wholesale basis for resale to retail consumers. To be eligible to apply for power available from a project's initial resource pool, those entities that desire to purchase Western power for resale to consumers must have attained utility status by December 31, 1996, for the Pick-Sloan Missouri Basin Program—Eastern Division, and by September 30, 2000, for the Loveland Area Projects. To be eligible to apply for power from subsequent resource pool increments, these entities must have attained utility status no later than 3 years prior to availability of the incremental addition to the resource pool. Deadlines for attaining utility status for other projects will be established at a later date.

### § 905.36 Marketing criteria.

Western shall retain applicable provisions of existing marketing criteria for projects where resource commitments are extended beyond the current expiration date of long-term firm power sales contracts. Western must retain important marketing plan provisions such as classes of service, marketing area, and points of delivery, to the extent that these provisions are consistent with the PMI. The PMI, eligibility and allocation criteria for potential new customers, retained or amended provisions of existing marketing criteria, the project-specific resource definition, and the size of a project-specific resource pool shall constitute the future marketing plan for each project.

### § 905.37 Process.

Modified contractual language shall be required to place resource extensions under contract. Resource extensions and allocations to new customers from the initial resource pool will take effect when existing contracts expire. These dates are December 31, 2000, for the Pick-Sloan Missouri Basin Program—Eastern Division and September 30, 2004, for the Loveland Area Projects. For the Pick-Sloan Missouri Basin Program—Eastern Division, Western will offer contracts to existing customers for resource extensions no sooner than the effective date of the final regulations. For the Loveland Area Projects, existing contracts provide for potential adjustments to marketable resources in 1999. No contracts will be offered to existing customers for post-2004 Loveland Area Projects resources until the analysis of potential resource adjustments in 1999 has been completed and any adjustments are implemented. Existing power sales contracts require that this analysis be completed by 1996.

## Subpart D—Energy Services

### § 905.40 Technical assistance.

Western shall establish a program that provides technical assistance to customers to conduct integrated resource planning, implement applicable IRPs and small customer plans, and otherwise comply with the requirements of these regulations.

## Subpart E—Final Principles of Integrated Resource Planning for Western Resource Acquisition

SOURCE: 79 FR 56481, Sept. 22, 2014, unless otherwise noted.

### § 905.50 Resource acquisition principles.

Western's resource acquisition activities will be determined by project-specific power marketing plans, hydropower production capability, and the application of the following principles of IRP:

(a) Western will consider a full range of resource options, both supply-side and demand-side, as well as renewable resource options.

(b) On a project-by-project basis, Western, through a public process involving interested stakeholders will develop criteria to be used in evaluating power resource alternatives.

(c) Evaluation criteria will address cost, environmental impact, dependability, dispatchability, risk, diversity, and the ability to verify demand-side alternatives. Evaluation criteria will be reviewed as the need for resources changes or when long-term commitments to purchase power expire.

(d) Evaluation criteria will be consistent with Western's power marketing policy, which states that Federal power is to be marketed in such a manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles. The policy, found in Delegation Order No. 00–037.00A, is derived from statutes authorizing the sale of power from both Department of the Army and Department of the Interior hydroelectric projects. These statutes include section 5 of the Flood Control Act of 1944, 16 U.S.C. 825(s) and section 9(c) of the Reclamation Project Act of 1939.

(e) Resource acquisition planning will be consistent with power marketing plans and associated contractual obligations.

(f) Resource acquisition decisions will be documented and made available to Western's power customers and the public.

### § 905.51 Transmission planning principles.

Western's transmission planning is conducted to assess the capability of the Federal transmission system to provide adequate and reliable electric service to its customers and the interconnected power grid. These planning efforts occur as part of its participation in regional and sub-regional planning entities as well as Western's Open Access Transmission Tariff.

# PART 950—STANDBY SUPPORT FOR CERTAIN NUCLEAR PLANT DELAYS

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## Subpart E—Audit and Investigations and Other Provisions

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950.42 Disclosure.

AUTHORITY: 42 U.S.C. 2201, 42 U.S.C. 7101 *et seq.*, and 42 U.S.C. 16014

SOURCE: 71 FR 46325, Aug. 11, 2006, unless otherwise noted.

## Subpart A—General Provisions

### § 950.1 Purpose.

The purpose of this part is to facilitate the construction and full power operation of new advanced nuclear facilities by providing risk insurance for certain delays attributed to the Nuclear Regulatory Commission regulatory process or to litigation.

### § 950.2 Scope and applicability.

This part sets forth the policies and procedures for the award and administration of Standby Support Contracts between the Department and sponsors of new advanced nuclear facilities.

### § 950.3 Definitions.

For the purposes of this part:

*Act* means the Energy Policy Act of 2005.

*Advanced nuclear facility* means any nuclear facility the reactor design for which is approved after December 31, 1993, by the Nuclear Regulatory Commission (and such design or a substantially similar design of comparable capacity was not approved on or before that date).

*Available indemnification* means $500 million with respect to the initial two reactors and $250 million with respect to the subsequent four reactors.

*Claims administrator* means the official in the Department of Energy responsible for the administration of the Standby Support Contracts, including the responsibility to approve or disapprove claims submitted by a sponsor for payment of covered costs under the Standby Support Contract.

*Combined license* means a combined construction and operating license (COL) for an advanced nuclear facility issued by the Commission.

*Commencement of construction* means the point in time when a sponsor initiates the pouring of safety-related concrete for the reactor building.

*Commission* means the Nuclear Regulatory Commission (NRC).

*Conditional Agreement* means a contractual agreement between the Department and a sponsor under which the Department will execute a Standby Support Contract with the sponsor if and only if the sponsor is one of the first six sponsors to satisfy the conditions precedent to execution of a Standby Support Contract, and if funding and other applicable contractual, statutory and regulatory requirements are satisfied.

*Construction* means the construction activities related to the advanced nuclear facility encompassed in the time period after commencement of construction and before the initiation of fuel load for the advanced nuclear facility.

*Covered cost* means:

(1) Principal or interest on any debt obligation financing an advanced nuclear facility (but excluding charges due to a borrower's failure to meet a debt obligation unrelated to the delay); and

(2) Incremental costs that are incurred as a result of covered delay.

*Covered delay* means a delay in the attainment of full power operation of an advanced nuclear facility caused by a covered event, as defined by this section.

*Covered event* means an event that may result in a covered delay due to:

(1) The failure of the Commission to comply with schedules for review and approval of inspections, tests, analyses and acceptance criteria established under the combined license;

(2) The conduct of pre-operational hearings by the Commission for the advanced nuclear facility; or

(3) Litigation that delays the commencement of full power operations of the advanced nuclear facility.

*Department* means the United States Department of Energy.

*Full power operation* means the point at which the sponsor first synchronizes the advanced nuclear facility to the electrical grid.

*Grant account* means the account established by the Secretary that receives appropriations or non-Federal funds in an amount sufficient to cover the amount of incremental costs for which indemnification is available under a Standby Support Contract.

*Incremental costs* means the incremental difference between:

(1) The fair market price of power purchased to meet the contractual supply agreements that would have been met by the advanced nuclear facility but for a covered delay; and

(2) The contractual price of power from the advanced nuclear facility subject to the delay.

*Initial two reactors* means the first two reactors covered by Standby Support Contracts that receive a combined license and commence construction.

*Litigation* means adjudication in Federal, State, local or tribal courts, including appeals of Commission decisions related to the combined license process to such courts, but excluding administrative litigation that occurs at the Commission related to the combined license process.

*Loan cost* means the net present value of the estimated cash flows of:

(1) Payments by the government to cover defaults and delinquencies, interest subsidies, or other payments; and

(2) Payments to the government including origination and other fees, penalties and recoveries, as outlined under the Federal Credit Reform Act of 1990.

*Pre-operational hearing* means any Commission hearing that is provided for in 10 CFR part 52, after issuance of the combined license.

*Program account* means the account established by the Secretary that receives appropriations or loan guarantee fees in an amount sufficient to cover the loan costs.

*Program administrator* means the Department official authorized by the Secretary to represent the Department in the administration and management of the Standby Support Program, including negotiating with and entering into a Conditional Agreement or a Standby Support Contract with a sponsor.

*Related party* means the sponsor's parent company, a subsidiary of the sponsor, or a subsidiary of the parent company of the sponsor.

*Secretary* means the Secretary of Energy or a designee.

*Sponsor* means a person whose application for a combined license for an advanced nuclear facility has been docketed by the Commission.

*Standby Support Contract* means the contract that, when entered into by a sponsor and the Program Administrator pursuant to section 638 of the Energy Policy Act of 2005 after satisfaction of the conditions in § 950.12 and any other applicable contractual, statutory and regulatory requirements, establishes the obligation of the Department to compensate covered costs in the event of a covered delay subject to the terms and conditions specified in the Standby Support Contract.

*Standby Support Program* means the program established by section 638 of the Act as administered by the Department of Energy.

*Subsequent four reactors* means the next four reactors covered by Standby Support Contracts, after the initial two reactors, which receive a combined license and commence construction.

*System-level construction schedule* means an electronic critical path method schedule identifying the dates and durations of plant systems installation (but excluding details of components or parts installation), sequences and interrelationships, and milestone dates from commencement of construction through full power operation, using software acceptable to the Department.

## Subpart B—Standby Support Contract Process

### § 950.10 Conditional agreement.

(a) *Purpose*. The Department and a sponsor may enter into a Conditional Agreement. The Department will enter into a Standby Support Contract with the first six sponsors to satisfy the specified conditions precedent for a Standby Support Contract if and only if all funding and other contractual, statutory and regulatory requirements have been satisfied.

(b) *Eligibility*. A sponsor is eligible to enter into a Conditional Agreement with the Program Administrator after the sponsor has submitted to the Department the following information but before the sponsor receives approval of the combined license application from the Commission:

(1) An electronic copy of the combined license application docketed by the Commission pursuant to 10 CFR part 52, and if applicable, an electronic copy of the design certification or early site permit, or environmental report referenced or included with the sponsor's combined license application;

(2) A summary schedule identifying the projected dates of construction, testing, and full power operation;

(3) A detailed business plan that includes intended financing for the project including the credit structure and all sources and uses of funds for the project, the most recent private credit rating or other similar credit analysis for project related covered financing, and the projected cash flows for all debt obligations of the advanced nuclear facility which would be covered under the Standby Support Contract;

(4) The sponsor's estimate of the amount and timing of the Standby Support payments for debt service under covered delays; and

(5) The estimated dollar amount to be allocated to the sponsor's covered costs for principal or interest on the debt obligation of the advanced nuclear facility and for incremental costs, including whether these amounts would be different if the advanced nuclear facility is one of the initial two reactors or one of the subsequent four reactors.

(c) The Program Administrator shall enter into a Conditional Agreement with a sponsor upon a determination by the Department that the sponsor is eligible for a Conditional Agreement, the information provided by the sponsor under paragraph (b) of this section is accurate and complete, and the Conditional Agreement is consistent with applicable laws and regulations.

EFFECTIVE DATE NOTE: At 71 FR 46325, Aug. 11, 2006, § 950.10 was revised, effective Sept. 11, 2006. Paragraph (b) of this text contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

### § 950.11 Terms and conditions of the Conditional Agreement.

(a) *General.* Each Conditional Agreement shall include a provision specifying that the Program Administrator and the sponsor will enter into a Standby Support Contract provided that the sponsor is one of the first six sponsors to fulfill the conditions precedent specified in § 950.12, subject to certain funding requirements and limitations specified in § 950.12 and any other applicable contractual, statutory and regulatory requirements.

(b) *Allocation of Coverage.* Each Conditional Agreement shall include a provision specifying the amount of coverage to be allocated under the Standby Support Contract to cover principal or interest costs and to cover incremental costs, including a provision on whether the allocation shall be different if the advanced nuclear facility is one of the initial two reactors or one of the subsequent four reactors, subject to paragraphs (c) and (d) of this section. A sponsor may elect to allocate 100 percent of the coverage to either the Program Account or the Grant Account.

(c) *Funding.* Each Conditional Agreement shall contain a provision that the Program Account or Grant Account shall be funded in advance of execution of the Standby Support Contract and in the following manner, subject to the conditions of paragraphs (d) and (e) of this section. Under no circumstances will the amount of the coverage for payments of principal or interest under a Standby Support Contract exceed 80 percent of the total of the financing guaranteed under that Contract.

(1) The Program Account shall receive funds appropriated to the Department, loan guarantee fees, or a combination of appropriated funds and loan guarantee fees that are in an amount equal to the loan costs associated with the amount of principal or interest covered by the available indemnification. Loan costs may not be paid from the proceeds of debt guaranteed or funded by the Federal government. The parties shall specify in the Conditional Agreement the anticipated amount or anticipated percentage of the total funding in the Program Account to be contributed by appropriated funds to the Department, by the sponsor, by a non-federal source, or by a combination of these funding sources. Covered costs paid through the Program Account are backed by the full faith and credit of the United States.

(2) The Grant Account shall receive funds appropriated to the Department, funds from a sponsor, funds from a non-Federal source, or a combination of appropriated funds and funds from the sponsor or other non-Federal source, in an amount equal to the incremental

costs. The parties shall specify in the Conditional Agreement the anticipated amount or anticipated percentage of the total funding in the Grant Account to be contributed by appropriated funds to the Department, by the sponsor, by a non-Federal source, or by a combination of these funding sources.

(d) *Reconciliation*. Each Conditional Agreement shall include a provision that the sponsor shall provide no later than ninety (90) days prior to execution of a Standby Support Contract sufficient information for the Program Administrator to recalculate the loan costs and the incremental costs associated with the advanced nuclear facility, taking into account whether the sponsor's advanced nuclear facility is one of the initial two reactors or the subsequent four reactors.

(e) *Limitations*. Each Conditional Agreement shall contain a provision that limits the Department's contribution of Federal funding to the Program Account or the Grant Account to only those amounts, if any, that are appropriated to the Department in advance of the Standby Support Contract for the purpose of funding the Program Account or Grant Account. In the event the amount of appropriated funds to the Department for deposit in the Program Account or Grant Account is not sufficient to result in an amount equal to the full amount of the loan costs or incremental costs resulting from the allocation of coverage under the Conditional Agreement pursuant to 950.11(b), the sponsor shall no later than sixty (60) days prior to execution of the Standby Support Contract:

(1) Notify the Department that it shall not execute a Standby Support Contract; or

(2) Notify the Department that it shall provide the anticipated contributions to the Program Account or Grant Account as specified in the Conditional Agreement pursuant to 950.11(c)(1). The sponsor shall have the option to provide additional funds to the Program Account or Grant Account up to the amount equal to the full amount of loan costs or incremental costs. In the event the sponsor does not provide sufficient additional funds to fund the Program Account or the Grant Account in an amount equal to the full amount of loan costs or incremental costs, then the amounts of coverage available under the Standby Support Contract shall be reduced to reflect the amounts deposited in the Program Account or Grant Account. If the sponsor elects less than the full amount of coverage available under the law, then the sponsor shall not have recourse against, and the Department is not liable for, any claims for an amount of covered costs in excess of that reduced amount of coverage or the amount deposited in the Grant Account upon execution of the Standby Support Contract, notwithstanding any other provision of law.

(f) *Termination of Conditional Agreements*. Each Conditional Agreement shall include a provision that the Conditional Agreement remains in effect until such time as:

(1) The sponsor enters into a Standby Support Contract with the Program Administrator;

(2) The sponsor has commenced construction on an advanced nuclear facility and has not entered into a Standby Support Contract with the Program Administrator within thirty (30) days after commencement of construction;

(3) The sponsor notifies the Program Administrator in writing that it wishes to terminate the Conditional Agreement, thereby extinguishing any rights or obligations it may have under the Conditional Agreement;

(4) The Program Administrator has entered into Standby Support Contracts that cover three different reactor designs, and the Conditional Agreement is for an advanced nuclear facility of a different reactor design than those covered under existing Standby Support Contracts; or

(5) The Program Administrator has entered into six Standby Support Contracts.

### § 950.12 Standby Support Contract Conditions.

(a) *Conditions Precedent*. If Program Administrator has not entered into six Standby Support Contracts, the Program Administrator shall enter into a Standby Support Contract with the sponsor, consistent with applicable statutes and regulations and subject to the conditions set forth in paragraphs

(b) and (c) of this section, upon a determination by the Department that all the conditions precedent to a Standby Support Contract have been fulfilled, including that the sponsor has:

(1) A Conditional Agreement with the Department, consistent with this subpart;

(2) A combined license issued by the Commission;

(3) Documentation that it possesses all Federal, State, or local permits required by law to commence construction;

(4) Documentation that it has commenced construction of the advanced nuclear facility;

(5) Documented coverage of insurance required for the project by the Commission and lenders;

(6) Paid any required fees into the Program Account and the Grant Account, as set forth in the Conditional Agreement and paragraph (b) of this section;

(7) Provided to the Program Administrator, no later than ninety (90) days prior to execution of the contract, the sponsor's detailed schedule for completing the inspections, tests, analyses and acceptance criteria in the combined license and informing the Commission that the acceptance criteria have been met; and the sponsor's proposed schedule for review of such inspections, tests, analyses and acceptance criteria by the Commission, consistent with § 950.14(a) of this part and which the Department will evaluate and approve; and

(8) Provided to the Program Administrator, no later than ninety (90) days prior to execution of the contract, a detailed systems-level construction schedule that includes a schedule identifying projected dates of construction, testing and full power operation of the advanced nuclear facility.

(9) Provided to the Program Administrator, no later than ninety (90) days prior to the execution of the contract, a detailed and up-to-date plan of financing for the project including the credit structure and all sources and uses of funds for the project, and the projected cash flows for all debt obligations of the advanced nuclear facility.

(b) *Funding*. No later than thirty (30) days prior to execution of the contract, and consistent with section 638(b)(2)(C), funds in amounts determined pursuant to § 950.11(e) have been made available and shall be deposited in the Program Account or the Grant Account respectively.

(c) *Limitations*. The Department shall not enter into a Standby Support Contract, if:

(1) *Program Account*. The contract provides coverage of principal or interest costs for which the loan costs exceed the amount of funds deposited in the Program Account; or

(2) *Grant Account*. The contract provides coverage of incremental costs that exceed the amount of funds deposited in the Grant Account.

(d) *Cancellation by Abandonment*. (1) If the Program Administrator cancels a Standby Support Contract for abandonment pursuant to 950.13(f)(1), the Program Administrator may re-execute a Standby Support Contract with a sponsor other than a sponsor or that sponsor's assignee with whom the Department had a cancelled contract, provided that such replacement Standby Support Contract is executed in accordance with the terms and conditions set forth in this part, and shall be deemed to be one of the subsequent four reactors under this part.

(2) Not more than two Standby Support Contracts may be re-executed in situations involving abandonment and cancellation by the Program Administrator.

EFFECTIVE DATE NOTE: At 71 FR 46325, Aug. 11, 2006, § 950.12 was revised, effective Sept. 11, 2006. Paragraph (a) of this text contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

### § 950.13 Standby Support Contract: General provisions.

(a) *Purpose*. Each Standby Support Contract shall include a provision setting forth an agreement between the parties in which the Department shall provide compensation for covered costs incurred by a sponsor for covered events that result in a covered delay of full power operation of an advanced nuclear facility.

(b) *Covered facility*. Each Standby Support Contract shall include a provision of coverage only for an advanced nuclear facility which is not a federal entity. Each Standby Support Contract shall also include a provision to specify the advanced nuclear facility to be covered, along with the reactor design, and the location of the advanced nuclear facility.

(c) *Sponsor contribution*. Each Standby Support Contract shall include a provision to specify the amount that a sponsor has contributed to funding each type of account.

(d) *Maximum compensation*. Each Standby Support Contract shall include a provision to specify that the Program Administrator shall not pay compensation under the contract:

(1) In an aggregate amount that exceeds the amount of coverage up to $500 million each for the initial two reactors or up to $250 million each for the subsequent four reactors;

(2) In an amount for principal or interest costs for which the loan costs exceed the amount deposited in the Program Account; and

(3) In an amount for incremental costs that exceed the amount deposited in the Grant Account.

(e) *Term*. Each Standby Support Contract shall include a provision to specify the date at which the contract commences as well as the term of the contract. The contract shall enter into force on the date it has been signed by both the sponsor and the Program Administrator. Subject to the cancellation provisions set forth in paragraph (f) of this section, the contract shall terminate when all claims have been paid up to the full amounts to be covered under the Standby Support Contract, or all disputes involving claims under the contract have been resolved in accordance with subpart D of this part.

(f) *Cancellation provisions*. Each Standby Support Contract shall provide for cancellation in the following circumstances:

(1) If the sponsor abandons construction, and the abandonment is not caused by a covered event or force majeure, the Program Administrator may cancel the Standby Support Contract by giving written notice thereof to the sponsor and the parties have no further rights or obligations under the contract.

(2) If the sponsor does not require continuing coverage under the contract, the sponsor may cancel the Standby Support Contract by giving written notice thereof to the Program Administrator and the parties have no further rights or obligations under the contract.

(3) For such other cause as agreed to by the parties.

(g) *Termination by sponsor*. Each Standby Support Contract shall include a provision that prohibits a sponsor or any related party from executing another Standby Support Contract, if the sponsor elects to terminate its original existing Standby Support Contract, unless the sponsor has cancelled or terminated construction of the reactor covered by its original existing Standby Support Contract.

(h) *Assignment*. Each Standby Support Contract shall include a provision on assignment of a sponsor's rights and obligations under the contract and assignment of payment of covered costs. The Program Administrator shall permit the assignment of payment of covered costs with prior written notice to the Department. The Program Administrator shall permit assignment of rights and obligations under the contract with the Department's prior approval. The sponsor may not assign its rights and obligations under the contract without the prior written approval of the Program Administrator and any attempt to do so is null and void.

(i) *Claims administration*. Each Standby Support Contract shall include a provision to specify a mechanism for administering claims pursuant to the procedures set forth in subpart C of this part.

(j) *Dispute resolution*. Consistent with the Administrative Dispute Resolution Act, each Standby Support Contract shall include a provision to specify a mechanism for resolving disputes pursuant to the procedures set forth in subpart D of this part.

(k) *Re-estimation*. Consistent with the Federal Credit Reform Act (FCRA) of 1990, the sponsor shall provide all needed documentation as required in § 950.12

to allow the Department to annually re-estimate the loan cost needed in the financing account as that term is used in 2 U.S.C. 661a(7) and funded by the Program Account. ''The sponsor is neither responsible for any increase in loan costs, nor entitled to recoup fees for any decrease in loan costs, resulting from the re-estimation conducted pursuant to FCRA.

### § 950.14 Standby Support Contract: Covered events, exclusions, covered delay and covered cost provisions.

(a) *Covered events.* Subject to the exclusions set forth in paragraph (b) of this section, each Standby Support Contract shall include a provision setting forth the type of events that are covered events under the contract. The type of events shall include:

(1) The Commission's failure to review the sponsor's inspections, tests, analyses and acceptance criteria in accordance with the Commission's rules, guidance, audit procedures, or formal opinions, in the case where the Commission has in place any rules, guidance, audit procedures or formal opinions setting schedules for its review of inspections, tests, analyses, and acceptance criteria under a combined license or the sponsor's combined license;

(2) The Commission's failure to review the sponsor's inspections, tests, analyses, and acceptance criteria on the schedule for such review proposed by the sponsor, subject to the Department's review and approval of such schedule, including review of any informal guidance or opinion of the Commission that has been provided to the sponsor or the Department, in the case where the Commission has not provided any rules, guidance, audit procedures or formal Commission opinions setting schedules for review of inspections, tests, analyses and acceptance criteria under a combined license, or under the sponsor's combined license;

(3) The conduct of pre-operational Commission hearings, that are provided for in 10 CFR part 52, after issuance of the combined license; and

(4) Litigation in State, Federal, local, or tribal courts, including appeals of Commission decisions related to an application for a combined license to such courts., and excluding administrative litigation that occurs at the Commission related to the combined license.

(b) *Exclusions.* Each Standby Support Contract shall include a provision setting forth the exclusions from covered costs under the contract, and for which any associated delay in the attainment of full power operations is not a covered delay. The exclusions are:

(1) The failure of the sponsor to take any action required by law, regulation, or ordinance, including but not limited to the following types of events:

(i) The sponsor's failure to comply with environmental laws or regulations such as those related to pollution abatement or human health and the environment;

(ii) The sponsor's re-performance of any inspections, tests, analyses or re-demonstration that acceptance criteria have been met due to Commission non-acceptance of the sponsor's submitted results of inspections, tests, analyses, and demonstration of acceptance criteria;

(iii) Delays attributable to the sponsor's actions to redress any deficiencies in inspections, tests, analyses or acceptance criteria as a result of a Commission disapproval of fuel loading; or

(2) Events within the control of the sponsor, including but not limited to delays attributable to the following types of events:

(i) Project planning and construction problems;

(ii) Labor-management disputes;

(iii) The sponsor's failure to perform inspections, tests, analyses and to demonstrate acceptance criteria are met or failure to inform the Commission of the successful completion of inspections, tests, analyses and demonstration of meeting acceptance criteria in accordance with its schedule; or

(iv) The lack of adequate funding for construction and testing of the advanced nuclear facility.

(3) Normal business risks, including but not limited to the following types of events:

(i) Delays attributable to force majeure events such as a strike or the failure of power or other utility services supplied to the location, or natural

events such as severe weather, earthquake, landslide, mudslide, volcanic eruption, other earth movement, or flood;

(ii) Government action meaning the seizure or destruction of property by order of governmental authority;

(iii) War or military action;

(iv) Acts or decisions, including the failure to act or decide, of any government body (excluding those acts or decisions or failure to act or decide by the Commission that are covered events);

(v) Supplier or subcontractor delays in performance;

(vi) Litigation, whether initiated by the sponsor or another party, that is not a covered event under paragraph (a) of this section; or

(vii) Failure to timely obtain regulatory permits or approvals that are not covered events under paragraph (a) of this section.

(c) *Covered delay*. Each Standby Support Contract shall include a provision for the payment of covered costs, in accordance with the procedures in subpart C of this part for the payment of covered costs, if a covered event(s) is determined to be the cause of delay in attainment of full power operation, provided that:

(1) Under Standby Support Contracts for the subsequent four reactors, covered delay may occur only after the initial 180-day period of delay, and

(2) The sponsor has used due diligence to mitigate, shorten, and end, the covered delay and associated costs covered by the Standby Support Contract.

(d) *Covered costs*. Each Standby Support Contract shall include a provision to specify the type of costs for which the Department shall provide payment to a sponsor for covered delay in accordance with the procedures set forth in subparts C and D of this part. The types of costs shall be limited to either or both, dependent upon the terms of the contract:

(1) The principal or interest on which the loan costs for the Program Account was calculated; and

(2) The incremental costs on which funding for the Grant Account was calculated.

(e) *ITAAC Schedule*. Each Standby Support Contract shall provide for adjustments to the ITAAC review schedule when the parties deem necessary, in the case where the Commission has not provided any rules, guidance, audit procedures or formal Commission opinions setting schedules for review of inspections, tests, analyses and acceptance criteria under a combined license, upon review and approval by the Department and the sponsor. Adjustments to the ITAAC review schedule must be in writing, expressly approved by the Department and the sponsor, and remain in effective for determining covered events unless and until a subsequently issued ITAAC review schedule is approved by the parties.

## Subpart C—Claims Administration Process

### § 950.20 General provisions.

The parties shall include provisions in the Standby Support Contract to specify the procedures and conditions set forth in this subpart for the submission of claims and the payment of covered costs under the Standby Support Contract. A sponsor is required to establish that there is a covered event, a covered delay and a covered cost; the Department is required to establish an exclusion in accordance with § 950.14(b).

### § 950.21 Notification of covered event.

(a) A sponsor shall submit in writing to the Claims Administrator a notification that a covered event has occurred that has delayed the schedule for construction or testing and that may cause covered delay. The sponsor shall submit the notification to the Claims Administrator no later than thirty (30) days of the end of the covered event and contain the following information:

(1) A description and explanation of the covered event, including supporting documentation of the event;

(2) The duration of the delay in the schedule for construction, testing and full power operation, and the schedule for inspections, tests, analyses and acceptance criteria, if applicable;

(3) The sponsor's projection of the duration of covered delay;

(4) A revised schedule for construction, testing and full power operation,

including the dates of system level construction or testing that had been conducted prior to the event; and

(5) A revised inspections, tests, analyses, and acceptance criteria schedule, if applicable, including the dates of Commission review of inspections, tests, analyses, and acceptance criteria that had been conducted prior to the event.

(b) An authorized representative of the sponsor shall sign the notification of a covered event, certify the notification is made in good faith and the covered event is not an exclusion as specified in § 950.14(b), and represent that the supporting information is accurate and complete to the sponsor's knowledge and belief.

### § 950.22 Covered event determination.

(a) *Completeness review*. Upon notification of a covered event from the sponsor, the Claims Administrator shall review the notification for completeness within thirty (30) days of receipt. If the notification is not complete, the Claims Administrator shall return the notification within thirty (30) days of receipt and specify the incomplete information for submission by the sponsor to the Claims Administrator in time for a determination by the Claims Administrator in accordance with paragraph (c) of this section.

(b) *Covered Event Determination*. The Claims Administrator shall review the notification and supporting information to determine whether there is agreement by the Claims Administrator with the sponsor's representation of the event as a covered event (Covered Event Determination) based on a review of the contract conditions for covered events and exclusions.

(1) If the Claims Administrator believes the event is an exclusion as set forth in § 950.14(b), the Claims Administrator shall request within 30 days of receipt of the notification of a covered event information in the sponsor's possession that is relevant to the exclusion. The sponsor shall provide the requested information to the Administrator within 20 days of receipt of the Administrator's request.

(2) The sponsor's failure to provide the requested information in a complete or timely manner constitutes a basis for the Claims Administrator to disagree with the sponsor's covered event notification as provided in paragraph (c) of this section, and to deny a claim for covered costs related to the exclusion as provided in § 950.24 of this part.

(c) *Timing*. The Claims Administrator shall notify the sponsor within sixty (60) days of receipt of the notification whether the Administrator agrees with the sponsor's representation, disagrees with the representation, requires further information, or is an exclusion. If the sponsor disagrees with the Covered Event Determination, the parties shall resolve the dispute in accordance with the procedures set forth in subpart D of this part.

### § 950.23 Claims process for payment of covered costs.

(a) *General*. No more than 120 days of when a sponsor was scheduled to attain full power operation and expects it will incur covered costs, the sponsor may make a claim upon the Department for the payment of its covered costs under the Standby Support Contract. The sponsor shall file a Certification of Covered Costs and thereafter such Supplementary Certifications of Covered Costs as may be necessary to receive payment under the Standby Support Contract for covered costs.

(b) *Certification of Covered Costs*. The Certification of Covered Costs shall include the following:

(1) A Claim Report, including the information specified in paragraph (c) of this section;

(2) A certification by the sponsor that:

(i) The covered costs listed on the Claim Report filed pursuant to this section are losses to be incurred by the sponsor;

(ii) The claims for the covered costs were processed in accordance with appropriate business practices and the procedures specified in this subpart; and

(iii) The sponsor has used due diligence to mitigate, shorten, and end, the covered delay and associated costs covered by the Standby Support Contract.

(c) *Claim Report*. For purposes of this part, a ''Claim Report'' is a report of

information about a sponsor's underlying claims that, in the aggregate, constitute the sponsor's covered costs. The Claim Report shall include, but is not limited to:

(1) Detailed information substantiating the duration of the covered delay;

(2) Detailed information about the covered costs associated with covered delay, including as applicable:

(i) The amount of payment for principal or interest during the covered delay, including the relevant dates of payment, amounts of payment and any other information deemed relevant by the Department, and the name of the holder of the debt, if the debt obligation is held by a Federal agency; or

(ii) The underlying payment during the covered delay related to the incremental cost of purchasing power to meet contractual agreements, including any documentation deemed relevant by the Department to calculate the fair market price of power.

(d) *Supplementary Certification of Covered Cost*. If the total amount of the covered costs due to a sponsor under the Standby Support Contract has not been determined at the time the Certification of Covered Costs has been filed, the sponsor shall file monthly, or on a schedule otherwise determined by the Claims Administrator, Supplementary Certifications of Covered Costs updating the amount of the covered costs owed to the sponsor. Supplementary Certifications of Covered Costs shall include a Claim Report and a certification as described in this section.

(e) *Supplementary information*. In addition to the information required in paragraphs (b) and (c) of this section, the Claims Administrator may request such additional supporting documentation as required to ascertain the allowable covered costs sustained by a sponsor.

EFFECTIVE DATE NOTE: At 71 FR 46325, Aug. 11, 2006, § 950.23 was revised, effective Sept. 11, 2006. This text contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

**§ 950.24 Claims determination for covered costs.**

(a) No later than thirty (30) days from the sponsor's submission of a Certification of Covered Costs, the Claims Administrator shall issue a Claim Determination identifying those claimed costs deemed to be allowable based on an evaluation of:

(1) The duration of covered delay, taking into account contributory or concurrent delays resulting from exclusions from coverage as established by the Claims Administrator in accordance with § 950.22;

(2) The covered costs associated with covered delay, including an assessment of the sponsor's due diligence in mitigating or ending covered costs, as set forth in § 950.23;

(3) Any adjustments to the covered costs, as set forth in § 950.26; and

(4) Other information as necessary and appropriate.

(b) The Claim Determination shall state the Claims Administrator's determination that the claim shall be paid in full, paid in an adjusted amount as deemed allowable by the Claims Administrator, or rejected in full.

(c) Should the Claims Administrator conclude that the sponsor has not supplied the required information in the Certification of Covered Costs or any supporting documentation sufficient to allow reasonable verification of the duration of the covered delay or covered costs, the Claims Administrator shall so inform the sponsor and specify the nature of additional documentation requested, in time for the sponsor to supply supplemental documentation and for the Claims Administrator to issue the Claim Determination.

(d) Should the Claims Administrator find that any claimed covered costs are not allowable or otherwise should be considered excluded costs under the Standby Support Contract, the Claims Administrator shall identify such costs and state the reason(s) for that decision in writing. A determination by the Claims Administrator that an event is an exclusion or that the sponsor has not provided complete or timely information relevant to the exclusion as specified in § 950.22 shall provide a basis for the Claims Administrator to find covered costs are not allowable. If the

parties cannot agree on the covered costs, they shall resolve the dispute in accordance with the requirements in subpart D of this part.

**§ 950.25 Calculation of covered costs.**

(a) The Claims Administrator shall calculate the allowable amount of the covered costs claimed in the Certification of Covered Costs as follows:

(1) *Costs covered through Program Account.* The principal or interest on any debt obligation financing the advanced nuclear facility for the duration of covered delay to the extent the debt obligation was included in the calculation of the loan cost; and

(2) *Costs covered by Grant Account.* The incremental costs calculated for the duration of the covered delay. In calculating the incremental cost of power, the Claims Administrator shall consider:

(i) *Fair Market Price.* The fair market price may be determined by the lower of the two options: The actual cost of the short-term supply contract for replacement power, purchased by the sponsor, during the period of delay, or for each day of replacement power by its day-ahead weighted average index price in $/MWh at the hub geographically nearest to the advanced nuclear facility as posted on the previous day by the Intercontinental Exchange (ICE) or an alternate electronic marketplace deemed reliable by the Department. The daily MWh assumed to be covered is no more than its nameplate capacity multiplied by 24 hours; multiplied by the capacity-weighted U.S. average capacity factor in the previous calendar year, including in the calculation any and all commercial nuclear power units that operated in the United States for any part of the previous calendar year; and multiplied by the average of the ratios of the net generation to the grid for calculating payments to the Nuclear Waste Fund to the nameplate capacity for each nuclear unit included. In addition, the Claims Administrator may consider ''fair market price'' from other published indices or prices at regional trading hubs and bilateral contracts for similar delivered firm power products and the costs incurred, including acquisition costs, to move the power to the contract-specified point of delivery, as well as the provisions of the covered contract regarding replacement power costs for delivery default; and

(ii) *Contractual price of power.* The contractual price of power shall be determined as the daily weighted average price in equivalent $/MWh under a contractual supply agreement(s) for delivery of firm power that the sponsor entered into prior to any covered event. The daily MWh assumed to be covered is no more than the advanced nuclear facility's nameplate capacity multiplied by 24 hours; multiplied by the capacity-weighted U.S. average capacity factor in the previous calendar year, including in the calculation any and all commercial nuclear power units that operated in the United States for any part of the previous calendar year; and multiplied by the average of the ratios of the net generation to the grid for calculating payments to the Nuclear Waste Fund to the nameplate capacity for each nuclear unit included.

**§ 950.26 Adjustments to claim for payment of covered costs.**

(a) *Aggregate amount of covered costs.* The sponsor's aggregate amount of covered costs shall be reduced by any amounts that are determined to be either excluded or not covered.

(b) *Amount of Department share of covered costs.* The Department share of covered costs shall be adjusted as follows:

(1) *No excess recoveries.* The share of covered costs paid by the Department to a sponsor shall not be greater than the limitations set forth in § 950.27(d).

(2) *Reduction of amount payable.* The share of covered costs paid by the Department shall be reduced by the appropriate amount consistent with the following:

(i) *Excluded claims.* The Department shall ensure that no payment shall be made for costs resulting from events that are not covered under the contract as specified in § 950.14; and

(ii) *Sponsor due diligence.* Each sponsor shall ensure and demonstrate that it uses due diligence to mitigate, shorten, and to end the covered delay and associated costs covered by the Standby Support Contract.

**§ 950.27 Conditions for payment of covered costs.**

(a) *General.* The Department shall pay the covered costs associated with a Standby Support Contract in accordance with the Claim Determination issued by the Claims Administrator under § 950.24 or the Final Claim Determination under § 950.34, provided that:

(1) Neither the sponsor's claim for covered costs nor any other document submitted to support the underlying claim is fraudulent, collusive, made in bad faith, dishonest or otherwise designed to circumvent the purposes of the Act and regulations;

(2) The losses submitted for payment are within the scope of coverage issued by the Department under the terms and conditions of the Standby Support Contract as specified in subpart B of this part; and

(3) The procedures specified in this subpart have been followed and all conditions for payment have been met.

(b) *Adjustments to Payments.* In the event of fraud or miscalculation, the Department may subsequently adjust, including an adjustment obligating the sponsor to repay any payment made under paragraph (a) of this section.

(c) *Suspension of payment for covered costs.* If the Department paid or is paying covered costs under paragraph (a) of this section, and subsequently makes a determination that a sponsor has failed to meet any of the requirements for payment specified in paragraph (a) of this section for a particular covered cost, the Department may suspend payment of covered costs pending investigation and audit of the sponsor's covered costs.

(d) *Amount payable.* The Department's share of compensation for the initial two reactors is 100 percent of the covered costs of covered delay but not more than the coverage in the contract or $500 million per contract, whichever is less; and for the subsequent four reactors, not more than 50 percent of the covered costs of the covered delay but not more than the coverage in the contract or $250 million per contract, whichever is less. The Department's share of compensation for the subsequent four reactors is further limited in that the payment is for covered costs of a covered delay that occurs after the initial 180-day period of covered delay.

**§ 950.28 Payment of covered costs.**

(a) *General.* The Department shall pay to a sponsor covered costs in accordance with this subpart and the terms of the Standby Support Contract. Payment shall be made in such installments and on such conditions as the Department determines appropriate. Any overpayments by the Department of the covered costs shall be offset from future payments to the sponsor or returned by the sponsor to the Department within forty-five (45) days. If there is a dispute, then the Department shall pay the undisputed costs and defer payment of the disputed portion upon resolution of the dispute in accordance with the procedures in subpart D of this part. If the covered costs include principal or interest owed on a loan made or guaranteed by a Federal agency, the Department shall instead pay that Federal agency the covered costs, rather than the sponsor.

(b) *Timing of Payment.* The sponsor may receive payment of covered costs when:

(1) The Department has approved payment of the covered cost as specified in this subpart; and

(2) The sponsor has incurred and is obligated to pay the costs for which payment is requested.

(c) *Payment process.* The covered costs shall be paid to the sponsor designated on the Certification of Covered Costs required by § 950.23, or to the sponsor's assignee as permitted by § 950.13(h). A sponsor that requests payment of the covered costs must receive payment through electronic funds transfer.

## Subpart D—Dispute Resolution Process

**§ 950.30 General.**

The parties, i.e., the sponsor and the Department, shall include provisions in the Standby Support Contract that specify the procedures set forth in this subpart for the resolution of disputes under a Standby Support Contract. Sections 950.31 and 950.32 address disputes involving covered events; §§ 950.33 and 950.34 address disputes involving

covered costs; and §§ 950.36 and 950.37 address disputes involving other contract matters.

### § 950.31 Covered event dispute resolution.

(a) If a sponsor disagrees with the Covered Event Determination rendered in accordance with § 950.22 and cannot resolve the dispute informally with the Claims Administrator, then the disagreement is subject to resolution as follows:

(1) A sponsor shall, within thirty (30) days of receipt of the Covered Event Determination, deliver to the Claims Administrator written notice of a sponsor's rebuttal which sets forth reasons for its disagreement, including any expert opinion obtained by the sponsor.

(2) After submission of the sponsor's rebuttal to the Claims Administrator, the parties shall have fifteen (15) days during which time they must informally and in good faith participate in mediation to attempt to resolve the disagreement before instituting the process under paragraph (b) of this section. If the parties reach agreement through mediation, the agreement shall constitute a Final Determination on Covered Events.

(3) The parties shall jointly select the mediator(s). The parties shall share equally the cost of the mediation.

(b) If the parties cannot resolve the disagreement through mediation under the timeframe established under paragraph (a)(2) of this section and the sponsor elects to continue pursuing the claim, the sponsor shall within ten (10) days submit any remaining issues in controversy to the Civilian Board of Contract Appeals (Civilian Board) or its successor, for resolution by an Administrative Judge of the Civilian Board utilizing the Civilian Board's Summary Binding Decision procedure. The parties shall abide by the procedures of the Civilian Board for Summary Binding Decision. The parties agree that the decision of the Civilian Board constitutes a Final Determination on Covered Events.

### § 950.32 Final determination on covered events.

(a) If the parties reach a Final Determination on Covered Events through mediation, or Summary Binding Decision as set forth in this subpart, the Final Determination on Covered Events is a final settlement of the issue, made by the sponsor and the Program Administrator. The sponsor, and the Department, may rely on, and neither may challenge, the Final Determination on Covered Events in any future Certification of Covered Costs related to the covered event that was the subject of that Initial Determination.

(b) The parties agree that no appeal shall be taken or further review sought, and that the Final Determination on Covered Events is final, conclusive, non-appealable and may not be set aside, except for fraud.

### § 950.33 Covered costs dispute resolution.

(a) If a sponsor disagrees with the Claim Determination rendered in accordance with § 950.24 and cannot resolve the dispute informally with the Claims Administrator, then the parties agree that any dispute must be resolved as follows:

(1) A sponsor shall, within thirty (30) days of receipt of the Claim Determination, deliver to the Claims Administrator in writing notice of and reasons for its disagreement (Sponsor's Rebuttal), including any expert opinion obtained by the sponsor.

(2) After submission of the sponsor's rebuttal to the Claims Administrator, the parties have fifteen (15) days to informally and in good faith participate in mediation to resolve the disagreement before instituting the process under paragraph (b) of this section. If the parties reach agreement through mediation, the agreement shall constitute a Final Claim Determination.

(3) The parties shall jointly select the mediator(s). The parties shall share equally the cost of the mediator(s).

(b) If the parties cannot resolve the disagreement through mediation under the timeframe established under paragraph (a)(2) of this section, any remaining issues in controversy shall be submitted by the sponsor within ten (10) days to the Civilian Board or its successor, for resolution by an Administrative Judge of the Civilian Board utilizing the Board's Summary Binding

Decision procedure. The parties shall abide by the procedures of the Civilian Board for Summary Binding Decision. The parties agree that the decision of the Civilian Board shall constitute a Final Claim Determination.

### § 950.34 Final claim determination.

(a) If the parties reach a Final Claim Determination through mediation, or Summary Binding Decision as set forth in this subpart, the Final Claim Determination is a final settlement of the issue, made by the sponsor and the Program Administrator.

(b) The parties agree that no appeal shall be taken or further review sought and that the Final Claim Determination is final, conclusive, non-appealable, and may not be set aside, except for fraud.

### § 950.35 Payment of final claim determination.

Once a Final Claim Determination is reached by the methods set forth in this subpart, the parties intend that such a Final Claim Determination shall constitute a final settlement of the claim and the sponsor may immediately present to the Department a Final Claim Determination for payment.

### § 950.36 Other contract matters in dispute.

(a) If the parties disagree over terms or conditions of the Standby Support Contract other than disagreements related to covered events or covered costs, then the parties shall engage in informal dispute resolution as follows:

(1) The parties shall engage in good faith efforts to resolve the dispute after written notification by one party to the other that there is a contract matter in dispute.

(2) If the parties cannot reach a resolution of the matter in disagreement within thirty (30) days of the written notification of the matter in dispute, then the parties shall have fifteen (15) days during which time they must informally and in good faith participate in mediation to attempt to resolve the disagreement before instituting the process under paragraph (b) of this section. If the parties reach agreement through mediation, the agreement shall constitute a Final Agreement on the matter in dispute.

(3) The parties shall jointly select the mediator(s). The parties shall share equally the cost of the mediation.

(b) If the parties cannot resolve the disagreement through mediation under the timeframe established in paragraph (a)(2) of this section and either party elects to continue pursuing the disagreement, that party shall within ten (10) days submit any remaining issues in controversy to the Civilian Board or its successor, for resolution by an Administrative Judge of the Civilian Board utilizing the Civilian Board's Summary Binding Decision procedure. The parties shall abide by the procedures of the Civilian Board for Summary Binding Decision. The parties shall agree that the decision of the Civilian Board constitutes a Final Decision on the matter in dispute.

### § 950.37 Final agreement or final decision.

(a) If the parties reach a Final Agreement on a contract matter in dispute through mediation, or a Final Decision on a contract matter in dispute through a Summary Binding Decision as set forth in this subpart, the Final Agreement or Final Decision is a final settlement of the contract matter in dispute, made by the sponsor and the Program Administrator.

(b) The parties agree that no appeal shall be taken or further review sought, and that the Final Agreement or Final Decision is final, conclusive, non-appealable and may not be set aside, except for fraud.

## Subpart E—Audit and Investigations and Other Provisions

### § 950.40 General.

The parties shall include a provision in the Standby Support Contract that specifies the procedures in this subpart for the monitoring, auditing and disclosure of information under a Standby Support Contract.

### § 950.41 Monitoring/Auditing.

The Department has the right to audit any and all costs associated with the Standby Support Contracts. Auditors who are employees of the United

States government, who are designated by the Secretary of Energy or by the Comptroller General of the United States, shall have access to, and the right to examine, at the sponsor's site or elsewhere, any pertinent documents and records of a sponsor at reasonable times under reasonable circumstances. The Secretary may direct the sponsor to submit to an audit by a public accountant or equivalent acceptable to the Secretary.

### § 950.42 Disclosure.

Information received from a sponsor by the Department may be available to the public subject to the provision of 5 U.S.C. 552, 18 U.S.C. 1905 and 10 CFR part 1004; provided that:

(a) Subject to the requirements of law, information such as trade secrets, commercial and financial information that a sponsor submits to the Department in writing shall not be disclosed without prior notice to the sponsor in accordance with Department regulations concerning the public disclosure of information. Any submitter asserting that the information is privileged or confidential should appropriately identify and mark such information.

(b) Upon a showing satisfactory to the Program Administrator that any information or portion thereof obtained under this regulation would, if made public, divulge trade secrets or other proprietary information, the Department may not disclose such information.

## PART 960—GENERAL GUIDELINES FOR THE PRELIMINARY SCREENING OF POTENTIAL SITES FOR A NUCLEAR WASTE REPOSITORY

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AUTHORITY: 42 U.S.C. 2011 *et seq.*, 42 U.S.C. 7101 *et seq.*, 42 U.S.C. 10101 *et seq.*

SOURCE: 49 FR 47752, Dec. 6, 1984, unless otherwise noted.

## Subpart A—General Provisions

### §960.1 Applicability.

These guidelines were developed in accordance with the requirements of Section 112(a) of the Nuclear Waste Policy Act of 1982 for use by the Secretary of Energy in evaluating the suitability of sites. The guidelines will be used for suitability evaluations and determinations made pursuant to Section 112(b). The guidelines set forth in this part are intended to complement the requirements set forth in the Act, 10 CFR part 60, and 40 CFR part 191. The DOE recognizes NRC jurisdiction for the resolution of differences between the guidelines and 10 CFR part 60. The guidelines have received the concurrence of the NRC. The DOE contemplates revising the guidelines from time to time, as permitted by the Act, to take into account revisions made to the above regulations and to otherwise update the guidelines as necessary. The DOE will submit the revisions to the NRC and obtain its concurrence before issuance.

[49 FR 47752, Dec. 6, 1984, as amended at 66 FR 57334, Nov. 14, 2001]

### §960.2 Definitions.

As used in this part:

*Accessible environment* means the atmosphere, the land surface, surface water, oceans, and the portion of the lithosphere that is outside the controlled area.

*Act* means the Nuclear Waste Policy Act of 1982, as amended.

*Active fault* means a fault along which there is recurrent movement, which is usually indicated by small, periodic displacements or seismic activity.

*Affected area* means either the area of socioeconomic impact or the area of environmental impact, each of which will vary in size among potential repository sites.

*Affected Indian tribe* means any Indian tribe (1) within whose reservation boundaries a repository for radioactive waste is proposed to be located or (2) whose federally defined possessory or usage rights to other lands outside the reservation's boundaries arising out of congressionally ratified treaties may be substantially and adversely affected by the locating of such a facility: *Provided*, That the Secretary of the Interior finds, upon the petition of the appropriate governmental officials of the tribe, that such effects are both substantial and adverse to the tribe.

*Affected State* means any State that (1) has been notified by the DOE in accordance with Section 116(a) of the Act as containing a potentially acceptable site; (2) contains a candidate site for site characterization or repository development; or (3) contains a site selected for repository development.

*Application* means the act of making a finding of compliance or noncompliance with the qualifying or disqualifying conditions specified in the guidelines of subparts C and D of this part.

*Aquifer* means a formation, a group of formations, or a part of a formation that contains sufficient saturated permeable material to yield significant quantities of water to wells and springs.

*Barrier* means any material or structure that prevents or substantially delays the movement of water or radionuclides.

*Candidate site* means an area, within a geohydrologic setting, that is recommended by the Secretary of Energy under section 112 of the Act for site characterization, approved by the President under section 112 of the Act for characterization, or undergoing site characterization under section 113 of the Act.

*Closure* means final backfilling of the remaining open operational areas of the underground facility and boreholes

after the termination of waste emplacement, culminating in the sealing of shafts.

*Confining unit* means a body of impermeable or distinctly less permeable material stratigraphically adjacent to one or more aquifers.

*Containment* means the confinement of radioactive waste within a designated boundary.

*Controlled area* means a surface location, to be marked by suitable monuments, extending horizontally no more than 10 kilometers in any direction from the outer boundary of the underground facility, and the underlying subsurface, which area has been committed to use as a geologic repository and from which incompatible activities would be prohibited before and after permanent closure.

*Cumulative releases of radionuclides* means the total number of curies of radionuclides entering the accessible environment in any 10,000-year period, normalized on the basis of radiotoxicity in accordance with 40 CFR part 191. The peak cumulative release of radionuclides refers to the 10,000-year period during which any such release attains its maximum predicted value.

*Decommissioning* means the permanent removal from service of surface facilities and components neceessary for preclosure operations only, after repository closure, in accordance with regulatory requirements and environmental policies.

*Determination* means a decision by the Secretary that a site is suitable for site characterization for the selection of a repository, consistent with applications of the guidelines of subparts C and D of this part in accordance with the provisions set forth in subpart B of this part.

*Disposal* means the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive material with no foreseeable intent of recovery, whether or not such emplacement permits the recovery of such waste, and the isolation of such waste from the accessible environment.

*Disqualifying condition* means a condition that, if present at a site, would eliminate that site from further consideration.

*Disturbed zone* means that portion of the controlled area, excluding shafts, whose physical or chemical properties are predicted to change as a result of underground facility construction or heat generated by the emplaced radioactive waste such that the resultant change of properties could have a significant effect on the preformance of the geologic repository.

*DOE* means the U.S. Department of Energy or its duly authorized representatives.

*Effective porosity* means the amount of interconnected pore space and fracture openings available for the transmission of fluids, expressed as the ratio of the volume of interconnected pores and openings to the volume of rock.

*Engineered-barrier system* means the manmade components of a disposal system designed to prevent the release of radionuclides from the underground facility or into the geohydrologic setting. Such term includes the radioactive-waste form, radioactive-waste canisters, materials placed over and around such canisters, any other components of the waste package, and barriers used to seal penetrations in and into the underground facility.

*Environmental assessment* means the document required by section 112(b)(1)(E) of the Nuclear Waste Policy Act of 1982.

*Environmental impact statement* means the document required by section 102(2)(C) of the National Environmental Policy Act of 1969. Sections 114(a) and 114(f) of the Nuclear Waste Policy Act of 1982 include certain limitations on the National Environmental Policy Act requirements as they apply to the preparation of an environmental impact statement for the development of a repository at a characterized site.

*EPA* means the U.S. Environmental Protection Agency or its duly authorized representatives.

*Evaluation* means the act of carefully examining the characteristics of a site in relation to the requirements of the qualifying or disqualifying conditions specified in the guidelines of subparts C and D. Evaluation includes the consideration of favorable and potentially adverse conditions.

*Excepted* means assumed to be probable or certain on the basis of existing evidence and in the absence of significant evidence to the contrary.

*Expected repository performance* means the manner in which the repository is predicted to function, consideration those conditions, processes, and events that are likely to prevail or may occur during the time period of interest.

*Facility* means any structure, system, or system component, including engineered barriers, created by the DOE to meet repository-performance or functional objectives.

*Fault* means a fracture or a zone of fractures along which there has been displacement of the side relative to one another parallel to the fracture or zone of fractures.

*Faulting* means the process of fracturing and displacement that produces a fault.

*Favorable condition* means a condition that, though not necessary to qualify a site, is presumed, if present, to enhance confidence that the qualifying condition of a particular guideline can be met.

*Finding* means a conclusion that is reached after evaluation.

*Geohydrologic setting* means the system of geohydrologic units that is located within a given geologic setting.

*Geohydrologic system* means the geohydrologic units within a geologic setting, including any recharge, discharge, interconnections between units, and any natural or man-induced processes or events that could affect ground-water flow within or among those units.

*Geohydrologic unit* means an aquifer, a confining unit, or a combination of aquifers and confining units comprising a framework for a reasonably distinct geohydrologic system.

*Geologic repository* means a system, requiring licensing by the NRC, that is intended to be used, or may be used, for the disposal of radioactive waste in excavated geologic media. A geologic repository includes (1) the geologic-repository operations area and (2) the portion of the geologic setting that provides isolation of the radioactive waste and is located within the controlled area.

*Geologic-repository operations area* means a radioactive-waste facility that is part of the geologic repository, including both surface and subsurface areas and facilities where waste-handling activities are conducted.

*Geologic setting* means the geologic, hydrologic, and geochemical systems of the region in which a geologic-repository operations area is or may be located.

*Geomorphic processes* means geologic processes that are responsible for the general configuration of the Earth's surface, including the development of present landforms and their relationships to underlying structures, and are responsible for the geologic changes recorded by these surface features.

*Ground water* means all subsurface water as distinct from surface water.

*Ground-water flux* means the rate of ground-water flow per unit area of porous or fractured media measured perpendicular to the direction of flow.

*Ground-water sources* means aquifers that have been or could be economically and technologically developed as sources of water in the foreseeable future.

*Ground-water travel time* means the time required for a unit volume of ground water to travel between two locations. The travel time is the length of the flow path divided by the velocity, where velocity is the average ground-water flux passing through the cross-sectional area of the geologic medium through which flow occurs, perpendicular to the flow direction, divided by the effective porosity along the flow path. If discrete segments of the flow path have different hydrologic properties, the total travel time will be the sum of the travel times for each discrete segment.

*Guideline* means a statement of policy or procedure that may include, when appropriate, qualifying, disqualifying, favorable, or potentially adverse conditions as specified in the ''guidelines.''

*Guidelines* means part 960 of title 10 of the Code of Federal Regulations—General Guidelines for the Recommendation of Sites for Nuclear Waste Repositories.

*High-level radioactive waste* means (1) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations and (2) other highly radioactive material that the NRC, consistent with existing law, determines by rule requires permanent isolation.

*Highly populated area* means any incoporated place (recognized by the decennial reports of the U.S. Bureau of the Census) of 2,500 or more persons, or any census designated place (as defined and delineated by the Bureau) of 2,500 or more persons, unless it can be demonstrated that any such place has a lower population density than the mean value for the continental United States. Counties or county equivalents, whether incorporated or not, are specifically excluded form the definition of ''place'' as used herein.

*Host rock* means the geologic medium in which the waste is emplaced, specifically the geologic materials that directly encompass and are in close proximity to the underground facility.

*Hydraulic conductivity* means the volume of water that will move through a medium in a unit of time under a unit hydraulic gradient through a unit area measured perpendicular to the direction of flow.

*Hydraulic gradient* means a change in the static pressure of ground water, expressed in terms of the height of water above a datum, per unit of distance in a given direction.

*Hydrologic process* means any hydrologic phenomenon that exhibits a continuous change in time, whether slow or rapid.

*Hydrologic properties* means those properties of a rock that govern the entrance of water and the capacity to hold, transmit, and deliver water, such as porosity, effective porosity, specific retention, permeability, and the directions of maximum and minimum permeabilities.

*Igneous activity* means the emplacement (intrusion) of molten rock material (magma) into material in the Earth's crust or the expulsion (extrusion) of such material onto the Earth's surface or into its atmosphere or surface water.

*Isolation* means inhibiting the transport of radioactive material so that the amounts and concentrations of this material entering the accessible environment will be kept within prescribed limits.

*Likely* means processing or displaying the qualities, characteristics, or attributes that provide a reasonable basis for confidence that what is expected indeed exists or will occur.

*Lithosphere* means the solid part of the Earth, including any ground water contained within it.

*Member of the public* means any individual who is not engaged in operations involving the management, storage, and disposal of radioactive waste. A worker so engaged is a member of the public except when on duty at the geologic-repository operations area.

*Mitigation* means: (1) Avoiding the impact altogether by not taking a certain action or parts of an action; (2) minimizing impacts by limiting the degree or magnitude of the action and its implementation; (3) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (4) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; or (5) compensating for the impact by replacing or providing substitute resources or environments.

*Model* means a conceptual description and the associated mathematical representation of a system, subsystem, component, or condition that is used to predict changes from a baseline state as a function of internal and/or external stimuli and as a function of time and space.

*NRC* means the U.S. Nuclear Regulatory Commission or its duly authorized representatives.

*Perched ground water* means unconfined ground water separated from an underlying body of ground water by an unsaturated zone. Its water table is a perched water table. Perched ground water is held up by a perching bed whose permeability is so low that water percolating downward through it is not able to bring water in the underlying unsaturated zone above atmospheric pressure.

*Performance assessment* means any analysis that predicts the behavior of a system or system component under a given set of constant and/or transient conditions. Performance assessments will include estimates of the effects of uncertainties in data and modeling.

*Permanent closure* is synonymous with ''closure.''

*Postclosure* means the period of time after the closure of the geologic repository.

*Potentially acceptable site* means any site at which, after geologic studies and field mapping but before detailed geologic data gathering, the DOE undertakes preliminary drilling and geophysical testing for the definition of site location.

*Potentially adverse condition* means a condition that is presumed to detract from expected system performance, but further evaluation, additional data, or the identification of compensating or mitigating factors may indicate that its effect on the expected system performance is acceptable.

*Preclosure* means the period of time before and during the closure of the geologic repository.

*Pre-waste-emplacement* means before the authorization of repository construction by the NRC.

*Qualifying condition* means a condition that must be satisfied for a site to be considered acceptable with respect to a specific guideline.

*Quaternary Period* means the second period of the Cenozoic Era, following the Tertiary, beginning 2 to 3 million years ago and extending to the present.

*Radioactive waste* or ''waste'' means high-level radioactive waste and other radioactive materials, including spent nuclear fuel, that are received for emplacement in a geologic repository.

*Radioactive-waste facility* means a facility subject to the licensing and related regulatory authority of the NRC pursuant to Sections 202(3) and 202(4) of the Energy Reorganization Act of 1974 (88 Stat. 1244).

*Radionuclide retardation* means the process or processes that cause the time required for a given radionuclide to move between two locations to be greater than the ground-water travel time, because of physical and chemical interactions between the radionuclide and the geohydrologic unit through which the radionuclide travels.

*Reasonably available technology* means technology which exists and has been demonstrated or for which the results of any requisite development, demonstration, or confirmatory testing efforts before application will be available within the required time period.

*Repository* is synonymous with ''geologic repository.''

*Repository closure* is synonymous with ''closure.''

*Repository construction* means all excavation and mining activities associated with the construction of shafts, shaft stations, rooms, and necessary openings in the underground facility, preparatory to radioactive-waste emplacement, as well as the construction of necessary surface facilities, but excluding site-characterization activities.

*Repository operation* means all of the functions at the site leading to and involving radioactive-waste emplacement in the underground facility, including receiving, transportation, handling, emplacement, and, if necessary, retrieval.

*Repository support facilities* means all permanent facilities constructed in support of site-characterization activities and repository construction, operation, and closure activities, including surface structures, utility lines, roads, railroads, and similar facilities, but excluding the underground facility.

*Restricted area* means any area access to which is controlled by the DOE for purposes of protecting individuals from exposure to radiation and radioactive materials before repository closure, but not including any areas used as residential quarters, although a separate room or rooms in a residential building may be set apart as a restricted area.

*Retrieval* means the act of intentionally removing radioactive waste before repository closure from the underground location at which the waste had been previously emplaced for disposal.

*Saturated zone* means that part of the Earth's crust beneath the water table in which all voids, large and small, are ideally filled with water under pressure greater than atmospheric.

*Secretary* means the Secretary of Energy.

*Site* means a potentially acceptable site or a candidate site, as appropriate, until such time as the controlled area has been established, at which time the site and the controlled area are the same.

*Site characterization* means activities, whether in the laboratory or in the field, undertaken to establish the geologic conditions and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.

*Siting* means the collection of exploration, testing, evaluation, and decision-making activities associated with the process of site screening, site nomination, site recommendation, and site approval for characterization or repository development.

*Source term* means the kinds and amounts of radionuclides that make up the source of a potential release of radioactivity.

*Spent nuclear fuel* means fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.

*Surface facilities* means repository support facilities within the restricted area.

*Surface water* means any waters on the surface of the Earth, including fresh and salt water, ice, and snow.

*System* means the geologic setting at the site, the waste package, and the repository, all acting together to contain and isolate the waste.

*System performance* means the complete behavior of a repository system in response to the conditions, processes, and events that may affect it.

*Tectonic* means of, or pertaining to, the forces involved in, or the resulting structures or features of, *tectonics*.

*Tectonics* means the branch of geology dealing with the broad architecture of the outer part of the Earth, that is, the regional assembling of structural or deformational features and the study of their mutual relations, origin, and historical evolution.

*To the extent practicable* means the degree to which an intended course of action is capable of being effected in a manner that is reasonable and feasible within a framework of constraints.

*Underground facility* means the underground structure and the rock required for support, including mined openings and backfill materials, but excluding shafts, boreholes, and their seals.

*Unsaturated zone* means the zone between the land surface and the water table. Generally, water in this zone is under less than atmospheric pressure, and some of the voids may contain air or other gases at atmospheric pressure. Beneath flooded areas or in perched water bodies, the water pressure locally may be greater than atmospheric.

*Waste form* means the radioactive waste materials and any encapsulating or stabilizing matrix.

*Waste package* means the waste form and any containers, shielding, packing, and other sorbent materials immediately surrounding an individual waste container.

*Water table* means that surface in a body of ground water at which the water pressure is atmospheric.

[49 FR 47752, Dec. 6, 1984, as amended at 66 FR 57334, Nov. 14, 2001]

## Subpart B—Implementation Guidelines

### § 960.3 Implementation guidelines.

The guidelines of this subpart establish the procedure and basis for applying the postclosure and the preclosure guidelines of subparts C and D, respectively, to evaluations of the suitability of sites. As may be appropriate during the siting process, this procedure requires consideration of a variety of geohydrologic settings and rock types, regionality, and environmental impacts and consultation with affected States, affected Indian tribes, and Federal agencies.

[49 FR 47752, Dec. 6, 1984, as amended at 66 FR 57334, Nov. 14, 2001]

### §960.3–1 Siting provisions.

The siting provisions establish the framework for the implementation of the siting process specified in §960.3–2. Sections 960.3–1–1 and 960.3–1–2 require that consideration be given to sites situated in different geohydrologic settings and different types of host rock, respectively. These diversity guidelines are intended to balance the process of site selection by requiring consideration of a variety of geologic conditions and media, and thereby enhance confidence in the technical suitability of sites selected for the development of repositories. As required by the Act, §960.3–1–3 specifies consideration of a regional distribution of repositories after recommendation of a site for development of the first repository. Section 960.3–1–4 describes the evidence that is required to support siting decisions. Section 960.3–1–5 establishes the basis for site evaluations against the postclosure and the preclosure guidelines of subparts C and D during the various phases of the siting process.

### §960.3–1–1 Diversity of geohydrologic settings.

Consideration shall be given to a variety of geohydrologic settings in which sites for the development of repositories may be located. To the extent practicable, sites recommended as candidate sites for characterization shall be located in different geohydrologic settings.

### §960.3–1–2 Diversity of rock types.

Consideration shall be given to a variety of geologic media in which sites for the development of repositories may be located. To the extent practicable, and with due consideration of candidate sites characterized previously or approved for such characterization if the circumstances apply, sites recommended as candidate sites for characterization shall have different types of host rock.

### §960.3–1–3 Regionality.

In making site recommendations for repository development after the site for the first repository has been recommended, the Secretary shall give due consideration to the need for, and the advantages of, a regional distribution in the siting of subsequent repositories. Such consideration shall take into account the proximity of sites to locations at which waste is generated or temporarily stored and at which other repositories have been or are being developed.

### §960.3–1–4 Evidence for siting decisions.

The siting process involves a sequence of four decisions: The identification of potentially acceptable sites; the nomination of sites as suitable for characterization; the recommendation of sites as candidate sites for site characterization; and after the completion of site characterization and nongeologic data gathering, the recommendation of a candidate site for the development of a repository. Each of these decisions will be supported by the evidence specified below.

#### §960.3–1–4–1 Site identification as potentially acceptable.

The evidence for the identification of a potentially acceptable site shall be the types of information specified in appendix IV of this part. Such evidence will be relatively general and less detailed than that required for the nomination of a site as suitable for characterization. Because the gathering of detailed geologic data will not take place until after the recommendation of a site for characterization, the levels of information may be relatively greater for the evaluation of those guidelines in subparts C and D that pertain to surface-identifiable factors for such site. The sources of information shall include the literature in the public domain and the private sector, when available, and will be supplemented in some instances by surface investigations and conceptual engineering design studies conducted by the DOE. Geologic surface investigations may include the mapping of identifiable rock masses, fracture and joint characteristics, and fault zones. Other surface investigations will consider the aquatic and terrestrial ecology; water rights and uses; topography; potential offsite hazards; natural resource concentrations; national or State protected resources; existing transportation systems; meteorology and climatology;

population densities, centers, and distributions; and general socioeconomic characteristics.

### § 960.3–1–4–2 Site nomination for characterization.

The evidence required to support the nomination of a site as suitable for characterization shall include the types of information specified in appendix IV of this part and shall be contained or referenced in the environmental assessments to be prepared in accordance with the requirements of the Act. The source of this information shall include the literature and related studies in the public domain and the private sector, when available, and various meteorological, environmental, socioeconomic, and transportation studies conducted by the DOE in the affected area; exploratory boreholes in the region of such site, including lithologic logging and hydrologic and geophysical testing of such boreholes, laboratory testing of core samples for the evaluation of geochemical and engineering rock properties, and chemical analyses of water samples from such boreholes; surface investigations, including geologic mapping and geophysical surveys, and compilations of satellite imagery data; in situ or laboratory testing of similar rock types under expected repository conditions; evaluations of natural and man-made analogs of the repository and its subsystems, such as geothermally active areas, underground excavations, and case histories of socioeconomic cycles in areas that have experienced intermittent large-scale construction and industrial activities; and extrapolations of regional data to estimate site-specific characteristics and conditions. The exact types and amounts of information to be collected within the above categories, including such details as the specific types of hydrologic tests, combinations of geophysical tests, or number of exploratory boreholes, are dependent on the site-specific needs for the application of the guidelines of subparts C and D, in accordance with the provisions of this subpart and the application requirements set forth in appendix III of this part. The evidence shall also include those technical evaluations that use the information specified above and that provide additional bases for evaluating the ability of a site to meet the qualifying conditions of the guidelines of subparts C and D. In developing the above-mentioned bases for evaluation, as may be necessary, assumptions that approximate the characteristics or conditions considered to exist at a site, or expected to exist or occur in the future, may be used. These assumptions will be realistic but conservative enough to underestimate the potential for a site to meet the qualifying condition of a guideline; that is, the use of such assumptions should not lead to an exaggeration of the ability of a site to meet the qualifying condition.

### § 960.3–1–4–3 Site recommendation for characterization.

The evidence required to support the recommendation of a site as a candidate site for characterization shall consist of the evaluations and data contained or referenced in the environmental assessment for such site, unless the Secretary certifies that such information, in the absence of additional preliminary borings or excavations, will not be adequate to satisfy applicable requirements of the Act.

### § 960.3–1–5 Basis for site evaluations.

(a) Evaluations of individual sites and comparisons between and among sites shall be based on the postclosure and preclosure guidelines specified in subparts C and D of this part, respectively. Except for screening for potentially acceptable sites as specified in § 960.3–2–1, such evaluations shall place primary significance on the postclosure guidelines and secondary significance on the preclosure guidelines, with each set of guidelines considered collectively for such purposes. Both the postclosure and the preclosure guidelines consist of a system guideline or guidelines and corresponding groups of technical guidelines.

(b) The postclosure guidelines of subpart C of this part contain eight technical guidelines in one group. The preclosure guidelines of subpart D of this part contain eleven technical guidelines separated into three groups that represent, in decreasing order of importance, preclosure radiological

safety; environment, socioeconomics, and transportation; and ease and cost of siting, construction, operation, and closure.

(c) The relative significance of any technical guideline to its corresponding system guideline is site specific. Therefore, for each technical guideline, an evaluation of compliance with the qualifying condition shall be made in the context of the collection of system elements and the evidence related to that guideline, considering on balance the favorable conditions and the potentially adverse conditions identified at a site. Similarly, for each system guideline, such evaluation shall be made in the context of the group of technical guidelines and the evidence related to that system guideline.

(d) For purposes of recommending sites for development as repositories, such evidence shall include analyses of expected repository performance to assess the likelihood of demonstrating compliance with 40 CFR part 191 and 10 CFR part 60, in accordance with §960.4–1. A site shall be disqualified at any time during the siting process if the evidence supports a finding by the DOE that a disqualifying condition exists or the qualifying condition of any system or technical guideline cannot be met.

(e) Comparisons between and among sites shall be based on the system guidelines, to the extent practicable and in accordance with the levels of relative significance specified above for the postclosure and the preclosure guidelines. Such comparisons are intended to allow comparative evaluations of sites in terms of the capabilities of the natural barriers for waste isolation and to identify innate deficiencies that could jeopardize compliance with such requirements. If the evidence for the sites is not adequate to substantiate such comparisons, then the comparisons shall be based on the groups of technical guidelines under the postclosure and the preclosure guidelines, considering the levels of relative significance appropriate to the postclosure and the preclosure guidelines and the order of importance appropriate to the subordinate groups within the preclosure guidelines. Comparative site evaluations shall place primary importance on the natural barriers of the site. In such evaluations for the postclosure guidelines of subpart C of this part, engineered barriers shall be considered only to the extent necessary to obtain realistic source terms for comparative site evaluations based on the sensitivity of the natural barriers to such realistic engineered barriers. For a better understanding of the potential effects of engineered barriers on the overall performance of the repository system, these comparative evaluations shall consider a range of levels in the performance of the engineered barriers. That range of performance levels shall vary by at least a factor of 10 above and below the engineered-barrier performance requirements set forth in 10 CFR 60.113, and the range considered shall be identical for all sites compared. The comparisons shall assume equivalent engineered barrier performance for all sites compared and shall be structured so that engineered barriers are not relied upon to compensate for deficiencies in the geologic media. Furthermore, engineered barriers shall not be used to compensate for an inadequate site; mask the innate deficiencies of a site; disguise the strengths and weaknesses of a site and the overall system; and mask differences between sites when they are compared. Releases of different radionuclides shall be combined by the methods specified in appendix A of 40 CFR part 191.

(f) The comparisons specified in paragraph (e) of this section shall consist of two comparative evaluations that predict radionuclide releases for 100,000 years after repository closure and shall be conducted as follows. First, the sites shall be compared by means of evaluations that emphasize the performance of the natural barriers at the site. Second, the sites shall be compared by means of evaluations that emphasize the performance of the total repository system. These second evaluations shall consider the expected performance of the repository system; be based on the expected performance of waste packages and waste forms, in compliance with the requirements of 10 CFR 60.113, and on the expected hydrological and geochemical conditions at each site;

and take credit for the expected performance of all other engineered components of the repository system. The comparison of isolation capability shall be one of the significant considerations in the recommendation of sites for the development of repositories. The first of the two comparative evaluations specified in the paragraph (e) of this section shall take precedence unless the second comparative evaluation would lead to substantially different recommendations. In the latter case, the two comparative evaluations shall receive comparable consideration. Sites with predicted isolation capabilities that differ by less than a factor of 10, with similar uncertainties, may be assumed to provide equivalent isolation.

[66 FR 57334, Nov. 14, 2001]

### § 960.3–2 Siting process.

The siting process begins with site screening for the identification of potentially acceptable sites. This process was completed for purposes of the first repository before the enactment of the Act, and the identification of such sites was made after enactment in accordance with the provisions of section 116(a) of the Act. The screening process for the identification of potentially acceptable sites for the second and subsequent repositories shall be conducted in accordance with the requirements specified in § 960.3–2–1 of this subpart. The nomination of any site as suitable for characterization shall follow the process specified in § 960.3–2–2, and such nomination shall be accompanied by an environmental assessment as specified in section 112(b)(1)(E) of the Act. The recommendation of sites as candidate sites for characterization shall be accomplished in accordance with the requirements specified in § 960.3–2–3.

[49 FR 47752, Dec. 6, 1984, as amended at 66 FR 57335, Nov. 14, 2001]

### § 960.3–2–1 Site screening for potentially acceptable sites.

To identify potentially acceptable sites for the development of other than the first repository, the process shall begin with site-screening activities that consider large land masses that contain rock formations of suitable depth, thickness, and lateral extent and have structural, hydrologic, and tectonic features favorable for waste containment and isolation. Within those large land masses, subsequent site-screening activities shall focus on successively smaller and increasingly more suitable land units. This process shall be developed in consultation with the States that contain land units under consideration. It shall be implemented in a sequence of steps that first applies the applicable disqualifying conditions to eliminate land units on the basis of the evidence specified in § 960.3–1–4–1 and in accordance with the application requirements set forth in appendix III of this part. After the disqualifying conditions have been applied, the favorable and potentially adverse conditions, as identified for each remaining land unit, shall be evaluated. The presence of favorable conditions shall favor a given land unit, while the presence of potentially adverse conditions shall penalize that land unit. Recognizing that favorable conditions and potentially adverse conditions for different technical guidelines can exist in the same land unit, the DOE shall seek to evaluate the composite favorability of each land unit. Land units that, in the aggregrate, exhibit potentially adverse conditions shall be deferred in favor of land units that exhibit favorable conditions. The siting provisions that require diversity of geohydrologic settings and rock types and consideration of regionality, as specified in §§ 960.3–1–1, 960.3–1–2, and 960.3–1–3, respectively, may be used to discriminate between land units and to establish the range of options in site screening. To identify a site as potentially acceptable, the evidence shall support a finding that the site is not disqualified in accordance with the application requirements set forth in appendix III of this part and shall support the decision by the DOE to proceed the continued investigation of the site on the basis of the favorable and potentially adverse conditions identified to date. In continuation of the screening process after such identification and before site nomination, the DOE may defer from further consideration land units or potentially acceptable sites or portions thereof on

the basis of additional information or by the application of the siting provisions for diversity of geohydrologic settings, diversity of rock types, and regionality (§§ 960.3–1–1, 960.3–1–2, and 960.3–1–3, respectively). The deferral of potentially acceptable sites will be described in the environmental assessments that accompany the nomination of at least five sites as suitable for characterization. In order to identify potentially acceptable sites for the second and subsequent repositories, the Secretary shall *first* identify the State within which the site is located in a decision-basis document that describes the process and the considerations that led to the identification of such site and that has been issued previously in draft for review and comment by such State. *Second,* when such document is final, the Secretary shall notify the Governor and the legislature of that State and the tribal council of any affected Indian tribe of the potentially acceptable site.

### § 960.3–2–2 Nomination of sites as suitable for characterization.

From the sites identified as potentially acceptable, the Secretary shall nominate at least five sites determined suitable for site characterization for the selection of each repository site. For the second repository, at least three of the sites shall not have been nominated previously. Any site nominated as suitable for characterization for the first repository, but not recommended as a candidate site for characterization, may not be nominated as suitable for characterization for the second repository. The nomination of a site as suitable for characterization shall be accompanied by an environmental assessment as specified in section 112(b)(1)(E) of the Act. Such nomination shall be based on evaluations in accordance with the guidelines of this part, and the bases and relevant details of those evaluations and of the decision processes involved therein shall be contained in the environmental assessment for the site in the manner specified in this subpart. The evidence required to support such evaluations and siting decisions is specified in § 960.3–1–4–2.

#### § 960.3–2–2–1 Evaluation of all potentially acceptable sites.

*First,* in considering sites for nomination, each of the potentially acceptable sites shall be evaluated on the basis of the disqualifying conditions specified in the technical guidelines of subparts C and D, in accordance with the application requirements set forth in appendix III of this part. This evaluation shall support a finding by the DOE that such sites is not disqualified.

#### § 960.3–2–2–2 Selection of sites within geohydrologic settings.

*Second,* the siting provision requiring diversity of geohydrologic settings, as specified in § 960.3–1–1, shall be applied to group all potentially acceptable sites according to their geohydrologic settings. *Third,* for those geohydrologic settings that contain more than one potentially acceptable site, the preferred site shall be selected on the basis of a comparative evaluation of all potentially acceptable sites in that setting. This evaluation shall consider the distinguishing characteristics displayed by the potentially acceptable sites within the setting and the related guidelines from subparts C and D. That is, the appropriate guidelines shall be selected primarily on the basis of the kinds of evidence among sites for which distinguishing characteristics can be identified. Such comparative evaluation shall be made on the basis of the qualifying conditions for those guidelines, considering, on balance, the favorable conditions and potentially adverse conditions identified at each site. Due consideration shall also be given to the siting provisions specifying the basis for site evaluations in § 960.3–1–5, to the extent practicable, and diversity of rock types in § 960.3–1–2, if the circumstances so apply. If less than five geohydrologic settings are available for consideration, the above process shall be used to select two or more preferred sites from those settings that contain more than one potentially acceptable site, as required to obtain the number of sites to be nominated as suitable for characterization. For purposes of the second and subsequent repositories, due consideration shall also be given to the siting provision for regionality as specified in

§ 960.3–1–3. *Fourth,* each preferred site within a geohydrologic setting shall be evaluated as to whether such site is suitable for the development of a repository under the qualifying condition of each guideline specified in subparts C and D that does not require site characterization as a prerequisite for the application of such guideline. The guidelines considered appropriate to this evaluation have been selected on the basis of their exclusion under the definition of site characterization as specified in § 960.2. Although the final application of these guidelines, in accordance with the provisions set forth in appendix III of this part, does not require geologic data from site-characterization activities, such application will require additional data beyond those specified in appendix IV of this part, which will be obtained concurrently with site characterization. Such guidelines include those specified in § 960.4–2–8–2 (Site Ownership and Control) of subpart C; §§ 960.5–1(a)(1) and 960.5–1(a)(2) of subpart D (preclosure system guidelines for radiological safety and environmental quality, socioeconomics, and transportation); and §§ 960.5–2–1 through 960.5–2–7 of subpart D (Population Density and Distribution, Site Ownership and Control, Meteorology, Offsite Installations and Operations, Environmental Quality, Socioeconomic Impacts, and Transportation). This evaluation shall consider on balance those favorable conditions and potentially adverse conditions identified as such at a preferred site in relation to the qualifying condition of each such guideline. For each such guideline, this evaluation shall focus on the suitability of the site for the development of a repository by considering the activities from the start of site characterization through decommissioning and shall support a finding by the DOE in accordance with the application requirements set forth in appendix III of this part. *Fifth,* each preferred site within a geohydrologic setting shall be evaluated as to whether such site is suitable for site characterization under the qualifying conditions of those guidelines specified in subparts C and D that require characterization (i.e., subsurface geologic, hydrologic, and geochemical data gathering). Such guidelines include those specified in § 960.4–1(a) (postclosure system guideline); §§ 960.4–2–1 through 960.4–2–8–1 of subpart C (Geohydrology, Geochemistry, Rock Characteristics, Climatic Changes, Erosion, Dissolution, Tectonics, Human Interference, and Natural Resources); § 960.5–1(a)(3) (preclosure system guideline for ease and cost of siting, construction, operation, and closure); and § 960.5–2–8 through 960.5–2–11 of subpart D (Surface Characteristics, Rock Characteristics, Hydrology, and Tectonics). This evaluation shall consider on balance the favorable conditions and potentially adverse conditions identified as such at a preferred site in relation to the qualifying condition of each such guideline. For each such guideline, this evaluation shall focus on the suitability of the site for characterization and shall support a finding by the DOE in accordance with the application requirements set forth in appendix III of this part.

### § 960.3–2–2–3 Comparative evaluation of all sites proposed for nomination.

*Sixth,* for those potentially acceptable sites to be proposed for nomination, as determined by the process specified in § 960.3–2–2–2, a reasonable comparative evaluation of each such site with all other such sites shall be made. For each site and for each guideline specified in subparts C and D, the DOE shall summarize the evaluations and findings specified under § 960.3–2–2–1 and under the fourth and fifth provisions of § 960.3–2–2–2. Each such summary shall allow comparisons to be made among sites on this basis of each guideline.

### § 960.3–2–2–4 The environmental assessment.

To document the process specified above, and in compliance with section 112(b)(1)(E) of the Act, an environmental assessment shall be prepared for each site proposed for nomination as suitable for characterization. Each such environmental assessment shall describe the decision process by which such site was proposed for nomination as described in the preceding six steps

and shall contain or reference the evidence that supports such process according to the requirements of § 960.3–1–4–2 and appendix IV of this part. As specified in the Act, each environmental assessment shall include an evaluation of the effects of the site-characterization activities at the site on public health and safety and the environment; a discussion of alternative activities related to site characterization that may be taken to avoid such impact; and an assessment of the regional and local impacts of locating a repository at the site. The draft environmental assessment for each site proposed for nomination as suitable for characterization shall be made available by the DOE for public comment after the Secretary has notified the Governor and legislature of the State in which the site is located, and the governing body of the affected Indian tribe where such site is located, of such impending availability.

**§ 960.3–2–2–5 Formal site nomination.**

After the final environmental assessments have been prepared, the Secretary shall nominate at least five sites that he determines suitable for site characterization for the selection of a repository site, and, in so doing, he shall cause to have published in the FEDERAL REGISTER a notice specifying the sites so nominated and announcing the availability of the final environmental assessments for such sites. This determination by the Secretary shall be based on the final environmental assessments for such sites, including, in particular, consideration of the available evidence, evaluations, and the resultant findings for the guidelines of subparts C and D so specified under the fourth and fifth provisions of § 960.3–2–2–2. Before nominating a site, the Secretary shall notify the Governor and legislature of the State in which the site is located, and the governing body of the affected Indian tribe where such site is located, of such nomination and the basis for such nomination.

**§ 960.3–2–3 Recommendation of sites for characterization.**

After the nomination of at least five sites as suitable for site characterization for the selection of the first repository, the Secretary shall recommend in writing to the President not less than three candidate sites for such characterization. The recommendation decision shall be based on the available geophysical, geologic, geochemical, and hydrologic data; other information; associated evaluations and findings reported in the environmental assessments accompanying the nominations; and the considerations specified below, unless the Secretary certifies that such available data will not be adequate to satisfy applicable requirements of the Act in the absence of further preliminary borings or excavations. On the basis of the evidence and in accordance with the siting provision specifying the basis for site evaluations in § 960.3–1–5, the sites nominated as suitable for characterization shall be considered as to their order of preference as candidate sites for characterization. Subsequently, the siting provisions specifying diversity of geohydrologic settings, diversity of rock types, and, after the first repository, consideration of regionality in §§ 960.3–1–1, 960.3–1–2, and 960.3–1–3, respectively, shall be considered to determine a final order of preference for the characterization of such sites. Considering this order of preference together with the available siting alternatives specified in the Act, the sites recommended as candidate sites for characterization shall offer, on balance, the most advantageous combination of characteristics and conditions for the successful development of repositories at such sites. The process for the recommendation of sites as candidate sites for characterization for the selection of any subsequent repository shall be the same as that specified above for the first repository.

**§ 960.3–3 Consultation.**

The DOE shall provide to designated officials of the affected States and to the governing bodies of any affected Indian tribe timely and complete information regarding determinations or plans made with respect to the siting, site characterization, design, development, construction, operation, closure, decommissioning, licensing, or regulation of a repository. Written responses to written requests for information

from the designated officials of affected States or affected Indian tribes will be provided within 30 days after receipt of the written requests. In performing any study of an area for the purpose of determining the suitability of such area for the development of a repository, the DOE shall consult and cooperate with the Governor and the legislature of an affected State and the governing body of an affected Indian tribe in an effort to resolve concerns regarding public health and safety, environmental impacts, socioeconomic impacts, and technical aspects of the siting process. After notifying affected States and affected Indian tribes that potentially acceptable sites have been identified, or that a site has been approved for characterization, the DOE shall seek to enter into binding written agreements with such affected States or affected Indian tribes in accordance with the requirements of the Act. The DOE shall also consult, as appropriate, with other Federal agencies.

### § 960.3–4 Environmental impacts.

Environmental impacts shall be considered by the DOE throughout the site characterization, site selection, and repository development process. The DOE shall mitigate significant adverse environmental impacts, to the extent practicable, during site characterization and repository construction, operation, closure, and decommissioning.

## Subpart C—Postclosure Guidelines

### § 960.4 Postclosure guidelines.

The guidelines in this subpart specify the factors to be considered in evaluating and comparing sites on the basis of expected repository performance after closure. The postclosure guidelines are separated into a system guideline and eight technical guidelines. The system guideline establishes waste containment and isolation requirements that are based on NRC and EPA regulations. These requirements must be met by the repository system, which contains natural barriers and engineered barriers. The engineered barriers will be designed to complement the natural barriers, which provide the primary means for waste isolation.

### § 960.4–1 System guideline.

(a) *Qualifying Condition*. The geologic setting at the site shall allow for the physical separation of radioactive waste from the accessible environment after closure in accordance with the requirements of 40 CFR part 191, subpart B, as implemented by the provisions of 10 CFR part 60. The geologic setting at the site will allow for the use of engineered barriers to ensure compliance with the requirements of 40 CFR part 191 and 10 CFR part 60 (see appendix I of this part).

### § 960.4–2 Technical guidelines.

The technical guidelines in this subpart set forth qualifying, favorable, potentially adverse, and, in five guidelines, disqualifying conditions on the characteristics, processes, and events that may influence the performance of a repository system after closure. The favorable conditions and the potentially adverse conditions under each guideline are *not* listed in any assumed order of importance. Potentially adverse conditions will be considered if they affect waste isolation within the controlled area even though such conditions may occur outside the controlled area. The technical guidelines that follow establish conditions that shall be considered in determining compliance with the qualifying condition of the postclosure system guideline. For each technical guideline, an evaluation of qualification or disqualification shall be made in accordance with the requirements specified in subpart B.

### § 960.4–2–1 Geohydrology.

(a) *Qualifying condition*. The present and expected geohydrologic setting of a site shall be compatible with waste containment and isolation. The geohydrologic setting, considering the characteristics of and the processes operating within the geologic setting, shall permit compliance with (1) the requirements specified in § 960.4–1 for radionuclide releases to the accessible environment and (2) the requirements specified in 10 CFR 60.113 for radionuclide releases from the engineered-barrier system using reasonably available technology.

(b) *Favorable conditions.* (1) Site conditions such that the pre-waste-emplacement ground-water travel time along any path of likely radionuclide travel from the disturbed zone to the accessible environment would be more than 10,000 years.

(2) The nature and rates of hydrologic processes operating within the geologic setting during the Quaternary Period would, if continued into the future, not affect or would favorably affect the ability of the geologic repository to isolate the waste during the next 100,000 years.

(3) Sites that have stratigraphic, structural, and hydrologic features such that the geohydrologic system can be readily characterized and modeled with reasonable certainty.

(4) For disposal in the saturated zone, at least one of the following pre-waste-emplacement conditions exists:

(i) A host rock and immediately surrounding geohydrologic units with low hydraulic conductivities.

(ii) A downward or predominantly horizontal hydraulic gradient in the host rock and in the immediately surrounding geohydrologic units.

(iii) A low hydraulic gradient in and between the host rock and the immediately surrounding geohydrologic units.

(iv) High effective porosity together with low hydraulic conductivity in rock units along paths of likely radionuclide travel between the host rock and the accessible environment.

(5) For disposal in the unsaturated zone, at least one of the following pre-waste-emplacement conditions exists:

(i) A low and nearly constant degree of saturation in the host rock and in the immediately surrounding geohydrologic units.

(ii) A water table sufficiently below the underground facility such that the fully saturated voids continuous with the water table do not encounter the host rock.

(iii) A geohydrologic unit above the host rock that would divert the downward infiltration of water beyond the limits of the emplaced waste.

(iv) A host rock that provides for free drainage.

(v) A climatic regime in which the average annual historical precipitation is a small fraction of the average annual potential evapotranspiration.

NOTE: The DOE will, in accordance with the general principles set forth in § 960.1 of these regulations, revise the guidelines as necessary, to ensure consistency with the final NRC regulations on the unsaturated zone, which were published as a proposed rule on February 16, 1984, in 49 FR 5934.

(c) *Potentially adverse conditions.* (1) Expected changes in geohydrologic conditions—such as changes in the hydraulic gradient, the hydraulic conductivity, the effective porosity, and the ground-water flux through the host rock and the surrounding geohydrologic units—sufficient to significantly increase the transport of radionuclides to the accessible environment as compared with pre-waste-emplacement conditions.

(2) The presence of ground-water sources, suitable for crop irrigation or human consumption without treatment, along ground-water flow paths from the host rock to the accessible environment.

(3) The presence in the geologic setting of stratigraphic or structural features—such as dikes, sills, faults, shear zones, folds, dissolution effects, or brine pockets—if their presence could significantly contribute to the difficulty of characterizing or modeling the geohydrologic system.

(d) *Disqualifying condition.* A site shall be disqualified if the pre-waste-emplacement ground-water travel time from the disturbed zone to the accessible environment is expected to be less than 1,000 years along any pathway of likely and significant radionuclide travel.

### § 960.4–2–2 Geochemistry.

(a) *Qualifying condition.* The present and expected geochemical characteristics of a site shall be compatible with waste containment and isolation. Considering the likely chemical interactions among radionuclides, the host rock, and the ground water, the characteristics of and the processes operating within the geologic setting shall permit compliance with (1) the requirements specified in § 960.4–1 for radionuclide releases to the accessible environment and (2) the requirements specified in 10 CFR 60.113 for radionuclide

releases from the engineered-barrier system using reasonably available technology.

(b) *Favorable conditions.* (1) The nature and rates of the geochemical processes operating within the geologic setting during the Quaternary Period would, if continued into the future, not affect or would favorably affect the ability of the geologic repository to isolate the waste during the next 100,000 years.

(2) Geochemical conditions that promote the precipitation, diffusion into the rock matrix, or sorption of radionuclides; inhibit the formation of particulates, colloids, inorganic complexes, or organic complexes that increase the mobility of radionuclides; or inhibit the transport of radionuclides by particulates, colloids, or complexes.

(3) Mineral assemblages that, when subjected to expected repository conditions, would remain unaltered or would alter to mineral assemblages with equal or increased capability to retard radionuclide transport.

(4) A combination of expected geochemical conditions and a volumetric flow rate of water in the host rock that would allow less than 0.001 percent per year of the total radionuclide inventory in the repository at 1,000 years to be dissolved.

(5) Any combination of geochemical and physical retardation processes that would decrease the predicted peak cumulative releases of radionuclides to the accessible environment by a factor of 10 as compared to those predicted on the basis of ground-water travel time without such retardation.

(c) *Potentially adverse conditions.* (1) Ground-water conditions in the host rock that could affect the solubility or the chemical reactivity of the engineered-barrier system to the extent that the expected repository performance could be compromised.

(2) Geochemical processes or conditions that could reduce the sorption of radionuclides or degrade the rock strength.

(3) Pre-waste-emplacement groundwater conditions in the host rock that are chemically oxidizing.

**§ 960.4–2–3 Rock characteristics.**

(a) *Qualifying condition.* The present and expected characteristics of the host rock and surrounding units shall be capable of accommodating the thermal, chemical, mechanical, and radiation stresses expected to be induced by repository construction, operation, and closure and by expected interactions among the waste, host rock, ground water, and engineered components. The characteristics of and the processes operating within the geologic setting shall permit compliance with (1) the requirements specified in § 960.4–1 for radionuclide releases to the accessible environment and (2) the requirements set forth in 10 CFR 60.113 for radionuclide releases from the engineered-barrier system using reasonably available technology.

(b) *Favorable Conditions.* (1) A host rock that is sufficiently thick and laterally extensive to allow significant flexibility in selecting the depth, configuration, and location of the underground facility to ensure isolation.

(2) A host rock with a high thermal conductivity, a low coefficient of thermal expansion, or sufficient ductility to seal fractures induced by repository construction, operation, or closure or by interactions among the waste, host rock, ground water, and engineered components.

(c) *Potentially adverse conditions.* (1) Rock conditions that could require engineering measures beyond reasonably available technology for the construction, operation, and closure of the repository, if such measures are necessary to ensure waste containment or isolation.

(2) Potential for such phenomena as thermally induced fractures, the hydration or dehydration of mineral components, brine migration, or other physical, chemical, or radiation-related phenomena that could be expected to affect waste containment or isolation.

(3) A combination of geologic structure, geochemical and thermal properties, and hydrologic conditions in the host rock and surrounding units such that the heat generated by the waste

could significantly decrease the isolation provided by the host rock as compared with pre-waste-emplacement conditions.

### § 960.4–2–4 Climatic changes.

(a) *Qualifying condition.* The site shall be located where future climatic conditions will not be likely to lead to radionuclide releases greater than those allowable under the requirements specified in § 960.4–1. In predicting the likely future climatic conditions at a site, the DOE will consider the global, regional, and site climatic patterns during the Quaternary Period, considering the geomorphic evidence of the climatic conditions in the geologic setting.

(b) *Favorable conditions.* (1) A surface-water system such that expected climatic cycles over the next 100,000 years would not adversely affect waste isolation.

(2) A geologic setting in which climatic changes have had little effect on the hydrologic system throughout the Quaternary Period.

(c) *Potentially adverse conditions.* (1) Evidence that the water table could rise sufficiently over the next 10,000 years to saturate the underground facility in a previously unsaturated host rock.

(2) Evidence that climatic changes over the next 10,000 years could cause perturbations in the hydraulic gradient, the hydraulic conductivity, the effective porosity, or the ground-water flux through the host rock and the surrounding geohydrologic units, sufficient to significantly increase the transport of radionuclides to the accessible environment.

### § 960.4–2–5 Erosion.

(a) *Qualifying condition.* The site shall allow the underground facility to be placed at a depth such that erosional processes acting upon the surface will not be likely to lead to radionuclide releases greater than those allowable under the requirements specified in § 960.4–1. In predicting the likelihood of potentially disruptive erosional processes, the DOE will consider the climatic, tectonic, and geomorphic evidence of rates and patterns of erosion in the geologic setting during the Quaternary Period.

(b) *Favorable conditions.* (1) Site conditions that permit the emplacement of waste at a depth of at least 300 meters below the directly overlying ground surface.

(2) A geologic setting where the nature and rates of the erosional processes that have been operating during the Quaternary Period are predicted to have less than one chance in 10,000 over the next 10,000 years of leading to releases of radionuclides to the accessible environment.

(3) Site conditions such that waste exhumation would not be expected to occur during the first one million years after repository closure.

(c) *Potentially adverse conditions.* (1) A geologic setting that shows evidence of extreme erosion during the Quaternary Period.

(2) A geologic setting where the nature and rates of geomorphic processes that have been operating during the Quaternary Period could, during the first 10,000 years after closure, adversely affect the ability of the geologic repository to isolate the waste.

(d) *Disqualifying condition.* The site shall be *disqualified* if site conditions do not allow all portions of the underground facility to be situated at least 200 meters below the directly overlying ground surface.

### § 960.4–2–6 Dissolution.

(a) *Qualifying condition.* The site shall be located such that any subsurface rock dissolution will not be likely to lead to radionuclide releases greater than those allowable under the requirements specified in § 960.4–1. In predicting the likelihood of dissolution within the geologic setting at a site, the DOE will consider the evidence of dissolution within that setting during the Quaternary Period, including the locations and characteristics of dissolution fronts or other dissolution features, if identified.

(b) *Favorable condition.* No evidence that the host rock within the site was subject to significant dissolution during the Quaternary Period.

(c) *Potentially adverse condition.* Evidence of dissolution within the geologic setting—such as breccia pipes, dissolution cavities, significant volumetric reduction of the host rock or

surrounding strata, or any structural collapse—such that a hydraulic interconnection leading to a loss of waste isolation could occur.

(d) *Disqualifying condition.* The site shall be *disqualified* if it is likely that, during the first 10,000 years after closure, active dissolution, as predicted on the basis of the geologic record, would result in a loss of waste isolation.

### § 960.4–2–7 Tectonics.

(a) *Qualifying condition.* The site shall be located in a geologic setting where future tectonic processes or events will not be likely to lead to radionuclide releases greater than those allowable under the requirements specified in § 960.4–1. In predicting the likelihood of potentially disruptive tectonic processes or events, the DOE will consider the structural, stratigraphic, geophysical, and seismic evidence for the nature and rates of tectonic processes and events in the geologic setting during the Quaternary Period.

(b) *Favorable condition.* The nature and rates of igneous activity and tectonic processes (such as uplift, subsidence, faulting, or folding), if any, operating within the geologic setting during the Quaternary Period would, if continued into the future, have less than one chance in 10,000 over the first 10,000 years after closure of leading to releases of radionuclides to the accessible environment.

(c) *Potentially adverse conditions.* (1) Evidence of active folding, faulting, diapirism, uplift, subsidence, or other tectonic processes or igneous activity within the geologic setting during the Quaternary Period.

(2) Historical earthquakes within the geologic setting of such magnitude and intensity that, if they recurred, could affect waste containment or isolation.

(3) Indications, based on correlations of earthquakes with tectonic processes and features, that either the frequency of occurrence or the magnitude of earthquakes within the geologic setting may increase.

(4) More-frequent occurrences of earthquakes or earthquakes of higher magnitude than are representative of the region in which the geologic setting is located.

(5) Potential for natural phenomena such as landslides, subsidence, or volcanic activity of such magnitudes that they could create large-scale surface-water impoundments that could change the regional ground-water flow system.

(6) Potential for tectonic deformations—such as uplift, subsidence, folding, or faulting—that could adversely affect the regional ground-water flow system.

(d) *Disqualifying condition.* A site shall be disqualified if, based on the geologic record during the Quaternary Period, the nature and rates of fault movement or other ground motion are expected to be such that a loss of waste isolation is likely to occur.

### § 960.4–2–8 Human interference.

The site shall be located such that activities by future generations at or near the site will not be likely to affect waste containment and isolation. In assessing the likelihood of such activities, the DOE will consider the estimated effectiveness of the permanent markers and records required by 10 CFR part 60, taking into account site-specific factors, as stated in §§ 960.4–2–8–1 and 960.4–2–8–2, that could compromise their continued effectiveness.

### § 960.4–2–8–1 Natural resources.

(a) *Qualifying condition.* This site shall be located such that—considering permanent markers and records and reasonable projections of value, scarcity, and technology—the natural resources, including ground water suitable for crop irrigation or human consumption without treatment, present at or near the site will not be likely to give rise to interference activities that would lead to radionuclide releases greater than those allowable under the requirements specified in § 960.4–1.

(b) *Favorable conditions.* (1) No known natural resources that have or are projected to have in the foreseeable future a value great enough to be considered a commercially extractable resource.

(2) Ground water with 10,000 parts per million or more of total dissolved solids along any path of likely radionuclide travel from the host rock to the accessible environment.

(c) *Potentially adverse conditions.* (1) Indications that the site contains naturally occurring materials, whether or not actually identified in such form that (i) economic extraction is potentially feasible during the foreseeable future or (ii) such materials have a greater gross value, net value, or commercial potential than the average for other areas of similar size that are representative of, and located in, the geologic setting.

(2) Evidence of subsurface mining or extraction for resources within the site if it could affect waste containment or isolation.

(3) Evidence of drilling within the site for any purpose other than repository-site evaluation to a depth sufficient to affect waste containment and isolation.

(4) Evidence of a significant concentration of any naturally occurring material that is not widely available from other sources.

(5) Potential for foreseeable human activities—such as ground-water withdrawal, extensive irrigation, subsurface injection of fluids, underground pumped storage, military activities, or the construction of large-scale surface-water impoundments—that could adversely change portions of the ground-water flow system important to waste isolation.

(d) *Disqualifying conditions.* A site shall be disqualified if—

(1) Previous exploration, mining, or extraction activities for resources of commercial importance at the site have created significant pathways between the projected underground facility and the accessible environment; or

(2) Ongoing or likely future activities to recover presently valuable natural mineral resources outside the controlled area would be expected to lead to an inadvertent loss of waste isolation.

### § 960.4–2–8–2 Site ownership and control.

(a) *Qualifying condition.* The site shall be located on land for which the DOE can obtain, in accordance with the requirements of 10 CFR part 60, ownership, surface and subsurface rights, and control of access that are required in order that potential surface and subsurface activities as the site will not be likely to lead to radionuclide releases greater than those allowable under the requirements specified in § 960.4–1.

(b) *Favorable condition.* Present ownership and control of land and all surface and subsurface rights by the DOE.

(c) *Potentially adverse condition.* Projected land-ownership conflicts that cannot be successfully resolved through voluntary purchase-sell agreements, nondisputed agency-to-agency transfers of title, or Federal condemnation proceedings.

## Subpart D—Preclosure Guidelines

### § 960.5 Preclosure guidelines.

The guidelines in this subpart specify the factors to be considered in evaluating and comparing sites on the basis of expected repository performance before closure. The preclosure guidelines are separated into three system guidelines and eleven technical guidelines.

### § 960.5–1 System guidelines.

(a) *Qualifying conditions*—(1) *Preclosure radiological safety.* Any projected radiological exposures of the general public and any projected releases of radioactive materials to restricted and unrestricted areas during repository operation and closure shall meet the applicable safety requirements set forth in 10 CFR part 20, 10 CFR part 60, and 40 CFR 191, subpart A (see appendix II of this part).

(2) *Environment, socioeconomics, and transportation.* During repository siting, construction, operation, closure, and decommissioning the public and the environment shall be adequately protected from the hazards posed by the disposal of radioactive waste.

(3) *Ease and cost of siting, construction, operation, and closure.* Repository siting, construction, operation, and closure shall be demonstrated to be technically feasible on the basis of reasonably available technology, and the associated costs shall be demonstrated to be reasonable relative to other available and comparable siting options.

### § 960.5–2 Technical guidelines.

The technical guidelines in this subpart set forth qualifying, favorable, potentially adverse, and, in seven guidelines, disqualifying conditions for the characteristics, processes, and events that influence the suitability of a site relative to the preclosure system guidelines. These conditions are separated into three main groups: Preclosure radiological safety; environment, socioeconomics, and transportation; and ease and cost of siting, construction, operation, and closure. The first group includes conditions on population density and distribution, site ownership and control, meteorology, and offsite installations and operations. The second group includes conditions related to environmental quality and socioeconomic impacts in areas potentially affected by a repository and to the transportation of waste to a repository site. The third group includes conditions on the surface characteristics of the site, the characteristics of the host rock and surrounding strata, hydrology, and tectonics. The individual technical guidelines within each group, as well as the favorable conditions and the potentially adverse conditions under each guideline, are not listed in any assumed order of importance. The technical guidelines that follow establish conditions that shall be considered in determining compliance with the qualifying conditions of the preclosure system guidelines. For each technical guideline, an evaluation of qualification or disqualification shall be made in accordance with the requirements specified in subpart B.

PRECLOSURE RADIOLOGICAL SAFETY

### § 960.5–2–1 Population density and distribution.

(a) *Qualifying condition.* The site shall be located such that, during repository operation and closure, (1) the expected average radiation dose to members of the public within any highly populated area will not be likely to exceed a small fraction of the limits allowable under the requirements specified in § 960.5–1(a)(1), and (2) the expected radiation dose to any member of the public in an unrestricted area will not be likely to exceed the limit allowable under the requirements specified in § 960.5–1(a)(1).

(b) *Favorable conditions.* (1) A low population density in the general region of the site.

(2) Remoteness of site from highly populated areas.

(c) *Potentially adverse conditions.* (1) High residential, seasonal, or daytime population density within the projected site boundaries.

(2) Proximity of the site to highly populated areas, or to areas having at least 1,000 individuals in an area 1 mile by 1 mile as defined by the most recent decennial count of the U.S. census.

(d) *Disqualifying conditions.* A site shall be *disqualified* if—

(1) Any surface facility of a repository would be located in a highly populated area; or

(2) Any surface facility of a repository would be located adjacent to an area 1 mile by 1 mile having a population of not less than 1,000 individuals as enumerated by the most recent U.S. census; or

(3) The DOE could not develop an emergency preparedness program which meets the requirements specified in DOE Order 5500.3 (Reactor and Non-Reactor Facility Emergency Planning, Preparedness, and Response Program for Department of Energy Operations) and related guides or, when issued by the NRC, in 10 CFR part 60, subpart I, ''Emergency Planning Criteria.''

### § 960.5–2–2 Site ownership and control.

(a) *Qualifying condition.* The site shall be located on land for which the DOE can obtain, in accordance with the requirements of 10 CFR 60.121, ownership, surface and subsurface rights, and control of access that are required in order that surface and subsurface activities during repository operation and closure will not be likely to lead to radionuclide releases to an unrestricted area greater than those allowable under the requirements specified in § 960.5–1(a)(1).

(b) *Favorable condition.* Present ownership and control of land and all surface and subsurface mineral and water rights by the DOE.

(c) *Potentially adverse condition.* Projected land-ownership conflicts that cannot be successfully resolved

through voluntary purchase-sell agreements, nondisputed agency-to-agency transfers of title, or Federal condemnation proceedings.

### § 960.5–2–3 Meteorology.

(a) *Qualifying condition.* The site shall be located such that expected meteorological conditions during repository operation and closure will not be likely to lead to radionuclide releases to an unrestricted area greater than those allowable under the requirements specified in § 960.5–1(a)(1).

(b) *Favorable condition.* Prevailing meteorological conditions such that any radioactive releases to the atmosphere during repository operation and closure would be effectively dispersed, thereby reducing significantly the likelihood of unacceptable exposure to any member of the public in the vicinity of the repository.

(c) *Potentially adverse conditions.* (1) Prevailing meteorological conditions such that radioactive emissions from repository operation of closure could be preferentially transported toward localities in the vicinity of the repository with higher population densities than are the average for the region.

(2) History of extreme weather phenomena—such as hurricanes, tornadoes, severe floods, or severe and frequent winter storms—that could significantly affect repository operation or closure.

### § 960.5–2–4 Offsite installations and operations.

(a) *Qualifying condition.* The site shall be located such that present projected effects from nearby industrial, transportation, and military installations and operations, including atomic energy defense activities, (1) will not significantly affect repository siting, construction, operation, closure, or decommissioning or can be accommodated by engineering measures and (2), when considered together with emissions from repository operation and closure, will not be likely to lead to radionuclide releases to an unrestricted area greater than those allowable under the requirements specified in § 960.5–1(a)(1).

(b) *Favorable condition.* Absence of contributing radioactive releases from other nuclear installations and operations that must be considered under the requirements of 40 CFR 191, subpart A.

(c) *Potentially adverse conditions.* (1) The presence of nearby potentially hazardous installations or operations that could adversely affect repository operation or closure.

(2) Presence of other nuclear installations and operations, subject to the requirements of 40 CFR part 190 or 40 CFR part 191, subpart A, with actual or projected releases near the maximum value permissible under those standards.

(d) *Disqualifying condition.* A site shall be disqualified if atomic energy defense activities in proximity to the site are expected to conflict irreconcilably with repository siting, construction, operation, closure, or decommissioning.

## ENVIRONMENT, SOCIOECONOMICS, AND TRANSPORTATION

### § 960.5–2–5 Environmental quality.

(a) *Qualifying condition.* The site shall be located such that (1) the quality of the environment in the affected area during this and future generations will be adequately protected during repository siting, construction, operation, closure, and decommissioning, and projected environmental impacts in the affected area can be mitigated to an acceptable degree, taking into account programmatic, technical, social, economic, and environmental factors; and (2) the requirements specified in § 960.5–1(a)(2) can be met.

(b) *Favorable conditions.* (1) Projected ability to meet, within time constraints, all Federal, State, and local procedural and substantive environmental requirements applicable to the site and the activities proposed to take place thereon.

(2) Potential significant adverse environmental impacts to present and future generations can be mitigated to an insignificant level through the application of reasonable measures, taking into account programmatic, technical, social, economic, and environmental factors.

(c) *Potentially adverse conditions.* (1) Projected major conflict with applicable Federal, State, or local environmental requirements.

(2) Projected significant adverse environmental impacts that cannot be avoided or mitigated.

(3) Proximity to, or projected significant adverse environmental impacts of the repository or its support facilities on, a component of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Wilderness Preservation System, or National Forest Land.

(4) Proximity to, and projected significant adverse environmental impacts of the repository or its support facilities on, a significant State or regional protected resource area, such as a State park, a wildlife area, or a historical area.

(5) Proximity to, and projected significant adverse environmental impacts of the repository and its support facilities on, a significant Native American resource, such as a major Indian religious site, or other sites of unique cultural interest.

(6) Presence of critical habitats for threatened or endangered species that may be compromised by the repository or its support facilities.

(d) *Disqualifying conditions.* Any of the following conditions shall *disqualify* a site:

(1) During repository siting, construction, operation, closure, or decommissioning the quality of the environment in the affected area could not be adequately protected or projected environmental impacts in the affected area could not be mitigated to an acceptable degree, taking into account programmatic, technical, social, economic, and environmental factors.

(2) Any part of the restricted area or repository support facilities would be located within the boundaries of a component of the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, or the National Wild and Scenic Rivers System.

(3) The presence of the restricted area or the repository support facilities would conflict irreconcilably with the previously designated resource-preservation use of a component of the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the National Wild and Scenic Rivers System, or National Forest Lands, or any comparably significant State protected resource that was dedicated to resource preservation at the time of the enactment of the Act.

### § 960.5–2–6 Socioeconomic impacts.

(a) *Qualifying condition.* The site shall be located such that (1) any significant adverse social and/or economic impacts induced in communities and surrounding regions by repository siting, construction, operation, closure, and decommissioning can be offset by reasonable mitigation or compensation, as determined by a process of analysis, planning, and consultation among the DOE, affected State and local government jurisdictions, and affected Indian tribes; and (2) the requirements specified in § 960.5–1(a)(2) can be met.

(b) *Favorable conditions.* (1) Ability of an affected area to absorb the project-related population changes without significant disruptions of community services and without significant impacts on housing supply and demand.

(2) Availability of an adequate labor force in the affected area.

(3) Projected net increases in employment and business sales, improved community services, and increased government revenues in the affected area.

(4) No projected substantial disruption of primary sectors of the economy of the affected area.

(c) *Potentially adverse conditions.* (1) Potential for significant repository-related impacts on community services, housing supply and demand, and the finances of State and local government agencies in the affected area.

(2) Lack of an adequate labor force in the affected area.

(3) Need for repository-related purchase or acquisition of water rights, if such rights could have significant adverse impacts on the present or future development of the affected area.

(4) Potential for major disruptions of primary sectors of the economy of the affected area.

(d) *Disqualifying condition.* A site shall be disqualified if repository construction, operation, or closure would significantly degrade the quality, or significantly reduce the quantity, of water from major sources of offsite supplies presently suitable for human consumption or crop irrigation and such impacts cannot be compensated for, or mitigated by, reasonable measures.

**§ 960.5–2–7 Transportation.**

(a) *Qualifying condition.* The site shall be located such that (1) the access routes constructed from existing local highways and railroads to the site (i) will not conflict irreconcilably with the previously designated use of any resource listed in § 960.5–2–5(d) (2) and (3); (ii) can be designed and constructed using reasonably available technology; (iii) will not require transportation system components to meet performance standards more stringent than those specified in the applicable DOT and NRC regulations, nor require the development of new packaging containment technology; (iv) will allow transportation operations to be conducted without causing an unacceptable risk to the public or unacceptable environmental impacts, taking into account programmatic, technical, social, economic, and environmental factors; and (2) the requirements of § 960.5–1(a)(2) can be met.

(b) *Favorable conditions.* (1) Availability of access routes from local existing highways and railroads to the site which have any of the following characteristics:

(i) Such routes are relatively short and economical to construct as compared to access routes for other comparable siting options.

(ii) Federal condemnation is not required to acquire rights-of-way for the access routes.

(iii) Cuts, fills, tunnels, or bridges are not required.

(iv) Such routes are free of sharp curves or steep grades and are not likely to be affected by landslides or rock slides.

(v) Such routes bypass local cities and towns.

(2) Proximity to local highways and railroads that provide access to regional highways and railroads and are adequate to serve the repository without significant upgrading or reconstruction.

(3) Proximity to regional highways, mainline railroads, or inland waterways that provide access to the national transportation system.

(4) Availability of a regional railroad system with a minimum number of interchange points at which train crew and equipment changes would be required.

(5) Total projected life-cycle cost and risk for transportation of all wastes designated for the repository site which are significantly lower than those for comparable siting options, considering locations of present and potential sources of waste, interim storage facilities, and other repositories.

(6) Availability of regional and local carriers—truck, rail, and water—which have the capability and are willing to handle waste shipments to the repository.

(7) Absence of legal impediment with regard to compliance with Federal regulations for the transportation of waste in or through the affected State and adjoining States.

(8) Plans, procedures, and capabilities for response to radioactive waste transportation accidents in the affected State that are completed or being developed.

(9) A regional meteorological history indicating that significant transportation disruptions would not be routine seasonal occurrences.

(c) *Potentially adverse conditions.* (1) Access routes to existing local highways and railroads that are expensive to construct relative to comparable siting options.

(2) Terrain between the site and existing local highways and railroads such that steep grades, sharp switchbacks, rivers, lakes, landslides, rock slides, or potential sources of hazard to incoming waste shipments will be encountered along access routes to the site.

(3) Existing local highways and railroads that could require significant reconstruction or upgrading to provide adequate routes to the regional and national transportation system.

(4) Any local condition that could cause the transportation-related costs, environmental impacts, or risk to public health and safety from waste transportation operations to be significantly greater than those projected for other comparable siting options.

EASE AND COST OF SITING, CONSTRUCTION, OPERATION, AND CLOSURE

### § 960.5–2–8 Surface characteristics.

(a) *Qualifying condition.* The site shall be located such that, considering the surface characteristics and conditions of the site and surrounding area, including surface-water systems and the terrain, the requirements specified in § 960.5–1(a)(3) can be met during repository siting, construction, operation, and closure.

(b) *Favorable conditions.* (1) Generally flat terrain.

(2) Generally well-drained terrain.

(c) *Potentially adverse condition.* Surface characteristics that could lead to the flooding of surface or underground facilities by the occupancy and modification of flood plains, the failure of existing or planned man-made surface-water impoundments, or the failure of engineered components of the repository.

### § 960.5–2–9 Rock characteristics.

(a) *Qualifying condition.* The site shall be located such that (1) the thickness and lateral extent and the characteristics and composition of the host rock will be suitable for accommodation of the underground facility; (2) repository construction, operation, and closure will not cause undue hazard to personnel; and (3) the requirements specified in § 960.5–1(a)(3) can be met.

(b) *Favorable conditions.* (1) A host rock that is sufficiently thick and laterally extensive to allow significant flexibility in selecting the depth, configuration, and location of the underground facility.

(2) A host rock with characteristics that would require minimal or no artificial support for underground openings to ensure safe repository construction, operation, and closure.

(c) *Potentially adverse conditions.* (1) A host rock that is suitable for repository construction, operation, and closure, but is so thin or laterally restricted that little flexibility is available for selecting the depth, configuration, or location of an underground facility.

(2) In situ characteristics and conditions that could require engineering measures beyond reasonably available technology in the construction of the shafts and underground facility.

(3) Geomechanical properties that could necessitate extensive maintenance of the underground openings during repository operation and closure.

(4) Potential for such phenomena as thermally induced fracturing, the hydration and dehydration of mineral components, or other physical, chemical, or radiation-related phenomena that could lead to safety hazards or difficulty in retrieval during repository operation.

(5) Existing faults, shear zones, pressurized brine pockets, dissolution effects, or other stratigraphic or structural features that could compromise the safety of repository personnel because of water inflow or construction problems.

(d) *Disqualifying condition.* The site shall be *disqualified* if the rock characteristics are such that the activities associated with repository construction, operation, or closure are predicted to cause significant risk to the health and safety of personnel, taking into account mitigating measures that use reasonably available technology.

### § 960.5–2–10 Hydrology.

(a) *Qualifying condition.* The site shall be located such that the geohydrologic setting of the site will (1) be compatible with the activities required for repository construction, operation, and closure; (2) not compromise the intended functions of the shaft liners and seals; and (3) permit the requirements specified in § 960.5–1(a)(3) to be met.

(b) *Favorable conditions.* (1) Absence of aquifers between the host rock and the land surface.

(2) Absence of surface-water systems that could potentially cause flooding of the repository.

(3) Availability of the water required for repository construction, operation, and closure.

(c) *Potentially adverse condition.* Ground-water conditions that could require complex engineering measures that are beyond reasonably available technology for repository construction, operation, and closure.

(d) *Disqualifying condition.* A site shall be disqualified if, based on expected ground-water conditions, it is likely that engineering measures that are beyond reasonably available technology will be required for exploratory-shaft construction or for repository construction, operation, or closure.

**§ 960.5–2–11 Tectonics.**

(a) *Qualifying Conditions.* The site shall be located in a geologic setting in which any projected effects of expected tectonic phenomena or igneous activity on repository construction, operation, or closure will be such that the requirements specified in § 960.5–1(a)(3) can be met.

(b) *Favorable Condition.* The nature and rates of faulting, if any, within the geologic setting are such that the magnitude and intensity of the associated seismicity are significantly less than those generally allowable for the construction and operation of nuclear facilities.

(c) *Potentially Adverse Conditions.* (1) Evidence of active faulting within the geologic setting.

(2) Historical earthquakes or past man-induced seismicity that, if either were to recur, could produce ground motion at the site in excess of reasonable design limits.

(3) Evidence, based on correlations of earthquakes with tectonic processes and features, (e.g., faults) within the geologic setting, that the magnitude of earthquakes at the site during repository construction, operation, and closure may be larger then predicted from historical seismicity.

(d) *Disqualifying Condition.* A site shall be disqualified if, based on the expected nature and rates of fault movement or other ground motion, it is likely that engineering measures that are beyond reasonably available technology will be required for exploratory-shaft construction or for repository construction, operation, or closure.

## APPENDIX I TO PART 960—NRC AND EPA REQUIREMENTS FOR POSTCLOSURE REPOSITORY PERFORMANCE

Under proposed 40 CFR part 191, subpart B—*Environmental Standards for Disposal,* § 191.13, ''Containment Requirements'', specifies that for 10,000 years after disposal (a) releases of radioactive materials to the accessible environment that are estimated to have more than one chance in 100 of occurring over a 10,000 year period (''reasonably foreseeable releases'') shall be projected to be less than the quantities permitted by Table 2 of that regulation's appendix; and (b) for ''very unlikely releases'' (i.e., those estimated to have between one chance in 100 and one chance in 10,000 of occurring over a 10,000 year period), the limits specified in Table 2 would be multiplied by 10. The basis for Table 2 is an upper limit on long term risks of 1,000 health effects over 10,000 years for a repository containing wastes generated from 100,000 metric tons of heavy metal of reactor fuel. For releases involving more than one radionuclide, the allowed release for each radionuclide is reduced to the fraction of its limit that insures that the overall limit on harm is not exceeded. Additionally, to provide confidence needed for compliance with the containment requirements specified above, § 191.14, ''Assurance Requirements'', specifies the disposal of radioactive waste in accordance with seven requirements, relating to prompt disposal of waste; selection and design of disposal systems to keep releases to the accessible environment as small as reasonably achievable; engineered and natural barriers; nonreliance on active institutional controls after closure; passive controls after closure; natural resource areas; and design of disposal systems to allow future recovery of wastes.

The guidelines will be revised as necessary after the adoption of final regulations by the EPA.

The implementation of 40 CFR part 191, subpart B is required by 10 CFR 60.112. 10 CFR 60.113 establishes minimum conditions to be met for engineered components and ground-water flow; specifically: (1) Containment of radioactive waste within the waste packages will be substantially complete for a period to be determined by the NRC taking into account the factors specified in 10 CFR 60.113(b) provided that such period shall be not less than 300 years nor more than 1,000 years after permanent closure of the geologic repository; (2) the release rate of any radionuclide from the engineered barrier system following the containment period shall not exceed one part in 100,000 per year of the inventory of that radionuclide calculated to be present at 1,000 years following permanent closure, or such other fraction of the inventory as may be approved or specified by the NRC, provided that this requirement does

not apply to any radionuclide which is released at a rate less than 0.1% of the calculated total release rate limit. The calculated total release rate limit shall be taken to be one part in 100,000 per year of the inventory of radioactive waste originally emplaced in the underground facility that remains after 1,000 years of radioactive decay; and (3) the geologic repository shall be located so that pre-waste-emplacement ground-water travel time along the fastest path of likely radionuclide travel from the disturbed zone to the accessible environment shall be at least 1,000 years or such other travel time as may be approved or specified by the NRC.

The guidelines will be revised as necessary to ensure consistency with 10 CFR part 60.

## APPENDIX II TO PART 960—NRC AND EPA REQUIREMENTS FOR PRECLOSURE REPOSITORY PERFORMANCE

Under proposed 40 CFR part 191, subpart A—*Environmental Standards for Management and Storage*, Section 191.03, ''Standards for Normal Operations'', specifies: (1) That operations should be conducted so as to reduce exposure to members of the public to the extent reasonably achievable, taking into account technical, social, and economic considerations; and (2) that, except for variances permitted for unusual operations under Section 191.04 as an upper limit, normal operations shall be conducted in such a manner as to provide reasonable assurance that the combined annual dose equivalent to any member of the public due to: (i) operations covered by 40 CFR part 190, (ii) planned discharges of radioactive material to the general environment from operations covered by this subpart, and (iii) direct radiation from these operations; shall not exceed 25 millirems to the whole body, 75 millirems to the thyroid, or 25 millirems to any other organ.

The guidelines will be revised as necessary after the adoption of final regulations by the EPA.

The implementation of 40 CFR part 191, subpart A and 10 CFR part 20 is required by 10 CFR 60.111. 10 CFR 60.111 also specifies requirements for waste retrieval, if necessary, including considerations of design, backfilling, and schedule. 10 CFR part 20 establishes (a) exposure limits for operating personnel and (b) permissible concentrations of radionuclides in uncontrolled areas for air and water. The latter are generally less restrictive than 40 CFR 191, subpart A, but may be limiting under certain conditions (i.e., if used as a maximum for short durations rather than annual averages).

The guidelines will be revised as necessary to ensure consistency with 10 CFR part 60.

## APPENDIX III TO PART 960—APPLICATION OF THE SYSTEM AND TECHNICAL GUIDELINES DURING THE SITING PROCESS

1. This appendix presents a table that specifies how the guidelines of subparts C and D are to be applied at certain decision points of the siting process. The decision points, as referenced in the table, are defined as follows:

''Potentially acceptable'' means the decision point at which a site is identified as potentially acceptable.

''Nomination and recommendation'' means the decision point at which a site is nominated as suitable for characterization or recommended as a candidate site for characterization.

2. The findings resulting from the application of a disqualifying condition for any particular guideline at a given decision point are denoted in the table by the numeral 1 or 2. The numerals 1 and 2 signify the types of findings that are required and are defined as follows:

''1'' means *either* of the following:

(a) The evidence does *not* support a finding that the site is disqualified.

*or*

(b) The evidence supports a finding that the site is disqualified.

''2'' means *either* of the following:

(a) The evidence supports a finding that the site is *not* disqualified on the basis of that evidence and is *not* likely to be disqualified.

*or*

(b) The evidence supports a finding that the site is disqualified or is likely to be disqualified.

3. The findings resulting from the application of a qualifying condition for any particular guideline at a given decision point are denoted in the table by the numeral 3 or 4. The numerals 3 and 4 signify the types of findings that are required and are defined as follows:

''3'' means *either* of the following:

(a) The evidence does *not* support a finding that the site is *not* likely to meet the qualifying condition.

*or*

(b) The evidence supports a finding that the site is *not* likely to meet the qualifying condition, and therefore the site is disqualified.

4. If performance assessments are used to substantiate any of the above findings, those assessments shall include estimates of the effects of uncertainties in data and modeling.

5. For both the disqualifying and qualifying conditions of any guideline, a higher finding (e.g., a ''2'' finding rather than ''1'')

shall be made if there is sufficient evidence to support such a finding.

FINDINGS RESULTING FROM THE APPLICATION OF THE QUALIFYING AND DISQUALIFYING CONDITIONS OF THE TECHNICAL GUIDELINES AT MAJOR SITING DECISIONS

| Section 960 | Guideline | Condition | Siting decision | |
|---|---|---|---|---|
| | | | Potentially acceptable | Nomination and recommendation |
| 4–1(a) | System | Qualifying | | 3 |
| 4–2–1(a) | Geohydrology | ....do | | 3 |
| 4–2–1(d) | ....do | Disqualifying | | 1 |
| 4–2–2(a) | Geochemistry | Qualifying | | 3 |
| 4–2–3(a) | Rock Characteristics | ....do | | 3 |
| 4–2–4(a) | Climatic Changes | ....do | | 3 |
| 4–2–5(a) | Erosion | ....do | | 3 |
| 4–2–5(d) | ....do | Disqualifying | 1 | 1 |
| 4–2–6(a) | Dissolution | Qualifying | | 3 |
| 4–2–6(d) | ....do | Disqualifying | 1 | 1 |
| 4–2–7(a) | Tectonics | Qualifying | | 3 |
| 4–2–7(d) | ....do | Disqualifying | 1 | 1 |
| 4–2–8–1(a) | Natural Resources | Qualifying | | 3 |
| 4–2–8–1(d)(1) | ....do | Disqualifying | 1 | 1 |
| 4–2–8–1(d)(2) | ....do | ....do | | 1 |
| 4–2–8–2(a) | Site Ownership and Control | Qualifying | | 3 |
| 5–1(a)(1) | System | ....do | | 3 |
| 5–1(a)(2) | ....do | ....do | | 3 |
| 5–1(a)(3) | ....do | ....do | | 3 |
| 5–2–1(a) | Population Density and Distribution. | ....do | | 3 |
| 5–2–1(d)(1) | ....do | Disqualifying | 1 | 1 |
| 5–2–1(d)(2) | ....do | ....do | 1 | 1 |
| 5–2–1(d)(3) | ....do | ....do | | 1 |
| 5–2–2(a) | Site Ownership and Control | Qualifying | | 3 |
| 5–2–3(a) | Meteorology | ....do | | 3 |
| 5–2–4(a) | Offsite Installations and Operations. | ....do | | 3 |
| 5–2–4(d) | ....do | Disqualifying | 1 | 1 |
| 5–2–5(a) | Environmental Quality | Qualifying | | 3 |
| 5–2–5(d)(1) | ....do | Disqualifying | | 1 |
| 5–2–5(d)(2) | ....do | ....do | 1 | 1 |
| 5–2–5(d)(3) | ....do | ....do | 1 | 1 |
| 5–2–6(a) | Socioeconomic Impacts | Qualifying | | 3 |
| 5–2–6(d) | ....do | Disqualifying | | 1 |
| 5–2–7(a) | Transportation | Qualifying | | 3 |
| 5–2–8(a) | Surface Characteristics | ....do | | 3 |
| 5–2–9(a) | Rock Characteristics | ....do | | 3 |
| 5–2–9(d) | ....do | Disqualifying | | 1 |
| 5–2–10(a) | Hydrology | Qualifying | | 3 |
| 5–2–10(d) | ....do | Disqualifying | | 1 |
| 5–2–11(a) | Tectonics | Qualifying | | 3 |
| 5–2–11(d) | ....do | Disqualifying | 1 | 1 |

[49 FR 47752, Dec. 6, 1984, as amended at 66 FR 57335, Nov. 14, 2001]

## APPENDIX IV TO PART 960—TYPES OF INFORMATION FOR THE NOMINATION OF SITES AS SUITABLE FOR CHARACTERIZATION

The types of information specified below are those that the DOE expects will be included in the evidence used for evaluations and applications of the guidelines of subparts C and D at the time of nomination of a site as suitable for characterization. The types of information listed under each guideline are considered to be the most significant for the evaluation of that guideline. However, the types of information listed under any particular guideline will be used, as necessary, for the evaluation of any other guideline. As stated in § 960.3–1–4–2, the DOE will use technically conservative assumptions or extrapolations of regional data, where necessary, to supplement this information. The information specified below will be supplemented with conceptual models, as appropriate, and analyses of uncertainties in the data.

Before site-characterization studies and related nongeologic data gathering activities,

the evidence is not expected to provide precise information, but, rather, to provide a reasonable basis for assessing the merits or shortcomings of the site against the guidelines of subparts C and D. Consequently, the types of information described below should be interpreted so as to accommodate differences among sites and differences in the information acquired before detailed studies.

The specific information required for the guideline applications set forth in appendix III of this part is expected to differ from site to site because of site-specific factors, both with regard to favorable and potentially adverse conditions and with regard to the sources and reliability of the information. The types of information specified in this appendix will be used except where the findings set forth in appendix III of this part can be arrived at by reasonable alternative means or the information is not required for the particular site.

*Section 960.4–2–1 Geohydrology.*

Description of the geohydrologic setting of the site, in context with its geologic setting, in order to estimate the pre-waste-emplacement ground-water flow conditions. The types of information to support this description should include—

• Location and estimated hydraulic properties of aquifers, confining units, and aquitards.

• Potential areas and modes of recharge and discharge for aquifers.

• Regional potentiometric surfaces of aquifers.

• Likely flow paths from the repository to locations in the expected accessible environment, as based on regional data.

• Preliminary estimates of ground-water travel times along the likely flow paths from the repository to locations in the expected accessible environment.

• Current use of principal aquifers and State or local management plans for such use.

*Section 960.4–2–2 Geochemistry.*

Description of the geochemical and hydrochemical conditions of the host rock, of the surrounding geohydrologic units, and along likely ground-water paths to locations in the expected accessible environment, in order to estimate the potential for the migration of radionuclides. The types of information to support this description should include—

• Petrology of the rocks.

• Mineralogy of the rocks and general characteristics of fracture fillings.

• Geochemical and mechanical stability of the minerals under expected repository conditions.

• General characteristics of the ground-water chemistry (e.g., reducing/oxidizing conditions and the principal ions that may affect the waste package or radionuclide behavior).

• Geochemical properties of minerals as related to radionuclide transport.

*Section 960.4–2–3 Rock characteristics.*

Description of the geologic and geomechanical characteristics of the site, in context with the geologic setting, in order to estimate the capability of the host rock and surrounding rock units to accommodate the thermal, mechanical, chemical, and radiation stresses expected to be induced by repository construction, operation, and closure and by expected interactions among the waste, host rock, ground-water, and engineered components of the repository system. The types of information to support this description should include—

• Approximate geology and stratigraphy of the site, including the depth, thickness, and lateral extent of the host rock and surrounding rock units.

• Approximate structural framework of the rock units and any major discontinuities identified from core samples.

• Approximate thermal, mechanical, and thermomechanical properties of the rocks, with consideration of the effects of time, stress, temperature, dimensional scale, and any major identified structural discontinuities.

• Estimates of the magnitude and direction of in situ stress and of temperature in the host rock and surrounding rock units.

*Section 960.4–2–4 Climatic changes.*

Description of the climatic conditions of the site region, in context with global and regional patterns of climatic changes during the Quaternary Period, in order to project likely future changes in climate such that potential impacts on the repository can be estimated. The types of information to support this description should include—

• Expected climatic conditions and cycles, based on extrapolation of climates during the Quaternary Period.

• Geomorphology of the site region and evidence of changes due to climatic changes.

• Estimated effects of expected climatic cycles on the surface-water and the ground-water systems.

*Section 960.4–2–5 Erosion.*

Description of the structure, stratigraphy, and geomorphology of the site, in context with the geologic setting, in order to estimate the depth of waste emplacement and the likelihood for erosional processes to uncover the waste in less than one million years. The types of information to support this description should include—

• Depth, thickness, and lateral extent of the host rock and the overlying rock units.

• Lithology of the stratigraphic units above the host rock.

• Nature and rates of geomorphic processes during the Quaternary Period.

*Section 960.4–2–6 Dissolution.*

Description of the stratigraphy, structure, hydrology, and geochemistry of the site, in context with the geologic setting, to delineate the approximate limits of subsurface rock dissolution, if any. This description should include such information as the following:

• The stratigraphy of the site, including rock units largely comprised of water-soluble minerals.

• The approximate extent and configuration of features indicative of dissolution within the geologic setting.

*Section 960.4–2–7 Tectonics.*

Description of the tectonic setting of the site, in context with its geologic setting, in order to project the tectonic stability of the site over the next 10,000 years and to identify tectonic features and processes that could be reasonably expected to have a potentially adverse effect on the performance of the repository. The types of information to support this description should include—

• The tectonic history and framework of the geologic setting and the site.

• Quaternary faults in the geologic setting, including their length, displacement, and any information regarding the age of latest movement.

• Active tectonic processes, such as uplift, diapirism, tilting, subsidence, faulting, and volcanism.

• Estimate of the geothermal gradient.

• Estimate of the regional in situ stress field.

• The historical seismicity of the geologic setting.

*Section 960.4–2–8 Human interference.*

*Section 960.4–2–8–1 Natural resources.*

Description of the mineral and energy resources of the site, in order to project whether past or future exploration and recovery could have a potentially adverse effect on the performance of the repository. The types of information to support this description should include—

• Known occurrences of energy and mineral resources, including ground water.

• Estimates of the present and projected value of these resources compared with resources contained in other areas of similar size in the geologic setting.

• Past and present drilling and mining operations in the vicinity of the site.

*Section 960.4–2–8–2 Site ownership and control.*

Description of the ownership of land for the geologic-repository operations area and the controlled area, in order to evaluate whether the DOE can obtain ownership of, and control access to, the site. The types of information to support this description should include—

• Present land ownership.

*Section 960.5–2–1 Population density and distribution.*

Description of the population density and distribution of the site region, in order to identify highly populated areas and the nearest 1 mile by 1 mile area having a population greater than 1,000 persons. The types of information to support this description should include—

• The most-recent U.S. census, including population composition, distribution, and density.

*Section 960.5–2–2 Site ownership and control.*

Description of current ownership of land, including surface and subsurface mineral and water rights, in order to evaluate whether the DOE can obtain control of land within the projected restricted area. The types of information to support this description should include—

• Present land ownership.

*Section 960.5–2–3 Meteorology.*

The meteorological setting, as determined from the closest recording station, in order to project meteorological conditions during repository operation and closure and their potential effects on the transport of airborne emissions. The types of information to support this description should include—

• Wind and atmospheric-dispersion characteristics.

• Precipitation characteristics.

• Extreme weather phenomena.

*Section 960.5–2–4 Offsite installations and operations.*

Description of offsite installations and operations in the vicinity of the site in order to estimate their projected effects on repository construction, operation, or closure. The types of information to support this description should include—

• Location and nature of nearby industrial, transportation, and military installations and operations, including atomic energy defense activities.

*Section 960.5–2–5 Environmental quality.*

Description of environmental conditions in order to estimate potential impacts on public health and welfare and on environmental quality. The types of information to support this description should include—

• Applicable Federal, State, and local procedural and substantive environmental requirements.

• Existing air quality and trends.

• Existing surface-water and ground-water quality and quantity.

• Existing land resources and uses.

• Existing terrestrial and aquatic vegetation and wildlife.

• Location of any identified critical habitats for threatened or endangered species.

• Existing aesthetic characteristics.

• Location of components of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Wilderness Preservation System, or National Forest Land.

• Location of significant State or regional protected resource areas, such as State parks, wildlife areas, or historical areas.

• Location of significant Native American resources such as major Indian religious sites, or other sites of unique cultural interest.

*Section 960.5–2–6 Socioeconomic impacts.*

Description of the socioeconomic conditions of the site, including population density and distribution, economics, community services and facilities, social conditions, and fiscal and government structure, in order to estimate the impacts that might result from site characterization and from the development of a repository at that site. The types of information to support this description should include—

• Population composition, density, and distribution.

• Economic base and economic activity, including major sectors of local economy.

• Employment distribution and trends by economic sector.

• Resource usage.

• Community services and infrastructure, including trends in use and current capacity utilization.

• Housing supply and demand.

• Life style and indicators of the quality of life.

• Existing social problems.

• Sources of, and trends in, local government expenditures and revenues.

*Section 960.5–2–7 Transportation.*

Description of the transportation facilities in the vicinity of the site in order to evaluate existing or required access routes or improvements. The types of information to support this description should include—

• Estimates of the overall cost and risk of transporting waste to the site.

• Description of the road and rail network between the site and the nearest Interstate highways and major rail lines; also, description of the waterway system, if any.

• Analyses of the adequacy of the existing regional transportation network to handle waste shipments; the movement of supplies for repository construction, operation, and closure; removal of nonradioactive waste from the site; and the transportation of the labor force.

• Improvements anticipated to be required in the transportation network and their feasibility, cost, and environmental impacts.

• Compatibility of the required transportation network improvements with the local and regional transportation and land-use plans.

• Analysis of weather impacts on transportation.

• Analysis of emergency response requirements and capabilities related to transportation.

*Section 960.5–2–8 Surface characteristics.*

Description of the surface characteristics of the site, in order to evaluate whether repository construction, operation, and closure are feasible on the basis of site characteristics that influence those activities. The types of information to support this description should include—

• Topography of the site.

• Existing and planned surface bodies of water.

• Definition of areas of landslides and other potentially unstable slopes, poorly drained material, or materials of low bearing strength or of high liquefaction potential.

*Section 960.5–2–9 Rock characteristics.*

Description of the geologic and geomechanical characteristics of the site, in context with the geologic setting, in order to project the capability of the host rock and the surrounding rock units to provide the space required for the underground facility and safe underground openings during repository construction, operation, and closure. The types of information to support this description should include—

• Depth, thickness, and lateral extent of the host rock.

• Stratigraphic and structural features within the host rock and adjacent rock units.

• Thermal, mechanical, and thermomechanical properties and constructibility characteristics of the rocks, with consideration of the effects of time, stress, temperature, dimensional scale, and any major identified structural discontinuities.

• Fluid inclusions and gas content in the host rock.

• Estimates of the magnitude and direction of in situ stress and of temperature in the host rock.

*Section 960.5–2–10 Hydrology.*

Description of the hydrology of the site, in context with its geologic setting, in order to project compatibility with repository construction, operation, and closure. The types of information to support this description should include—

- Surface-water systems, including recharge and runoff characteristics, and potential for flooding of the repository.
- Nature and location of aquifers, confining units, and aquitards.
- Potentiometric surfaces of aquifers.
- Hydraulic properties of geohydrologic units.

*Section 960.5–2–11 Tectonics.*

Description of the tectonic setting of the site, in context with the regional setting, in order to estimate any expected effects of tectonic activity on repository construction, operation, or closure. The types of information to support this description should include—

- Quaternary faults.
- Active tectonic processes.
- Preliminary estimates of expected ground motion caused by the maximum potential earthquake within the geologic setting.

# PART 961—STANDARD CONTRACT FOR DISPOSAL OF SPENT NUCLEAR FUEL AND/OR HIGH-LEVEL RADIOACTIVE WASTE

## Subpart A—General

Sec.
961.1 Purpose.
961.2 Applicability.
961.3 Definitions.
961.4 Deviations.
961.5 Federal agencies.

## Subpart B—Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste

961.11 Text of the contract.

AUTHORITY: Sec. 644, Pub. L. 95–91, 91 Stat. 599 (42 U.S.C. 7254) and sec. 302, Pub. L. 97–425, 96 Stat. 2257 (42 U.S.C. 10222).

SOURCE: 48 FR 16599, Apr. 18, 1983, unless otherwise noted.

## Subpart A—General

### §961.1 Purpose.

This part establishes the contractual terms and conditions under which the Department of Energy (DOE) will make available nuclear waste disposal services to the owners and generators of spent nuclear fuel (SNF) and high-level radioactive waste (HLW) as provided in section 302 of the Nuclear Waste Policy Act of 1982 (Pub. L. 97–425). Under the contract set forth in §961.11 of this part, DOE will take title to, transport, and dispose of spent nuclear fuel and/or high-level radioactive waste delivered to DOE by those owners or generators of such fuel or waste who execute the contract. In addition, the contract will specify the fees owners and generators of SNF and/or HLW will pay for these services. All receipts, proceeds, and revenues realized by DOE under the contract will be deposited in the Nuclear Waste Fund, an account established by the Act in the U.S. Treasury. This fund will pay for DOE's radioactive waste disposal activities, the full costs of which will be borne by the owners and generators under contract with DOE for disposal services.

### §961.2 Applicability.

This part applies to the Secretary of Energy or his designee and any person who owns or generates spent nuclear fuel or high-level radioactive waste, of domestic origin, generated in a civilian nuclear power reactor. If executed in a timely manner, the contract contained in this part will commit DOE to accept title to, transport, and dispose of such spent fuel and waste. In exchange for these services, the owners or generators of such fuel or waste shall pay fees specified in the contract which are intended to recover fully the costs of the disposal services to be furnished by DOE. The contract must be signed by June 30, 1983, or by the date on which such owner or generator commences generation of, or takes title to, such spent fuel or waste, whichever occurs later.

### §961.3 Definitions.

For purposes of this part—

*Act* means the Nuclear Waste Policy Act of 1982, Public Law 97–425, 96 Stat. 2201 *et seq.*, 42 U.S.C. 10101 *et seq.*

*Contract* means the agreement set forth in §961.11 of this part and any duly executed amendment or modification thereto.

*Generator* means any person who is licensed by the Nuclear Regulatory Commission to use a utilization or production facility under the authority of section 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134).

*Owner* means any person who has title to spent nuclear fuel or high-level radioactive waste.

*Purchaser* means any person, other than a Federal agency, who is licensed by the Nuclear Regulatory Commission to use a utilization or production facility under the authority of sections 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134) or who has title to spent nuclear fuel or high level radioactive waste and who has executed a contract with DOE.

*Secretary* means the Secretary of Energy of his designee.

Other definitions relating to the subject matter of this rule are set forth in Article II of the contract which is contained in § 961.11, Text of the contract, of this part.

### § 961.4 Deviations.

Requests for authority to deviate from this part shall be submitted in writing to the Contracting Officer, who shall forward the request for approval to the Senior Procurement Official, Headquarters. Each request for deviation shall contain the following information:

(a) A statement of the deviation desired, including identification of the specific paragraph number(s) of the contract;

(b) A description of the intended effect of the deviation;

(c) The reason why the deviation is considered necessary or would be in the best interests of the Government;

(d) The name of the owner or generator seeking the deviation and nuclear power reactor(s) affected;

(e) A statement as to whether the deviation has been requested previously and, if so, circumstances of the previous request;

(f) A statement of the period of time for which the deviation is needed; and

(g) Any pertinent background information will contribute to a full understanding of the desired deviation.

### § 961.5 Federal agencies.

Federal agencies or departments requiring DOE's disposal services for SNF and/or HLW will be accommodated by a suitable interagency agreement reflecting, as appropriate, the terms and conditions set forth in the contract in § 961.11; *Provided, however*, that the fees to be paid by Federal agencies will be equivalent to the fees that would be paid under the contract.

## Subpart B—Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste

### § 961.11 Text of the contract.

The text of the standard contract for disposal of spent nuclear fuel and/or high/level radioactive waste follows:

U.S. DEPARTMENT OF ENERGY CONTRACT NO.

___

*Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste*

THIS CONTRACT, entered into this _____ day of _____ 19___, by and between the UNITED STATES OF AMERICA (hereinafter referred to as the ''Government''), represented by the UNITED STATES DEPARTMENT OF ENERGY (hereafter referred to as ''DOE'') and _____, (hereinafter referred to as the ''Purchaser''), a corporation organized and existing under the laws of the State of _____ [add as applicable: ''acting on behalf of itself and _____.'']].

Witnesseth that:

Whereas, the DOE has the responsibility for the disposal of spent nuclear fuel and high-level radioactive waste of domestic origin from civilian nuclear power reactors in order to protect the public health and safety, and the environment; and

Whereas, the DOE has the responsibility, following commencement of operation of a repository, to take title to the spent nuclear fuel or high-level radioactive waste involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent nuclear fuel; and

Whereas, all costs associated with the preparation, transportation, and the disposal of spent nuclear fuel and high-level radioactive waste from civilian nuclear power reactors shall be borne by the owners and generators of such fuel and waste; and

Whereas, the DOE is required to collect a full cost recovery fee from owners and generators delivering to the DOE such spent nuclear fuel and/or high level radioactive waste; and

Whereas, the DOE is authorized to enter into contracts for the permanent disposal of spent nuclear fuel and/or high-level radioactive waste of domestic origin in DOE facilities; and

Whereas, the Purchaser desires to obtain disposal services from DOE; and

Whereas, DOE is obligated and willing to provide such disposal services, under the terms and conditions hereinafter set forth; and

Whereas, this contract is made and entered into under the authority of the DOE Organization Act (Pub. L. 95–91, 42 U.S.C. 7101 *et seq.*) and the Nuclear Waste Policy Act of 1982 (Pub. L. 97–425, 42 U.S.C. 10101 *et seq.*)

Now, therefore, the parties hereto do hereby agree as follows:

ARTICLE I—DEFINITIONS

As used throughout this contract, the following terms shall have the meanings set forth below:

1. The term *assigned three-month period* means the period that each Purchaser will be assigned by DOE, giving due consideration to the Purchaser's assignment preference, for purposes of reporting kilowatt hours generated by the Purchaser's nuclear power reactor and for establishing fees due and payable to DOE.

2. The term *cask* means a container for shipping spent nuclear fuel and/or high-level radioactive waste which meets all applicable regulatory requirements.

3. The term *civilian nuclear power reactor* means a civilian nuclear powerplant required to be licensed under sections 103 or 104(b) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2133, 2134(b)).

4. The term *Commission* means the United states Nuclear Regulatory Commission.

5. The term *contract* means this agreement and any duly executed amendment or modification thereto.

6. The term *Contracting Officer* means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly disignated Contracting Officer of the DOE; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

7. The term *delivery* means the transfer of custody, f.o.b. carrier, of spent nuclear fuel or high-level radioactive waste from Purchaser to DOE at the Purchaser's civilian nuclear power reactor or such other domestic site as may be designated by the Purchaser and approved by DOE.

8. The term *disposal* means the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive waste with no foreseeable intent of recovery, whether or not such emplacement permits recovery of such waste.

9. The term *DOE* means the United States Department of Energy or any duly authorized representative thereof, including the Contracting Officer.

10. The term *DOE facility* means a facility operated by or on behalf of DOE for the purpose of disposing of spent nuclear fuel and/or high-level radioactive waste, or such other facility(ies) to which spent nuclear fuel and/or high-level radioactive waste may be shipped by DOE prior to its transportation to a disposal facility.

11. The term *full cost recovery*, means the recoupment by DOE, through Purchaser fees and any interest earned, of all direct costs, indirect costs, and all allocable overhead, consistent with generally accepted accounting principles consistently applied, of providing disposal services and conducting activities authorized by the Nuclear Waste Policy Act of 1982 (Pub. L. 97–425). As used herein, the term *cost* includes the application of Nuclear Waste Fund moneys for those uses expressly set forth in section 302 (d) and (e) of the said Act and all other uses specified in the Act.

12. The term *high-level radioactive waste* (HLW) means—

(a) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and

(b) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

13. The term *electricity (kilowatt hours) generated and sold* means gross electrical output produced by a civilian nuclear power reactor measured at the output terminals of the turbine generator minus the normal onsite nuclear station service loads during the time electricity is being generated multiplied by the total energy adjustment factor. For purposes of this provision, the following definition shall apply:

a. The term *Total Energy Adjustment Factor (TEAF)* means the sum of individual owners' weighted energy adjustment factors.

b. The term *Weighted Energy Adjustment Factor (WEAF)* means the product of an owner's energy adjustment factor times the owner's share of the plant.

c. The term *Owner's Energy Adjustment Factor (OEAF)* means the sum of the individual owner's adjustment for sales to ultimate consumers and adjustment for sales for resale.

d. The term *Owner's Share of the plant (OS)* means the owner's fraction of metered electricity sales, the owner's fraction of plant ownership, or the sponsor company's fixed entitlement percentage of the plant's output. This definition includes joint owners of generating companies or participants in a generation and transmission cooperative.

e. The term *Adjustment for Sales to ultimate Consumer (ASC)* means the owner's fraction of sales to the ultimate consumer multiplied by the owner's sales to ultimate consumer adjustment factor.

f. The term *Fraction of Sales to ultimate Consumer (FSC)* means the owner's fractional quantity of electricity sold to the ultimate consumer relative to the total of electricity sales (sales to ultimate consumers plus the sales for resale).

g. The term *Sales to ultimate Consumer Adjustment Factor (SCAF)* means one minus the quotient of all electricity lost or otherwise not sold for each owner divided by the total electricity available for disposition to ultimate consumers. Electricity lost or otherwise not sold includes:

(1) Energy furnished without charge;

(2) Energy used by the company;

(3) Transmission losses;

(4) Distribution losses; and

(5) Other unaccounted losses as reported to the Federal Government ''Annual Report of Major Electric Utilities, Licensees and Others,'' Federal Energy Regulatory Commission (FERC) Form No.1; Rural Electrification Administration (REA) Forms 7 and 11 if appropriate; or the ''Annual Electric Utility Report,'' Energy Information Administration (EIA) Form EIA–861.

h. The term *Total Electricity Available for Disposition to Ultimate Consumers* means the reporting year's total of all of a utility's electricity supply which is available for disposition, expressed in kilowatt hours, and is equal to the sum of the energy sources minus the electricity sold for resale by the utility.

i. The term *Adjustment for Sales for Resale (ASR)* means the owner's fraction of sales for resale multiplied by the national average adjustment factor.

j. The term *Fraction of Sales for Resale (FSR)* means the owner's fractional quantity of electricity sold for resale by the utility relative to the total of electricity sales.

k. The term *National Average Adjustment Factor (NAF)* means the ratio of the national total of electricity sold to the national total of electricity available for disposition, based on the most recent 3 years of national data provided to the Federal Government, and will be set by the Contracting Officer. This term will be evaluated annually and revised in increments of .005.

l. Pumped storage losses. If the proportion of nuclear generated electricity consumed by a pumped-storage hydro facility can be measured or estimated and if the electricity losses associated with pumped storage facilities can be documented (e.g. based on routine and uniform records of district power data on contributions from different electricity sources), a prorated nuclear share shall be allowed as an offset to gross electricity generation reported on the annex A of appendix G, NWPA–830G form. Specific methodologies for calculating these offsets must be approved by the Contracting Officer in advance.

Instructions to annex A of appendix G, NWPA–830G provide the necessary information to calculate the energy adjustment factors.

14. The term *metric tons uranium* means that measure of weight, equivalent to 2,204.6 pounds of uranium and other fissile and fertile material that are loaded into a reactor core as fresh fuel.

15. The term *Purchaser's site* means the location of Purchaser's civilian nuclear power reactor or such other location as the Purchaser may designate.

16. The term *quarterly Treasury rate* means the current value of funds rate as specified by the Treasury Fiscal Requirements Manual, Volume 1, Part 6, section 8020.20. This rate is published quarterly in the FEDERAL REGISTER prior to the beginning of the affected quarter.

17. The term *shipping lot* means a specified quantity of spent nuclear fuel or high-level radioactive waste designated by Purchaser for delivery to DOE beginning on a specified date.

18. The term *spent nuclear fuel* (SNF) means fuel that has been withdrawn from a nuclear reactor following irradiation, the consistituent elements of which have not been separated by reprocessing.

19. The term *spent nuclear fuel and high-level radioactive waste of domestic origin* means irradiated fuel material used, and radioactive wastes resulting from such use, in nuclear power reactors located only in the United States.

20. The term *year* means the period which begins on October 1 and ends on September 30.

ARTICLE II—SCOPE

This contract applies to the delivery by Purchaser to DOE of SNF and/or HLW of domestic origin from civilian nuclear power reactors, acceptance of title by DOE to such SNF and/or HLW, subsequent transportation, and disposal of such SNF and/or HLW and, with respect to such material, establishes the fees to be paid by the Purchaser for the services to be rendered hereunder by DOE. The SNF and/or HLW shall be specified in a delivery commitment schedule as provided in Article V below. The services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and

shall continue until such time as all SNF and/or HLW from the civilian nuclear power reactors specified in appendix A, annexed hereto and made a part hereof, has been disposed of.

ARTICLE III—TERM

The term of this contract shall be from the date of execution until such time as DOE has accepted, transported from the Purchaser's site(s) and disposed of all SNF and/or HLW of domestic origin from the civilian nuclear power reactor(s) specified in appendix A.

ARTICLE IV—RESPONSIBILITIES OF THE PARTIES

*A. Purchaser's Responsibilities*

1. *Discharge Information.*

(a) On an annual basis, commencing October 1, 1983, the Purchaser shall provide DOE with information on actual discharges to date and projected discharges for the next ten (10) years in the form and content set forth in appendix B, annexed hereto and made a part hereof. The information to be provided will include estimates and projections and will not be Purchaser's firm commitment with respect to discharges or deliveries.

(b) No later than October 1, 1983, the Purchaser shall provide DOE with specific information on:

(1) Total spent nuclear fuel inventory as of April 7, 1983;

(2) Total number of fuel assemblies removed from the particular reactor core prior to 12:00 a.m. April 7, 1983 for which there are plans for reinsertion in the core, indicating the current planned dates for reinsertion in the core. Estimates of the burned and unburned portion of each individual assembly are to be provided.

(c) In the event that the Purchaser fails to provide the annual forecast in the form and content required by DOE, DOE may, in its sole discretion, require a rescheduling of any delivery commitment schedule then in effect.

2. *Preparation for Transportation.*

(a) The Purchaser shall arrange for, and provide, all preparation, packaging, required inspections, and loading activities necessary for the transportation of SNF and/or HLW to the DOE facility. The Purchaser shall notify DOE of such activities sixty (60) days prior to the commencement of such activities. The preparatory activities by the Purchaser shall be made in accordance with all applicable laws and regulations relating to the Purchaser's responsibilities hereunder. DOE may designate a representative to observe the preparatory activities conducted by the Purchaser at the Purchaser's site, and the Purchaser shall afford access to such representative.

(b) Except as otherwise agreed to by DOE, the Purchaser shall advise DOE, in writing as specified in appendix F, annexed hereto and made a part hereof, as to the description of the material in each shipping lot sixty (60) days prior to scheduled DOE transportation of that shipping lot.

(c) The Purchaser shall be responsible for incidental maintenance, protection and preservation of any and all shipping casks furnished to the Purchaser by DOE for the performance of this contract. The Purchaser shall be liable for any loss of or damage to such DOE-furnished property, and for expenses incidental to such loss or damage while such casks are in the possession and control of the Purchaser except as otherwise provided for hereunder. Routine cask maintenance, such as scheduled overhauls, shall not be the responsibility of the Purchaser.

*B. DOE Responsibilities*

1. DOE shall accept title to all SNF and/or HLW, of domestic origin, generated by the civilian nuclear power reactor(s) specified in appendix A, provide subsequent transportation for such material to the DOE facility, and dispose of such material in accordance with the terms of this contract.

2. DOE shall arrange for, and provide, a cask(s) and all necessary transportation of the SNF and/or HLW from the Purchaser's site to the DOE facility. Such cask(s) shall be furnished sufficiently in advance to accommodate scheduled deliveries. Such cask(s) shall be suitable for use at the Purchaser's site, meet applicable regulatory requirements, and be accompanied by pertinent information including, but not limited to, the following:

(a) Written procedures for cask handling and loading, including specifications on Purchaser-furnished cannisters for containment of failed fuel;

(b) Training for Purchaser's personnel in cask handling and loading, as may be necessary;

(c) Technical information, special tools, equipment, lifting trunnions, spare parts and consumables needed to use and perform incidental maintenance on the cask(s); and

(d) Sufficient documentation on the equipment supplied by DOE.

3. DOE may fulfill any of its obligations, or take any action, under this contract either directly or through contractors.

4. DOE shall annually provide to the Purchaser pertinent information on the waste disposal program including information on cost projections, project plans and progress reports.

5. (a) Beginning on April 1, 1991, DOE shall issue an annual acceptance priority ranking for receipt of SNF and/or HLW at the DOE repository. This priority ranking shall be based on the age of SNF and/or HLW as calculated from the date of discharge of such

material from the civilian nuclear power reactor. The oldest fuel or waste will have the highest priority for acceptance, except as provided in paragraphs B and D of Article V and paragraph B.3 of Article VI hereof.

(b) Beginning not later than July 1, 1987, DOE shall issue an annual capacity report for planning purposes. This report shall set forth the projected annual receiving capacity for the DOE facility(ies) and the annual acceptance ranking relating to DOE contracts for the disposal of SNF and/or HLW including, to the extent available, capacity information for ten (10) years following the projected commencement of operation of the initial DOE facility.

ARTICLE V—DELIVERY OF SNF AND/OR HLW

*A. Description of SNF and HLW*

The Purchaser shall deliver to DOE and DOE shall, as provided in this contract, accept the SNF and/or HLW which is described in accordance with Article VI.A. of this contract, for disposal thereof.

*B. Delivery Commitment Schedule*

1. Delivery commitment schedule(s), in the form set forth in appendix C annexed hereto and made a part hereof, for delivery of SNF and/or HLW shall be furnished to DOE by Purchaser. After DOE has issued its proposed acceptance priority ranking, as described in paragraph B.5 of Article IV hereof, beginning January 1, 1992 the Purchaser shall submit to DOE the delivery commitment schedule(s) which shall identify all SNF and/or HLW the Purchaser wishes to deliver to DOE beginning sixty-three (63) months thereafter. DOE shall approve or disapprove such schedules within three (3) months after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and request a revised schedule from the Purchaser, to be submitted to DOE within thirty (30) days after receipt of DOE's notice of disapproval.

2. DOE shall approve or disapprove such revised schedule(s) within sixty (60) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall submit its proposed schedule(s). If these are not acceptable to the Purchaser, the parties shall promptly seek to negotiate mutually acceptable schedule(s). Purchaser shall have the right to adjust the quantities of SNF and/or HLW plus or minus (±) twenty percent (20%), and the delivery schedule up to two (2) months, until the submission of the final delivery schedule.

*C. Final Delivery Schedule*

Final delivery schedule(s), in the form set forth in appendix D, annexed hereto and made a part hereof, for delivery of SNF and/or HLW covered by an approved delivery commitment schedule(s) shall be furnished to DOE by Purchaser. The Purchaser shall submit to DOE final delivery schedules not less than twelve (12) months prior to the delivery date specified therein. DOE shall approve or disapprove a final delivery schedule within forty-five (45) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall request a revised schedule from the Purchaser, to be submitted to DOE within thirty (30) days after receipt of DOE's notice of disapproval. DOE shall approve or disapprove such revised schedule(s) within sixty (60) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall submit its proposed schedule(s). If these are not acceptable to the Purchaser, the parties shall promptly seek to negotiate mutually acceptable schedule(s).

*D. Emergency Deliveries*

Emergency deliveries of SNF and/or HLW may be accepted by DOE before the date provided in the delivery commitment schedule upon prior written approval by DOE.

*E. Exchanges*

Purchaser shall have the right to determine which SNF and/or HLW is delivered to DOE; *provided, however*, that Purchaser shall comply with the requirements of this contract. Purchaser shall have the right to exchange approved delivery commitment schedules with parties to other contracts with DOE for disposal of SNF and/or HLW; *provided, however*, that DOE shall, in advance, have the right to approve or disapprove, in its sole discretion, any such exchanges. Not less than six (6) months prior to the delivery date specified in the Purchaser's approved delivery commitment schedule, the Purchaser shall submit to DOE an exchange request, which states the priority rankings of both the Purchaser hereunder and any other Purchaser with whom the exchange of approved delivery commitment schedules is proposed. DOE shall approve or disapprove the proposed exchange within thirty (30) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval.

ARTICLE VI—CRITERIA FOR DISPOSAL

*A. General Requirements*

1. *Criteria.*

(a) Except as otherwise provided in this contract, DOE shall accept hereunder only such SNF and/or HLW which meets the General Specifications for such fuel and waste as set forth in appendix E, annexed hereto and made a part hereof.

(b) Purchaser shall accurately classify SNF and/or HLW prior to delivery in accordance with paragraphs B and D of appendix E.

2. *Procedures*.

(a) Purchaser shall provide to DOE a detailed description of the SNF and/or HLW to be delivered hereunder in the form and content as set forth in appendix F, annexed hereto and made a part hereof. Purchaser shall promptly advise DOE of nay changes in said SNF and/or HLW as soon as they become known to the purchaser.

(b) DOE's obligation for disposing of SNF under this contract also extends to other than standard fuel; however, for any SNF which has been designated by the Purchaser as other than standard fuel, as that term is defined in appendix E, the Purchaser shall obtain delivery and procedure confirmation from DOE prior to delivery. DOE shall advise Purchaser within sixty (60) days after receipt of such confirmation request as to the technical feasibility of disposing of such fuel on the currently agreed to schedule and any schedule adjustment for such services.

*B. Acceptance Procedures*

1. *Acceptance Priority Ranking*.

Delivery commitment schedules for SNF and/or HLW may require the disposal or more material than the annual capacity of the DOE disposal facility (or facilities) can accommodate. The following acceptance priority ranking will be utilized:

(a) Except as may be provided for in subparagraph (b) below and Article V.D. of this contract, acceptance priority shall be based upon the age of the SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor. DOE will first accept from Purchaser the oldest SNF and/or HLW for disposal in the DOE facility, except as otherwise provided for in paragraphs B and D of Article V.

(b) Notwithstanding the age of the SNF and/or HLW, priority may be accorded any SNF and/or HLW removed from a civilian nuclear power reactor that has reached the end of its useful life or has been shut down permanently for whatever reason.

2. *Verification of SNF and/or HLW*.

During cask loading and prior to acceptance by DOE for transportation to the DOE facility, the SNF and/or HLW description of the shipping lot shall be subject to verification by DOE. To the extent the SNF and/or HLW is consistent with the description submitted and approved, in accordance with appendices E and F, DOE agrees to accept such SNF and/or HLW for disposal when DOE has verified the SNF and/or HLW description, determined the material is properly loaded, packaged, marked, labeled and ready for transportation, and has taken custody, as evidenced in writing, of the material at the Purchaser's site, f.o.b. carrier. A properly executed off-site radioactive shipment record describing cask contents must be prepared by the Purchaser along with a signed certification which states: ''This is to certify that the above-named materials are properly described, classified, packaged, marked and labeled and are in proper condition for transfer according to the applicable regulations of the U. S. Department of Transportation.''

3. *Improperly described SNF and/or HLW*.

(a) *Prior to Acceptance*— If SNF and/or HLW is determined by DOE to be improperly described prior to acceptance by DOE at the Purchaser's site, DOE shall promptly notify the Purchaser in writing of such determination. DOE reserves the right, in its sole discretion, to refuse to accept such SNF and/or HLW until the SNF and/or HLW has been properly described. The Purchaser shall not transfer such SNF and/or HLW to DOE unless DOE agrees to accept such SNF and/or HLW under such other arrangements as may be agreed to, in writing, by the parties.

(b) *After Acceptance*— If subsequent to its acceptance DOE finds that such SNF and/or HLW is improperly described, DOE shall promptly notify the Purchaser, in writing, of such finding. In the event of such notification, Purchaser shall provide DOE with a proper designation within thirty (30) days. In the event of a failure by the Purchaser to provide such proper designation, DOE may hold in abeyance any and all deliveries scheduled hereunder.

ARTICLE VII—TITLE

Title to all SNF and/or HLW accepted by DOE for disposal shall pass to DOE at the Purchaser's site as provided for in Article VI hereof. DOE shall be solely repsonsible for control of all material upon passage of title. DOE shall have the right to dispose as it sees fit of any SNF and/or HLW to which it has taken title. The Purchaser shall have no claim against DOE or the Government with respect to such SNF or HLW nor shall DOE or the Government be obligated to compensate the Purchaser for such material.

ARTICLE VIII—FEES AND TERMS OF PAYMENT

*A. Fees*

1. Effective April 7, 1983, Purchaser shall be charged a fee in the amount of 1.0 mill per kilowatt hour (1M/kWh) electricity generated and sold.

2. For SNF, or solidified high-level radioactive waste derived from SNF, which fuel was used to generate electricity in a civilian nuclear power reactor prior to April 7, 1983, a one-time fee will be assessed by applying industry-wide average dollar per kilogram charges to four (4) distinct ranges of fuel burnup so that the integrated cost across all discharged (i.e. spent) fuel is equivalent to an industry-wide average charge of 1.0 mill

per kilowatt-hour. For purposes of this contract, discharged nuclear fuel is that fuel removed from the reactor core with no plans for reinsertion. In the event that any such fuel withdrawn with plans for reinsertion is not reinserted, then the applicable fee for such fuel shall be calculated as set forth in this paragraph 2. The categories of spent nuclear fuel burnup and the fee schedule are listed below:

[In 1982 dollars]

| Nuclear spent fuel burnup range | Dollars per kilogram |
|---|---|
| 0 to 5,000 MWDT/MTU | $80.00 |
| 5,000 to 10,000 MWDT/MTU | 142.00 |
| 10,000 to 20,000 MWDT/MTU | 162.00 |
| Over 20,000 MWDT/MTU | 184.00 |

This fee shall not be subject to adjustment, and the payment thereof by the Purchaser shall be made to DOE as specified in paragraph B of this Article VIII.

3. For in-core fuel as of April 7, 1983, that portion of the fuel burned through April 6, 1983 shall be subject to the one-time fee as calculated in accordance with the following methodology: [a] determine the total weight in kilograms of unranium loaded initially in the particular core; [b] determine the total megawatt-days (thermal) which have been generated by all of the fuel assemblies in the said core as of 12:00 A.M. April 7, 1983; [c] divide the megawatt-days (thermal) generated in the said core by the total metric tons of initially loaded uranium in that core and multiply the quotient by the conversion factor 0.0078 to obtain a value in dollars per kilogram; and [d] multiply the dollars per kilogram value by the kilograms determined in [a] above to derive the dollar charge for the one-time fee to be paid for the specified in-core fuel as of 12:00 A.M. April 7, 1983. For purposes of this contract, in-core fuel is that fuel in the reactor core as of the date specified, plus any fuel removed from the reactor with plans for reinsertion. That portion of such fuel unburned as of 12:00 A.M. April 7, 1983 shall be subject to the 1.0 mill per kilowatt-hour charge.

4. DOE will annually review the adequacy of the fees and adjust the 1M/KWH fee, if necessary, in order to assure full cost recovery by the Government. Any proposed adjustment to the said fee will be transmitted to Congress and shall be effective after a period of ninety (90) days of continuous session has elapsed following receipt of such transmittal unless either House of Congress adopts a resolution disapproving the proposed adjustment. Any adjustment to the 1M/KWH fee under paragraph A.1. of this Article VIII shall be prospective.

*B. Payment*

1. For electricity generated and sold by the Purchaser's civilian nuclear power reactor(s) on or after April 7, 1983, fees shall be paid quarterly by the Purchaser and must be received by DOE not later than the close of the last business day of the month following the end of each assigned 3-month period. The first payment shall be due on July 31, 1983, for the period April 7, 1983, to June 30, 1983. (Add as applicable: A one-time adjustment period payment shall be due on _____, for the period _____ to _____.) The assigned 3-month period, for purposes of payment and reporting of electricity generated and sold shall begin _____.

2. For SNF discharged prior to April 7, 1983, and for in-core burned fuel as of 12:00 A.M. April 7, 1983, the Purchaser shall, within two (2) years of contract execution, select one of the following fee payment options:

(a) *Option 1*— The Purchaser's financial obligation for said fuel shall be prorated evenly over forty (40) quarters and will consist of the fee plus interest on the outstanding fee balance. The interest from April 7, 1983, to date of the first payment is to be calculated based upon the 13-week Treasury bill rate, as reported on the first such issuance following April 7, 1983, and compounded quarterly thereafter by the 13-week Treasury bill rates as reported on the first such issuance of each succeeding assigned three-month period. Beginning with the first payment, interest is to be calculated on Purchaser's financial obligation plus accrued interest, at the ten-year Treasury note rate in effect on the date of the first payment. In no event shall the end of the forty (40) quarters extend beyond the first scheduled delivery date as reflected in the DOE-approved delivery commitment schedule. All payments shall be made concurrently with the assigned three month period payments. At any time prior to the end of the forty (40) quarters, Purchaser may, without penalty, make a full or partial lump sum payment at any of the assigned three month period payment dates. Subsequent quarterly payments will be appropriately reduced to reflect the reduction in the remaining balance in the fee due and payable. The remaining financial obligation, if any, will be subject to interest at the same ten-year Treasury note rate over the remainder of the ten year period.

(b) *Option 2*— The Purchaser's financial obligation shall be paid in the form of a single payment anytime prior to the first delivery, as reflected in the DOE approved delivery commitment schedule, and shall consist of the fee plus interest on the outstanding fee balance. Interest is to be calculated from April 7, 1983, to the date of the payment based upon the 13-week Treasury bill rate, as reported on the first such issuance following April 7, 1983, and compounded quarterly

thereafter by the 13-week Treasury bill rates as reported on the first such issuance of each succeeding assigned three-month period until payment.

(c) *Option 3*— The Purchaser's financial obligation shall be paid prior to June 30, 1985, or prior to two (2) years after contract execution, whichever comes later, in the form of a single payment and shall consist of all outstanding fees for SNF and in-core fuel burned prior to April 7, 1983. Under this option, no interest shall be due to DOE from April 7, 1983, to the date of full payment on the outstanding fee balance.

3. *Method of Payment:*

(a) Payments shall be made by wire transfer, in accordance with instructions specified by DOE in appendix G, annexed hereto and made a part hereof, and must be received within the time periods specified in paragraph B.1. of this Article VIII.

(b) The Purchaser will complete a Standard Remittance Advice, as set forth in appendix G, for each assigned three month period payment, and mail it postmarked no later than the last business day of the month following each assigned three month period to Department of Energy, Office of Controller, Cash Management Division, Box 500, Room D–208, Germantown, Maryland 20874.

4. Any fees not paid on a timely basis or underpaid because of miscalculation will be subject to interest as specified in paragraph C of this Article VIII.

*C. Interest on Late Fees*

1. DOE will notify the Purchaser of amounts due only when unpaid or underpaid by the dates specified in paragraph B above. Interest will be levied according to the following formula:

Interest = Unpaid balance due to DOE for assigned three month period × Quarterly Treasury rate plus six percent (6%) × Number of months late including month of payment (fractions rounded up to whole months) ÷ 12

2. Interest is payable at any time prior to the due date for the subsequent assigned three month period fee payment. Nonpayment by the end of the subsequent assigned three month period will result in compounding of interest due. Purchaser shall complete a Standard Remittance Advice of interest payments.

3. Following the assessment of a late fee by DOE, payments will be applied against accrued interest first and the principal thereafter.

*D. Effect of Payment*

Upon payment of all applicable fees, interest and penalties on upaid or underpaid amounts, the Purchaser shall have no further financial obligation to DOE for the disposal of the accepted SNF and/or HLW.

*E. Audit*

1. The DOE or its representative shall have the right to perform any audits or inspections necessary to determine whether Purchaser is paying the correct amount under the fee schedule and interest provisions set forth in paragraphs A, B and C above.

2. Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

3. The Purchaser shall furnish DOE with such records, reports and data as may be necessary for the determination of quantities delivered hereunder and for final settlement of amounts due under this contract and shall retain and make available to DOE and its authorized representative examination at all reasonable times such records, reports and data for a period of three (3) years from the completion of delivery of all material under this contract.

ARTICLE IX—DELAYS

*A. Unavoidable Delays by Purchaser or DOE*

Neither the Government nor the Purchaser shall be liable under this contract for damages caused by failure to perform its obligations hereunder, if such failure arises out of causes beyond the control and without the fault or negligence of the party failing to perform. In the event circumstances beyond the reasonable control of the Purchaser or DOE—such as acts of God, or of the public enemy, acts of Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather—cause delay in scheduled delivery, acceptance or transport of SNF and/or HLW, the party experiencing the delay will notify the other party as soon as possible after such delay is ascertained and the parties will readjust their schedules, as appropriate, to accommodate such delay.

*B. Avoidable Delays by Purchaser or DOE*

In the event of any delay in the delivery, acceptance or transport of SNF and/or HLW to or by DOE caused by circumstances within the reasonable control of either the Purchaser or DOE or their respective contractors or suppliers, the charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.

ARTICLE X—SUSPENSION

A. In addition to any other rights DOE may have hereunder, DOE reserves the right, at no cost to the Government, to suspend this contract or any portion thereof upon

written notice to the Purchaser within ninety (90) days of the Purchaser's failure to perform its obligations hereunder, and the Purchaser's failure to take corrective action within thirty (30) days after written notice of such failure to perform as provided above, unless such failure shall arise from causes beyond the control and without the fault or negligence of the Purchaser, its contractors or agents. However, the Purchaser's obligation to pay fees required hereunder shall continue unaffected by any suspension. Any such suspension shall be rescinded if and when DOE determines that Purchaser has completed corrective action.

B. The DOE reserves the right to suspend any scheduled deliveries in the event that a national emergency requires that priority be given to Government programs to the exclusion of the work under this contract. In the event of such a suspension by the Government, the DOE shall refund that portion of payments representing services not delivered as determined by the Contracting Officer to be an equitable adjustment. Any disagreement arising from the refund payment, if any, shall be resolved as provided in the clause of this contract, entitled ''DISPUTES.''

ARTICLE XI—REMEDIES

Nothing in this contract shall be construed to preclude either party from asserting its rights and remedies under the contract or at law.

ARTICLE XII—NOTICES

All notices and communications between the parties under this contract (except notices published in the FEDERAL REGISTER) shall be in writing and shall be sent to the following addressees:

To DOE: _____

_____

_____

To the Purchaser: _____

_____

_____

However, the parties may change the addresses or addressees for such notices or communications without formal modification to this contract; *provided, however*, that notice of such changes shall be given by registered mail.

ARTICLE XIII—REPRESENTATION CONCERNING NUCLEAR HAZARDS INDEMNITY

A. DOE represents that it will include in its contract(s) for the operation of any DOE facility an indemnity agreement based upon Section 170(d) of the Atomic Energy Act of 1954, as amended, a copy of which agreement shall be furnished to the Purchaser; that under said agreement, DOE shall have agreed to indemnify the contractor and other persons indemnified against claims for public liability (as defined in said Act) arising out of or in connection with contractual activities; that the indemnity shall apply to covered nuclear incidents which (1) take place at a contract location; or (2) arise out of or in the course of transportation of source, special nuclear or by-product material to or from a contract location. The obligation of DOE to indemnify shall be subject to the conditions stated in the indemnity agreement.

B. The provisions of this Article XIII shall continue beyond the term of this contract.

ARTICLE XIV—ASSIGNMENT

The rights and duties of the Purchaser may be assignable with transfer of title to the SNF and/or HLW involved; *provided, however*, that notice of any such transfer shall be made to DOE within ninety (90) days of transfer.

ARTICLE XV—AMENDMENTS

The provisions of this contract has been developed in the light of uncertainties necessarily attendant upon long-term contracts. Accordingly, at the request of either DOE or Purchaser, the parties will negotiate and, to the extent mutually agreed, amend this contract as the parties may deem to be necessary or proper to reflect their respective interests; *provided, however*, that any such amendment shall be consistent with the DOE final rule published in the FEDERAL REGISTER on April 18, 1983 entitled, ''Standard Contract for Disposal or SNF and/or HLW'', as the same may be amended from time to time.

ARTICLE XVI—DISPUTES

A. Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Purchaser. The decision of the Contracting Officer shall be final and conclusive unless within ninety (90) days from the date of receipt of such copy, the Purchaser mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the DOE Board of Contract Appeals (Board). The decision of the Board shall be final and conclusive unless determined by a court of competent jursidiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Purchaser shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

B. For Purchaser claims of more than $50,000, the Purchaser shall submit with the

claim a certification that the claim is made in good faith; the supporting data are accurate and complete to the best of the Purchaser's knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the Purchaser believes the Government is liable. The certification shall be executed by the Purchaser if an individual. When the Purchaser is not an individual, the certification shall be executed by a senior company official in charge at the Purchaser's plant or location involved, or by an officer or general partner of the Purchaser having overall responsibility for the conduct of the Purchaser's affairs.

C. For Purchaser claims of $50,000 or less, the Contracting Officer must render a decision within sixty (60) days. For Purchaser claims in excess of $50,000, the Contracting Officer must decide the claim within sixty (60) days or notify the Purchaser of the date when the decision will be made.

D. This ''Disputes'' clause does not preclude consideration of law questions in connection with decisions provided for in paragraph A above; *provided, however,* that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

ARTICLE XVII—OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE XVIII—COVENANT AGAINST CONTINGENT FEES

The Purchaser warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Purchaser for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or in its discretion to increase the contract price or consideration, or otherwise recover, the full amount of such commission, brokerage, or contingent fee.

ARTICLE XIX—EXAMINATION OF RECORDS

The Purchaser agrees that the Comptroller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any directly pertinent books, documents, papers and records of the Purchaser involving transactions related to this contract until the expiration of three years after final payment under this contract.

ARTICLE XX—PERMITS

The Government and the Purchaser shall procure all necessary permits or licenses (including any special nuclear material licenses) and comply with all applicable laws and regulations of the United States, States and municipalities necessary to execute their respective responsibilities and obligations under this contract.

ARTICLE XXI—RIGHTS IN TECHNICAL DATA

*A. Definitions.*

1. *Technical data* means recorded information regardless of form or characteristic, of a specific or technical nature. It may, for example, document research, experimental, developmental, or demonstration, or engineering work, or be usable or used to define a design or process, or to procure, produce, support, maintain or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design-type documents or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data as used herein do not include financial reports, cost analyses, and other information incidental to contract administration.

2. *Proprietary data* means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(a) Are not generally known or available from other sources without obligation concerning their confidentiality;

(b) Have not been made available by the owner to others without obligation concerning its confidentiality; and

(c) Are not already available to the Government without obligation concerning their confidentiality.

3. *Contract data* means technical data first produced in the performance of the contract, technical data which are specified to be delivered under the contract, or technical data actually delivered in connection with the contract.

4. *Unlimited rights* means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

*B. Allocation of Rights.*

1. The Government shall have:

(a) Unlimited rights in contract data except as otherwise provided below with respect to proprietary data properly marked as authorized by this clause;

(b) The right to remove, cancel, correct or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder, if in response to a written inquiry by DOE concerning the proprietary nature of the markings, the Purchaser fails to respond thereto within 60 days or fails to substantiate the proprietary nature of the markings. In either case, DOE will notify the Purchaser of the action taken;

(c) No rights under this contract in any technical data which are not contract data.

2. Subject to the foregoing provisions of this rights in technical data clause, the Purchaser shall have the right to mark proprietary data it furnishes under the contract with the following legend and no other, the terms of which shall be binding on the Government:

LIMITED RIGHTS LEGEND

This ''proprietary data,'' furnished under ''Contract No. ____'' with the U.S. Department of Energy may be duplicated and used by the Government with the express limitations that the ''proprietary data'' may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Purchaser, except that further disclosure or use may be made solely for the following purposes:

(a) This ''proprietary data'' may be disclosed for evaluation purposes under the restriction that the ''proprietary data'' be retained in confidence and not be further disclosed;

(b) This ''proprietary data'' may be disclosed to contractors participating in the Government's program of which this contract is a part, for information or use in connection with the work performed under their contracts and under the restriction that the ''proprietary data'' be retained in confidence and not be further disclosed; or

(c) This ''proprietary data'' may be used by the Government or others on its behalf for emergency work under the restriction that the ''proprietary data'' be retained in confidence and not be further disclosed. This legend shall be marked on any reproduction of this data in whole or in part.

3. In the event that proprietary data of a third party, with respect to which the Purchaser is subject to restrictions on use or disclosure, is furnished with the Limited Rights Legend above, Purchaser shall secure the agreement of such third party to the rights of the Government as set forth in the Limited Rights Legend. DOE shall upon request furnish the names of those contractors to which proprietary data has been disclosed.

ARTICLE XXII—ENTIRE CONTRACT

A. This contract, which consists of Articles I through XXII and appendices A through G, annexed hereto and made a part hereof, contains the entire agreement between the parties with respect to the subject matter hereof. Any representation, promise, or condition not incorporated in this contract shall not be binding on either party. No course of dealing or usage of trade or course of performance shall be relevant to explain or supplement any provision contained in this contract.

B. Nothing in this contract is intended to affect in any way the contractual obligation of any other persons with whom the Purchaser may have contracted with respect to assuming some or all disposal costs or to accept title to SNF and/or HLW.

*C. Appendices*

A. Nuclear Power Reactor(s) or Other Facilities Covered
B. Discharge Information (Ten Year; Annual)
C. Delivery Commitment Schedule
D. Final Delivery Schedule
E. General Specifications
F. Detailed Description of Purchaser's Fuel
G. Standard Remittance Advice For Payment of Fees

In witness whereof, the parties hereto have executed this contract as of the day and year first above written.

United States of America
United States Department of Energy
By: _____
(Contracting Officer)

Witnesses as to Execution on Behalf of Purchaser
(Name) _____
(Address) _____
(Name) _____
(Address) _____
(Purchaser's Company Name)
By: _____
Title: _____

I, (*Name*), certify that I am the (*Title*) of the corporation named as Purchaser herein; that (*Name*) who signed this document on behalf of the Purchaser was then (*Title*) of said corporation; that said document was duly signed for and on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

In Witness Whereof, I have hereunto affixed my hand and the seal of said corporation this ____ day of ____, 1983

(Corporate Seal)

(Signature) _____

APPENDIX A

*Nuclear Power Reactor(s) or Other Facilities Covered*

Purchaser _____
Contract Number/Date ____/____ _____
Reactor/Facility Name _____
Location:
Street _____
City _____
County/State _____/ _____
Zip Code _____
Capacity (MWE)__Gross _____
Reactor Type:
BWR ☐
PWR ☐
Other (Identify) _____
Facility Description _____
Date of Commencement of Operation _____
(actual or estimated)
NRC License #: _____
By Purchaser:
Signature _____
Title _____
Date _____

APPENDIX B

*Ten Year Discharge Forecast*

To be used for DOE planning purposes only and does not represent a firm commitment by Purchaser.
Purchaser _____
Contract Number/Date _____/ _____
Reactor/Facility Name _____
Location:
Street _____
City _____
County/State _____/ _____
Zip Code
Type: BWR ☐
PWR ☐
Other (Identify) _____

| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 10 yr total |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Discharge date—mo/yr (or refueling shut down date). | | | | | | | | | | | |
| Metric tons: | | | | | | | | | | | |
| —initial. | | | | | | | | | | | |
| —discharged. | | | | | | | | | | | |
| Number of assemblies discharged (per cycle). | | | | | | | | | | | |

By Purchaser:
Signature _____
Title _____
Date _____

APPENDIX B (ENCLOSURE 1)

*Actual Discharges*

Purchaser _____
Contract Number/Date _____
Reactor/Facility Name _____
Location:
Street _____
City _____
County/State _____
Zip Code _____
Type:
BWR ☐
PWR ☐
Other (Identify) _____
Refueling Shutdown Date _____
Metric Tons Uranium (Initial/Discharged);
Initial _____
Discharged _____
Number of Assemblies Discharged: _____

Any false, fictitious or fraudulent statement may be punishable by fine or imprisonment (U.S. Code, Title 18, Section 1001).

By Purchaser:
Signature _____
Title _____
Date _____

APPENDIX C

*Delivery Commitment Schedule*

This delivery commitment schedule shall be submitted by Purchaser to DOE as specified in Article V.B. of this contract.
Purchaser _____
Contract Number/Date _____
Reactor/Facility Name _____
Location:
Street _____
City _____
County/State _____
Zip Code _____
Type Cask Required: _____
Shipping Lot Number _____
(Assigned by DOE)
Proposed Shipping Mode:
Truck ☐
Rail ☐
Barge ☐
DOE Assigned Delivery Commitment Date __
Range of Discharge Date(s) (Earliest to Latest)
Mo____ Day____ Yr____ to Mo____ Day____ Yr____
Metric Tons Uranium:
(Initial) _____
(Discharged) _____
Number of Assemblies:
BWR _____
PWR _____

Other _____

Unless otherwise agreed to in writing by DOE, the Purchaser shall furnish herewith to DOE suitable proof of ownership of the SNF and/or HLW to be delivered hereunder. The Purchaser shall notify DOE in writing at the earliest practicable date of any change in said ownership.

Any false, fictitious or fraudulent statement may be punishable by fine or imprisonment (U.S. Code, Title 18, Section 1001).

By Purchaser:
Signature _____
Title _____
Date _____
Approved by DOE:
Technical Representative _____
Title _____
Date _____
Contracting Officer _____
Date _____

## APPENDIX D

*Final Delivery Schedule*

(To be submitted to DOE by Purchaser for each designated Purchaser Delivery site not later than twelve (12) months prior to estimated date of first delivery)

Purchaser: _____
Contract Number/Date _____
Reactor/Facility Name _____
Location:
Street _____
City _____
County/State _____
Zip Code _____
Type(s) cask(s) required: _____
No. Assembilies per cask _____
Shipping Lot Number _____
Shipping Mode:
(Assigned by DOE)
Truck _____
Rail _____
Barge _____
Metric Tons Uranium:
(Initial) _____
(Discharged) _____
Range of Discharge Date(s) (Earliest to Latest)
(From approved commitment schedule)
Mo____ Day____ Yr____ to Mo____ Day____ Yr____
Number of Assemblies:
BWR _____
PWR _____
Other _____
Purchaser's Delivery First Estimate
Mo____ Day____ Yr____ last Mo____ Day____ Mo____

Unless otherwise agreed to in writing by DOE, the Purchaser shall furnish herewith to DOE suitable proof of ownership of the SNF and/or HLW to be delivered hereunder. The Purchaser shall notify DOE in writing at the earliest practicable date of any change in said ownership.

To confirm acceptability of delivery date(s):
Purchaser Contact _____
Phone _____
Title _____
DOE Contact _____
Phone _____
Title _____

Any false, fictitious or fraudulent statement may be punishable by fine or imprisonment (U.S. Code, Title 18, Section 1001).

By Purchaser:
Signature _____
Title _____
Date _____
Approved by DOE:
Technical Representative _____
Title _____
Date _____
Contracting Officer _____
Date _____

## APPENDIX E

*General Specifications*

*A. Fuel Category Identification*

1. Categories—Purchaser shall use reasonable efforts, utilizing technology equivalent to and consistent with the commercial practice, to properly classify Spent Nuclear Fuel (SNF) prior to delivery to DOE, as follows:

a. *Standard Fuel* means SNF that meets all the General Specifications therefor set forth in paragraph B below.

b. *Nonstandard Fuel* means SNF that does not meet one or more of the General Specifications set forth in subparagraphs 1 through 5 of paragraph B below, and which is classified as Nonstandard Fuel Classes NS–1 through NS–5, pursuant to paragraph B below.

c. *Failed Fuel* means SNF that meets the specifications set forth in subparagraphs 1 through 3 of paragraph B below, and which is classified as Failed Fuel Class F–1 through F–3 pursuant to subparagraph 6 of paragraph B below.

d. Fuel may have ''Failed Fuel'' and/or several ''Nonstandard Fuel'' classifications

*B. Fuel Description and Subclassification—General Specifications*

1. *Maximum Nominal Physical Dimensions.*

| | Boiling water reactor (BWR) | Pressurized water reactor (PWR) |
|---|---|---|
| Overall Length ..... | 14 feet, 11 inches | 14 feet, 10 inches. |
| Active Fuel Length | 12 feet, 6 inches .. | 12 feet, 0 inches. |
| Cross Section [1] ..... | 6 inches × 6 inches. | 9 inches × 9 inches. |

[1] The cross section of the fuel assembly shall not include the channel.

NOTE: Fuel that does not meet these specifications shall be classified as Nonstandard Fuel—Class NS–1.

2. *Nonfuel Components*. Nonfuel components including, but not limited to, control spiders, burnable poison rod assemblies, control rod elements, thimble plugs, fission chambers, and primary and secondary neutron sources, that are contained within the fuel assembly, or BWR channels that are an integral part of the fuel assembly, which do not require special handling, may be included as part of the spent nuclear fuel delivered for disposal pursuant to this contract.

NOTE: Fuel that does not meet these specifications shall be classified as Nonstandard Fuel—Class NS–2.

3. *Cooling*. The minimum cooling time for fuel is five (5) years.

NOTE: Fuel that does not meet this specification shall be classified as Nonstandard Fuel—Class NS–3.

4. *Non-LWR Fuel*. Fuel from other than LWR power facilities shall be classified as Nonstandard Fuel—Class NS-4. Such fuel may be unique and require special handling, storage, and disposal facilities.

5. *Consolidated Fuel Rods*. Fuel which has been disassembled and stored with the fuel rods in a consolidated manner shall be classified as Nonstandard Fuel Class NS–5.

6. *Failed Fuel*.

a. Visual Inspection.

Assemblies shall be visually inspected for evidence of structural deformity or damage to cladding or spacers which may require special handling. Assemblies which [i] are structurally deformed or have damaged cladding to the extent that special handling may be required or [ii] for any reason cannot be handled with normal fuel handling equipment shall be classified as Failed Fuel—Class F–1.

b. Previously Encapsulated Assemblies.

Assemblies encapsulated by Purchaser prior to classification hereunder shall be classified as Failed Fuel—Class F–3. Purchaser shall advise DOE of the reason for the prior encapsulation of assemblies in sufficient detail so that DOE may plan for appropriate subsequent handling.

c. Regulatory Requirements.

Spent fuel assemblies shall be packaged and placed in casks so that all applicable regulatory requirements are met.

*C. Summary of Fuel Classifications*

1. *Standard Fuel:*
a. Class S–1: PWR
b. Class S–2: BWR
2. *Nonstandard Fuel:*
a. Class NS–1: Physical Dimensions
b. Class NS–2: Non Fuel Components
c. Class NS–3: Short Cooled
d. Class NS–4: Non-LWR
e. Class NS–5: Consolidated Fuel Rods.
3. *Failed Fuel:*
a. Class F–1: Visual Failure or Damage
b. Class F–2: Radioactive ''Leakage''
c. Class F–3: Encapsulated

*D. High-Level Radioactive Waste*

The DOE shall accept high-level radioactive waste. Detailed acceptance criteria and general specifications for such waste will be issued by the DOE no later than the date on which DOE submits its license application to the Nuclear Regulatory Commission for the first disposal facility.

APPENDIX F

*Detailed Description of Purchaser's Fuel*

This information shall be provided by Purchaser for each distinct fuel type within a Shipping Lot not later than sixty (60) days prior to the schedule transportation date.

Purchaser _____
Contract Number/Date ____/_____
Reactor/Facility Name__ _____
_____
_____

I. Drawings included in generic dossier: _____

1. Fuel Assembly DWG# ____
2. Upper & Lower end fittings DWG# ____

Dossier Number: ____
DOE Shipping Lot #: ____
# Assemblies Described:

_____BWR
_____PWR
_____Other

II. *Design Material Descriptions*.

*Fuel Element:*

1. Element type ____ (rod, plate, etc.)
2. Total length) ____/(in.)
3. Active length ____ (in.)
4. Cladding material ____ (Zr, s.s., etc.)

*Assembly Description:*

1. Number of Elements ____
2. Overall dimensions (length ____ (cross section) ____ (in.)
3. Overall weight ____

III. Describe any distortions, cladding damage or other damage to the spent fuel, or nonfuel components within this Shipping Lot which will require special handling procedures. (Attach additional pages if needed.)

_____
_____

IV. Assembly Number ____
Shipping Lot #____

| | Irradiation history cycle No. | | | | |
|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 |
| 1. Startup date (mo/day/yr). | | | | | |
| 2. Shutdown date (mo/day/yr). | | | | | |
| 3. Cumulative fuel exposure (mwd/mtu). | | | | | |
| 4. Avg. reactor power (mwth). | | | | | |
| 5. Total heat output/assembly in watts, using an approved calculational method: _____ as of Date _____ | | | | | |

Any false, fictitious or fradulent statement may be punishable by fine or imprisonment (U.S. Code, Title 18, Section 1001).

By Purchaser:

Signature _____

Title _____

Date _____

NWPA-830G

U.S. DEPARTMENT OF ENERGY
Germantown, MD 20875

OMB No.: 1901-0260
Expires: 11/30/93

## Appendix G - Standard Remittance Advice for Payment of Fees

This information is being collected under mandatory authorities vested in the U.S. Department of Energy under Public Law 97-425. Late filing, failure to file or to otherwise comply with the instructions provided may result in interest penalties as provided by Article VIII C of the Standard Contract for Disposal of Spent Nuclear Fuel and/or High Level Radioactive Waste. For information concerning confidentiality of information see Item 6 of the instructions. Public reporting burden for this collection of information is estimated to average 40 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Statistical Standards, EI-73, Mail Station: 2H-087, 1000 Independence Ave., S.W., Washington, D.C. 20585; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503.

### 1.0 IDENTIFICATION INFORMATION

1.1 Purchaser Information
- (a) Name _____
- (b) Address _____
- (c) City, State & Zip Code _____

1.2 Contact Person
- (a) Name _____
- (b) Telephone (Include Area Code) _____

1.3 Standard Contract Identification Number: _____

1.4 Period Covered by this Remittance Advice
- (a) From _____ (Month/Day/Year) to _____ (Month/Day/Year)
- (b) Date of this Payment _____ (Month/Day/Year)

### 2.0 SPENT NUCLEAR FUEL (SNF) FEE

2.1 Number of Reactors Covered _____

2.2 Total Purchaser Obligation as of April 7, 1983 $ _____

2.3 Date of First Payment:

| Month | Day | Year |
|---|---|---|
| | | |

2.4 10-Year Treasury Note Rate as of the Date of First Payment - - - - - - - - - - - - - - - - - - → _____ %

2.5 Unpaid Balance Prior to this Payment $ _____

2.6 Option Chosen _____

2.7 Fee Date
- (a) Principal _____
- (b) Interest _____
- (c) Total Spent Nuclear Fuel Fee Transmitted with this Payment $ _____

### 3.0 FEE FOR ELECTRICITY GENERATED AND SOLD (MILLS PER KILOWATT HOUR, M/kWh)

3.1 Number of Reactors Covered _____

3.2 Total Electricity Generated and Sold (Megawatt hours) (Sum of Line 4.2 from all Annex A's) _____

3.3 Current Fee Rate _____ (M/kWh)

3.4 Total Fee for Electricity Generated and Sold (M/kWh) Transmitted with this Payment $ _____

### 4.0 UNDERPAYMENT/LATE PAYMENT (As notified by DOE)

| Type of Payment (a) | Date of Notification (Month/Day/Year) (b) | DOE Invoice Number (c) | Date of Payment Transmittal (Month/Day/Year) (d) | Interest Paid (e) | Amount Transmitted (f) |
|---|---|---|---|---|---|
| 4.1 SNF Underpayment | | | | | |
| 4.2 Electricity Generation Late Payment | | | | | |
| 4.3 TOTAL UNDERPAYMENT | | | | | |
| 4.4 SNF Late Payment | | | | | |
| 4.5 Electricity Generation Late Payment | | | | | |
| 4.6 TOTAL LATE PAYMENT | | | | | |

### 5.0 OTHER CREDITS CLAIMED (Attach Explanation)

Enter the Total Amount Claimed for All Credits $ _____

### 6.0 TOTAL REMITTANCE

6.1 Total Spent Nuclear Fuel Fee Transmitted (from 2.7(c)) $ _____

6.2 Total Fee for Electricity Generated and Sold (from 3.4) $ _____

6.3 Total Underpayment (from 4.3(f)) $ _____

6.4 Total Late Payment (from 4.6(f)) $ _____

6.5 Total Credits (from 5.0) $ _____

6.6 TOTAL REMITTANCE (Sum of 6.1 through 6.4 minus 6.5) $ _____

### 7.0 CERTIFICATION

I certify that the Total Remittance is true and accurate to the best of my knowledge.

Name _____ Date _____ Signature _____

TITLE 18 USC 1001 makes it a crime for any person to knowingly and willfully make to any department or agency of the United States any false, fictitious, or fraudulent statements as to any matter within its jurisdiction.

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• GPO: 193-122

**DEPARTMENT OF ENERGY**
**Germantown, MD 20875**

## APPENDIX G - STANDARD REMITTANCE ADVICE FOR PAYMENT OF FEES

General Information

1. Purpose
   Standard Remittance Advice (RA) form is designed to serve as the source document for entries into the Department's accounting records to transmit data from Purchasers concerning payment of their contribution to the Nuclear Waste Fund.
2. Who Shall Submit
   The RA must be submitted by Purchasers who signed the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste. Submit Copy 1, 2, and 3 to DOE, Office of the Controller, Special Accounts and Payroll Division and retain Copy 4.
3. Where to Submit
   Purchasers shall forward completed RA to:

   U.S. Department of Energy
   Office of the Controller
   Special Accounts and Payroll Division (C-216 GTN)
   Box 500
   Germantown, MD 20875-0500
   Request for further information, additional forms, and instructions may be directed in writing to the address above or by telephone to (301) 353-4014.
4. When to Submit
   For electricity generated on or after 4-7-83 fees shall be paid quarterly by the Purchaser and must be received by DOE not later than the close of the last business day of the month following the end of each assigned three month period. Payment is by electronic wire transfer only.
5. Sanctions
   The timely submission of RA by a Purchaser is mandatory. Failure to file may result in late penalty fees as provided by Article VIII.C of the Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste.
6. Provisions Regarding the Confidentiality of Information
   The information contained in these forms may be (i) information which is exempt from disclosure to the public under the exemption for trade secrets and confidential commercial information specified in the Freedom of Information Act of 5 USC 522(b)(4)(FOIA) or (ii) prohibited from public release by 18 USC 1905. However, before a determination can be made that particular information is within the coverage of either of these statutory provisions, the person submitting the information must make a showing satisfactory to the Department concerning its confidential nature.

   Therefore, respondents should state briefly and specifically (on an element-by-element basis if possible), in a letter accompanying submission of the form why they consider the information concerned to be a trade secret or other proprietary information, whether such information is customarily treated as confidential information by their companies and the industry, and the type of competitive hardship that would result from disclosure of the information. In accordance with the provisions of 10 CFR 1004.11 of DOE's FOIA regulations, DOE will determine whether any information submitted should be withheld from public disclosure.

   If DOE receives a response and does not receive a request, with substantive justification, that the information submitted should not be released to the public, DOE may assume that the respondent does not object to disclosure to the public of any information submitted on the form.

   A new written justification need not be submitted each time the NWPA-830G is submitted if:
   a. views concerning information items identified as privileged or confidential have not changed and
   b. a written justification setting forth respondent's views in this regard was previously submitted.

   In accordance with the cited statutes and other applicable authority, the information must be made available upon request, to the Congress or any committee of Congress, the General Accounting Office, and other Federal agencies authorized by law to receive such information.

## INSTRUCTIONS FOR COMPLETING STANDARD REMITTANCE ADVICE FOR PAYMENT OF FEES

Section 1.0 *Identification Information*
- 1.1 Name of Purchaser as it appears on the Standard Contract, the mailing address, state, and zip code.
- 1.2 Name and telephone number of person responsible for the completion of this form.
- 1.3 Standard Contract identification number as assigned by DOE.
- 1.4 Period covered by this advice and date of this payment. Any period different from the assigned three month period should be explained on a separate attachment.

Section 2.0 *Spent Nuclear Fuel (SNF) Fee*
- 2.1 Enter the number of reactors for which the Purchaser had irradiated fuel as of midnight between 6/7 April 1983 (equal to the number of Annex B Forms attached).
- 2.2 Total amount owed to the Nuclear Waste Fund for spent fuel used to generate electricity prior to April 7, 1983 (See Annex B for calculation).
- 2.3 Self explanatory.
- 2.4 Ten year Treasury Note rate on the date the payment is made, to be used if payments are being made using the 40 quarter option or if lump sum payment is made after June 30, 1985.
- 2.5 Unpaid balance before this payment is made.
- 2.6 Enter the payment option (1, 2, or 3) chosen. The selection of payment option must be made within two years of Standard Contract execution.
- 2.7 Total payment of fee which this advice represents. Show principal, interest, and total.

Section 3.0 *Fee for Electricity Generated and Sold (M/kWh)*
- 3.1 Enter the number of reactors the Purchaser is reporting on during this reporting period.
- 3.2 Enter total electricity generated and sold during the reporting period from all reactors being reported. This is the sum of Station Total figures of line 4.2 from all Annex A forms attached, expressed in megawatt hours.
- 3.3 Current Fee Rate as provided by DOE (initially 1.0 M/kWh which is equal to 1.0 $/MWh).
- 3.4 Total Fee for Electricity Generated and Sold (M/kWh) represented by this advice.

Section 4.0 *Underpayment/Late payment (as notified by DOE)*
- 4.1 - 4.6 Self Explanatory.

Section 5.0 *Other Credits Claimed*
Represents all items for which a Purchaser may receive credit, as specified in the Standard Contract.

Section 6.0 *Total Remittance*
- 6.1 - 6.6 This section is a summary of the payments made in the previously mentioned categories with this remittance.

Section 7.0 *Certification*
Enter the name and title of the individual your company has designated to certify the accuracy of the data. Sign the "Certification" block and enter the current date.

U.S. Department of Energy
Energy Information Administration
Form NWPA-830G

# ANNEX A TO APPENDIX G

## Standard Remittance Advice for Payment of Fees

OMB No. 1901-0260
(Expires 11/30/93)

**Section 1. Identification Information: Please first read the instructions on the back.**

**1.1 Purchaser Information:**
1.11 Name:
1.12 Address:
1.13 Attention:
1.14 City:
1.15 State: 1.16 Zip:
1.17 Utility ID Number: ___ ___

**1.2 Contact Person:**
1.21 Name:
1.22 Title:
1.23 Phone No.:( )( - ) Ext.:

**1.3 Station Name:**

**1.4 Standard Contract Identification Number:**

**1.5 Period Covered (MM/DD/YY):**
1.51 From: / / To: / /
1.52 Date of This Submission: / /

**Section 2. Net Electricity Generated Calculation**

| Item | Unit 1 | Unit 2 | Unit 3 | Station Total* |
|---|---|---|---|---|
| **2.1 Unit ID Code:** | | | | |
| **2.2 Gross Thermal Energy Generated (MWh):** | | | | |
| **2.3 Gross Electricity Generated (MWh):** | | | | |
| **2.4 Nuclear Station Use While At Least One Nuclear Unit Is In Service** (MWh):** | | | | |
| **2.5 Nuclear Station Use While All Nuclear Units Are Out Of Service** (MWh):** | | | | |
| **2.6 Net Electricity Generated (MWh)** (Item 2.3 minus Item 2.4): | | | | |
| **2.7 Footnote (if any):** | | | | |

*For a nuclear station with more than one reactor and different ownerships for each reactor, a separate Annex A will be required.
**Utilities unable to meter individual unit use shall report estimated unit use and shall explain in a footnote how the unit data were estimated.

**Section 3. Total Energy Adjustment Factor Calculation**

| 3.1 Weighted Energy Adjustment Factor Calculation | Adj. for Sales to ultimate Consumer (ASC) | | Adjustment for Sales for Resale (ASR) | | | | |
|---|---|---|---|---|---|---|---|
| Name of Nuclear Station Owner(s) | Fraction of Sales to ult. Consumer (FSC) | Sales to ultimate Consumer Adj. Factor (SCAF) | Fraction of Sales for Resale (FSR) | National average Adj. Factor (NAF) | Owner's Energy Adj. Factor (OEAF) | Owner's Share (OS) | Weighted Energy Adj. Factor (WEAF) |
| 1. | ( . X . ) + | | ( . X . ) = | | . X . | | = . |
| 2. | ( . X . ) + | | ( . X . ) = | | . X . | | = . |
| 3. | ( . X . ) + | | ( . X . ) = | | . X . | | = . |
| 4. | ( . X . ) + | | ( . X . ) = | | . X . | | = . |
| 5. | ( . X . ) + | | ( . X . ) = | | . X . | | = . |
| 6. | ( . X . ) + | | ( . X . ) = | | . X . | | = . |
| 7. | ( . X . ) + | | ( . X . ) = | | . X . | | = . |
| 8. | ( . X . ) + | | ( . X . ) = | | . X . | | = . |
| 9. | ( . X . ) + | | ( . X . ) = | | . X . | | = . |
| 10. | ( . X . ) + | | ( . X . ) = | | . X . | | = . |
| 11. | ( . X . ) + | | ( . X . ) = | | . X . | | = . |
| 12. | ( . X . ) + | | ( . X . ) = | | . X . | | = . |
| 3.2 Total Energy Adjustment Factor (TEAF = $\sum$ WEAF) | | | | | | | . |

**Section 4. Fee Calculation for Electricity Generated and Sold**

| Item | Unit 1 | Unit 2 | Unit 3 | Station Total* |
|---|---|---|---|---|
| **4.1 Total Energy Adjustment Factor** (Enter value from 3.2 above): | | | | |
| **4.2 Electricity Generated and Sold** (Items in 4.1 times Items in 2.6): | | | | |
| **---- Current Fee Rate (Dollars):** | $1.00/MWh | $1.00/MWh | $1.00/MWh | $1.00/MWh |
| **4.3 Current Fee Due (Dollars):** (Transfer Station Total to line 3.4 of Appendix G) | | | | |

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U.S. Department of Energy
Energy Information Administration
Form NWPA-830G

# Annex A to Appendix G

## Standard Remittance Advice for Payment of Fees

OMB No. 1901-0260
(Expires 11/30/93)

### Annex A Instructions

**0. General Information**

**0.1 Purpose:** To report the calculations of fees due the Department of Energy's Nuclear Waste Fund.

**0.2 Please read all instructions before completing this form.**

**0.3 Complete a separate Annex A for each nuclear station.** For a nuclear station that has different ownership arrangements for more than one reactor, a separate Annex A will be required for each reactor.

**0.4 Submit Annex A Quarterly with Appendix G.**

**0.5 Where to submit:**

U.S. DOE, Office of the Controller
Special Accounts & Payroll Division
(C-216 GTN), Box 500
Germantown, MD 20875-0500

**Section 1. Identification Information: (Self explanatory)**

**Section 2. Net Electricity Generated Calculation**

**2.1 Unit ID Code:** Enter the Reactor Unit Identification (ID) Code as assigned by DOE, for each reactor in the station.

**2.2 Gross Thermal Energy Generated (MWh):** Utility shall report the thermal output of the nuclear steam supply system during the gross hours of the reporting period.

**2.3 Gross Electricity Generated (MWh):** Utility shall report this amount for each unit in the appropriate column, and the total in the column labeled "Station Total." This amount is measured at the output terminals of the generator during the reporting period.

**2.4 Nuclear Station Use While At Least One Nuclear Unit Is In Service (MWh):** Utility shall report this amount for each unit in the appropriate column, and the total in the column called "Station Total." The utility is to report consumption of electricity by the nuclear portion of the station during days in which at least one of the station's nuclear units was on-line and producing electricity. A utility unable to meter an individual unit shall report the estimated unit use, and shall explain in item 2.7 how the unit data were estimated. **Note that:**

A. During days in which nuclear station use exceeds nuclear station generation, the utility shall treat all resulting negative values as zero for fee calculation purposes.

B. A utility that has multiple nuclear units at one station:

- when at least 1 nuclear unit is operating and when generation from that unit exceeds the nuclear station's use, the utility may assume that the operating unit is supplying electricity for nuclear station use whether or not the electricity has been metered separately or the units terminate to a common electrical busbar; and
- shall report under item 2.5 any electricity use by the nuclear portion of the station during the days in which all nuclear units at the station were out of service simultaneously..

C. A utility that has a metered transmission line connecting an off-station nuclear reactor with another nuclear station may treat the off-station plant as part of this station for fee calculation purposes if it is not double counted.

D. Utility may deduct small quantities of unmetered non-nuclear electricity generation included in "Gross Electricity Generated," provided that it is identified and explained in item 2.7.

E. A utility may deduct nuclear electricity generation which is not sold and does not pass the busbar, provided they identify and explain the deduction in item 2.7 and that the deduction is not double counted.

**2.5 Nuclear Station Use While All Nuclear Units Are Out Of Service (MWh):** Utility shall report this amount for each unit in the appropriate column, and the total in the "Station Total" column. In this row, the utility shall report the consumption of electricity by the nuclear portion of the station during days in which total nuclear unit use exceeds nuclear generation (e.g., a day in which all nuclear units at the station were out of service at once). Note that a utility unable to meter individual unit use will report estimated unit use, and shall explain in item 2.7 how the unit data were estimated.

**2.6 Net Electricity Generated (MWh):** The utility shall report this amount for each unit in the appropriate column, and the total in the "Station Total" column. This amount is the result of subtracting items 2.4 from items 2.3.

**2.7 Footnote (if any):** Utilities that are unable to meter individual unit use shall explain here how the unit data were estimated.

**Section 3. Total Energy Adjustment Factor Calculation:** The reporting utility shall obtain necessary data from all owners to calculate the Total Energy Adjustment Factor and maintain consistent, accurate, and complete records to support these submissions. The values provided in this section must be accurate to 4 significant digits. If there are more than 12 owners, use a continuation sheet. For a nuclear station with more than one reactor and different ownerships for each reactor, a separate Annex A will be required for each reactor.

**3.1 Weighted Energy Adjustment Factor Calculation:**

***Name of Nuclear Station Owner(s):*** provide the name(s) in items 1. thru 12, of 3.1. If more than 12 names, use a continuation sheet.

***Adjustment for Sales to ultimate Consumer (ASC):*** is the product of Fraction of Sales to ultimate Consumer (FSC) and the Sales to ultimate Consumer Adjustment Factor(SCAF).

***Fraction of Sales to ultimate Consumer (FSC):*** is determined by dividing the owner's previous year's annual sales to the ultimate consumer by the sum of the owner's previous year's annual sales to the ultimate consumer plus the owner's previous year's annual sales for resale. These figures can be found on the Energy Information Administration (EIA) Form EIA-861 or the Federal Energy Regulatory Commission (FERC) Form No. 1.

***Sales to ultimate Consumer Adjustment Factor (SCAF):*** is equal to one minus the quotient of all electricity lost or otherwise not sold for each owner, divided by the total electricity available for disposition to ultimate consumers. The total electricity available is the reporting year total of all of an owner's electricity supply which is available for disposition, expressed in kilowatt hours. Electricity lost or otherwise not sold includes: (a) energy furnished without charge; (b) energy used by the company; (c) transmission losses; (d) distribution losses; (e) other unaccounted losses as reported on the Form EIA-861 or the FERC Form No. 1.

***Adjustment for Sales for Resale (ASR):*** **Is the product of Fraction of Sales for Resale (FSR) and National average Adjustment Factor (NAF).**

***Fraction of Sales for Resale (FSR):*** is determined by dividing the owner's previous year's annual sales for resale by the sum of the owner's previous year's annual sales to the ultimate consumer plus the owner's previous year's annual sales for resale. These figures can be found on the Form EIA-861 or the FERC Form No. 1.

***National average Adjustment Factor (NAF):*** is the quotient of the national total of electricity sold divided by the national total of electricity available for disposition.

***Owner's Energy Adjustment Factor (OEAF):*** is the Owner's fraction of metered electricity

***Weighted Energy Adjustment Factor (WEAF):*** is the product of an Owner's Energy Adjustment Factor (OEAF) times the Owner's Share (OS).

**3.2 Total Energy Adjustment Factor (TEAF):** is the sum of individual owner's Weighted Energy Adjustment Factors (WEAF).

**Section 4. Fee Calculation for Electricity Generated and Sold:**

**4.1** Total Energy Adjustment Factor: Enter the value from item 3.2 as appropriate.

**4.2** Electricity Generated and Sold: Multiply the values in item 4.1 by the "Unit" values in item 2.6. Sum these values and enter in "Station Total".

**4.3 Current Fee Due (Dollars):** Multiply the values in item 4.2 by one (1) dollar/megawatt hour (or 1.0 mill/kWh), which is the current fee. Add this station fee to the current fee due for all other reactors operated by the Purchaser, and then enter the sum on line 3.4 of the Appendix G, Remittance Advice.

ANNEX B TO APPENDIX G

*Standard Remittance of Advice (RA) for Payment of Fees*

This Annex should be completed only for SNF burned before midnight between April 6/7, 1983.

I. *Identification*

A. Purchaser:_____

B. Unit identification (Only one unit may be covered in each report.)

1. Reactor/Facility Name: _____
2. Location: _____
3. Type: _____
4. Capacity: _____
5. Date of Commencement of Operations: ____
6. NRC License No.: _____

II. *Fee Calculation*

A. *Discharged nuclear fuel*

| | | | | |
|---|---|---|---|---|
| 1. Burnup [1] (MWDT/MTU) | 0–5,000 | 5,000–10,000 | 10,000–20,000 | 20,000 up |
| 2. Initial loading (KgU) (with indicated burnup). | | | | |
| 3. Fee rate ($/KgU) | 80.00 | 142.00 | 162.00 | 184.00 |
| 4. Fee ($). | | | | |
| 5. Total fee (4) | | | | |

B. Nuclear fuel in the reactor core as of midnight of 6/7 April 1983.

| Assembly identification | Initial loading (KgU) | Burnup [1] as of midnight 6/7 April 1983 (MWDT/MTU) | Fee |
|---|---|---|---|
| 1.. | | | |
| 2.. | | | |
| 3.. | | | |
| 4.. | | | |
| 5.. | | | |
| 6.. | | | |
| 7.. | | | |
| 8.. | | | |
| 9.. | | | |
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| 24.. | | | |
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[1] Please provide (as an attachment) a clear reference to the methodology used to derive the burnup figures (computer codes, etc.) and a clear reference to all data used in the derivation of those figures.

C. Total fee.

(Approved by the Office of Management and Budget under control number 1091–0260)

[48 FR 16599, Apr. 18, 1983; 48 FR 23160, May 24, 1983, as amended at 52 FR 35359, Sept. 18, 1987; 56 FR 67659, Dec. 31, 1991]

# PART 962—BYPRODUCT MATERIAL

Sec.
962.1 Scope.
962.2 Purpose.
962.3 Byproduct material.

AUTHORITY: The Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*); Energy Reorganization Act of 1974 (42 U.S.C. 5801 *et seq.*); Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*); Nuclear Waste Policy Act (Pub. L. 97–425, 96 Stat. 2201).

SOURCE: 52 FR 15940, May 1, 1987, unless otherwise noted.

## § 962.1 Scope.

This part applies only to radioactive waste substances which are owned or produced by the Department of Energy at facilities owned or operated by or for the Department of Energy under the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq*). This part does not apply to substances which are not owned or produced by the Department of Energy.

## § 962.2 Purpose.

The purpose of this part is to clarify the meaning of the term ''byproduct material'' under section 11e(1) of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)(1)) for use only in determining the Department of Energy's obligations under the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*) with regard to radioactive waste substances owned or produced by the Department of Energy pursuant to the exercise of its responsibilities under the Atomic Energy Act of 1954. This part does not affect materials defined as byproduct material under section 11e(2) of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)(2)).

### §962.3 Byproduct material.

(a) For purposes of this part, the term *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.

(b) For purposes of determining the applicability of the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*) to any radioactive waste substance owned or produced by the Department of Energy pursuant to the exercise of its atomic energy research, development, testing and production responsibilities under the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*), the words ''any radioactive material,'' as used in paragraph (a) of this section, refer only to the actual radionuclides dispersed or suspended in the waste substance. The nonradioactive hazardous component of the waste substance will be subject to regulation under the Resource Conservation and Recovery Act.

# PART 963—YUCCA MOUNTAIN SITE SUITABILITY GUIDELINES

## Subpart A—General Provisions

Sec.
963.1 Purpose.
963.2 Definitions.

## Subpart B—Site Suitability Determination, Methods, and Criteria

963.10 Scope.
963.11 Suitability determination.
963.12 Preclosure suitability determination.
963.13 Preclosure suitability evaluation method.
963.14 Preclosure suitability criteria.
963.15 Postclosure suitability determination.
963.16 Postclosure suitability evaluation method.
963.17 Postclosure suitability criteria.

AUTHORITY: 42 U.S.C. 2011 *et seq.;* 42 U.S.C. 7101 *et seq.;* 42 U.S.C. 10101, *et seq.*

SOURCE: 66 FR 57336, Nov. 14, 2001, unless otherwise noted.

## Subpart A—General Provisions

### §963.1 Purpose.

(a) The purpose of this part is to establish DOE methods and criteria for determining the suitability of the Yucca Mountain site for the location of a geologic repository. DOE will use these methods and criteria in analyzing the data from the site characterization activities required under section 113 of the Nuclear Waste Policy Act.

(b) This part does not address other information that must be considered and submitted to the President, and made available to the public, by the Secretary under section 114 of the Nuclear Waste Policy Act if the Yucca Mountain site is recommended for development as a geologic repository.

### §963.2 Definitions.

For purposes of this part:

*Applicable radiation protection standard* means (1) For the preclosure period, the preclosure numerical radiation dose limits in 10 CFR 63.111(a) and (b) and 63.204; and

(2) For the postclosure period, the postclosure numerical radiation dose limits in 10 CFR 63.311 and 63.321 and radionuclide concentration limits in 10 CFR 63.331.

*Barrier* means any material, structure or feature that prevents or substantially reduces the rate of movement of water or radionuclides from the Yucca Mountain repository to the accessible environment, or prevents the release or substantially reduces the release rate of radionuclides from the waste. For example, a barrier may be a geologic feature, an engineered structure, a canister, a waste form with physical and chemical characteristics that significantly decrease the mobility of radionuclides, or a material placed over and around the waste, provided that the material substantially delays movement of water or radionuclides.

*Cladding* is the metallic outer sheath of a fuel rod element; it is generally made of a corrosion resistant zirconium alloy or stainless steel, and is intended to isolate the fuel from the external environment.

*Closure* means the final closing of the remaining open operational areas of the underground facility and boreholes after termination of waste emplacement, culminating in the sealing of shafts and ramps, except those openings that may be designed for ventilation or monitoring.

*Colloid* means any fine-grained material in suspension, or any such material that can be easily suspended.

*Criteria* means the characterizing traits relevant to assessing the performance of a geologic repository, as defined by this section, at the Yucca Mountain site.

*Design* means a description of the engineered structures, systems, components and equipment of a geologic repository at Yucca Mountain that includes the engineered barrier system.

*Design bases* means that information that identifies the specific functions to be performed by a structure, system, or component of a facility and the specific values or ranges of values chosen for controlling parameters as reference bounds for design. These values may be constraints derived from generally accepted ''state-of-the-art'' practices for achieving functional goals or requirements derived from analysis (based on calculation or experiments) of the effects of a postulated event under which a structure, system, or component must meet its functional goals. The values for controlling parameters for external events include:

(1) Estimates of severe natural events to be used for deriving design bases that will be based on consideration of historical data on the associated parameters, physical data, or analysis of upper limits of the physical processes involved; and

(2) Estimates of severe external human-induced events to be used for deriving design bases, that will be based on analysis of human activity in the region, taking into account the site characteristics and the risks associated with the event.

*DOE* means the U.S. Department of Energy, or its duly authorized representatives.

*Engineered barrier system* means the waste packages, including engineered components and systems other than the waste package (e.g., drip shields), and the underground facility.

*Event sequence* means a series of actions and/or occurrences within the natural and engineered components of a geologic repository operations area that could potentially lead to exposure of individuals to radiation. An event sequence includes one or more initiating events and associated combinations of repository system component failures, including those produced by the action or inaction of operating personnel. Those event sequences that are expected to occur one or more times before permanent closure of the geologic repository operations area are referred to as Category 1 event sequences. Other event sequences that have at least one chance in 10,000 of occurring before permanent closure are referred to as Category 2 event sequences.

*Geologic repository* means a system that is intended to be used for, or may be used for, the disposal of radioactive wastes in excavated geologic media. A geologic repository includes the engineered barrier system and the portion of the geologic setting that provides isolation of the radioactive waste.

*Geologic repository operations area* means a high-level radioactive waste facility that is part of a geologic repository, including both surface and subsurface areas, where waste handling activities are conducted.

*Geologic setting* means geologic, hydrologic, and geochemical system of the region in which a geologic repository is or may be located.

*High-level radioactive waste* means

(1) The highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentration; and

(2) Other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

*Human intrusion* means breaching of any portion of the Yucca Mountain disposal system within the repository footprint by any human activity.

*Infiltration* means the flow of a fluid into a solid substance through pores or small openings; specifically, the movement of water into soil and fractured or porous rock.

*Initiating event* means a natural or human induced event that causes an event sequence.

*Near-field* means the region where the adjacent natural geohydrologic system has been significantly impacted by the excavation of the repository and the emplacement of the waste.

*NRC* means the U.S. Nuclear Regulatory Commission or its duly authorized representatives.

*Perched water* means ground water of limited lateral extent separated from an underlying body of ground water by an unsaturated zone.

*Preclosure* means the period of time before and during closure of the geologic repository.

*Preclosure safety evaluation* means a preliminary assessment of the adequacy of repository support facilities to prevent or mitigate the effects of postulated initiating events and event sequences and their consequences (including fire, radiation, criticality, and chemical hazards), and the site, structures, systems, components, equipment, and operator actions that would be relied on for safety.

*Postclosure* means the period of time after the closure of the geologic repository.

*Radioactive waste or waste* means high-level radioactive waste and other radioactive materials, including spent nuclear fuel, that are received for emplacement in the geologic repository.

*Reasonably maximally exposed individual* means the hypothetical person meeting the criteria specified at 10 CFR 63.312.

*Reference biosphere* means the description of the environment, inhabited by the reasonably maximally exposed individual. The reference biosphere comprises the set of specific biotic and abiotic characteristics of the environment, including, but not limited to, climate, topography, soils, flora, fauna, and human activities.

*Seepage* means the inflow of ground water moving in fractures or pore spaces of permeable rock to an open space in the rock such as an excavated drift.

*Sensitivity study* means an analytic or numerical technique for examining the effects on model outcomes, such as radionuclide releases, of varying specified parameters, such as the infiltration rate due to precipitation.

*Site characterization* means activities, whether in the laboratory or in the field, undertaken to establish the geologic conditions and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.

*Surface facilities* means all permanent facilities within the restricted area constructed in support of site characterization activities and repository construction, operation, and closure activities, including surface structures, utility lines, roads, railroads, and similar facilities, but excluding the underground facility.

*System performance* means the complete behavior of a geologic repository system at Yucca Mountain in response to the features, events, and processes that may affect it.

*Total system performance assessment* means a probabilistic analysis that is used to:

(1) Identify the features, events and processes (except human intrusion) that might affect the Yucca Mountain disposal system and their probabilities of occurring during 10,000 years after disposal;

(2) Examine the effects of those features, events, processes, and sequences of events and processes (except human intrusion) on the performance of the Yucca Mountain disposal system; and

(3) Estimate the dose incurred by the reasonably maximally exposed individual, including associated uncertainties, as a result of releases caused by all significant features, events, processes, and sequences of events and

processes, weighted by their probability of occurrence.

*Underground facility* means the underground structure, backfill materials, if any, and openings that penetrate the underground structure (e.g., ramps, shafts and boreholes, including their seals).

*Waste form* means the radioactive waste materials and any encapsulating or stabilizing matrix.

*Waste package* means the waste form and any containers, shielding, packing, and other absorbent materials immediately surrounding an individual waste container.

*Yucca Mountain disposal system* means the combination of underground engineered and natural barriers within the controlled area that prevents or substantially reduces releases from the waste.

*Yucca Mountain site* means the candidate site in the State of Nevada recommended by the Secretary to the President under section 112(b)(1)(B) of the Nuclear Waste Policy Act of 1982 (NWPA) (42 U.S.C. 1032(b)(1)(B)) on May 27, 1986.

## Subpart B—Site Suitability Determination, Methods, and Criteria

### § 963.10 Scope.

(a) The scope of this subpart includes the following for both the preclosure and postclosure periods:

(1) The bases for the suitability determination for the Yucca Mountain site as a location for a geologic repository;

(2) The suitability evaluation methods for applying the site suitability criteria to a geologic repository at the Yucca Mountain site; and

(3) The site suitability criteria that DOE will apply in accordance with section 113(b)(1)(A)(iv) of the NWPA.

(b) DOE will seek NRC concurrence on any future revisions to this subpart.

### § 963.11 Suitability determination.

DOE will evaluate whether the Yucca Mountain site is suitable for the location of a geologic repository on the basis of the preclosure and postclosure determinations described in §§ 963.12 and 963.15. If DOE's evaluation of the Yucca Mountain site for the location of a geologic repository under §§ 963.12 and 963.15 shows that the geologic repository is likely to meet the applicable radiation protection standards for the preclosure and postclosure periods, then DOE may determine that the site is a suitable location for the development of such a repository.

### § 963.12 Preclosure suitability determination.

DOE will apply the method and criteria described in §§ 963.13 and 963.14 to evaluate the suitability of the Yucca Mountain site for the preclosure period. If DOE finds that the results of the preclosure safety evaluation conducted under § 963.13 show that the Yucca Mountain site is likely to meet the applicable radiation protection standard, DOE may determine the site suitable for the preclosure period.

### § 963.13 Preclosure suitability evaluation method.

(a) DOE will evaluate preclosure suitability using a preclosure safety evaluation method. DOE will evaluate the performance of the geologic repository at the Yucca Mountain site using the method described in paragraph (b) of this section and the criteria in § 963.14. DOE will consider the performance of the system in terms of the criteria to evaluate whether the geologic repository is likely to comply with the applicable radiation protection standard.

(b) The preclosure safety evaluation method, using preliminary engineering specifications, will assess the adequacy of the repository facilities to perform their intended functions and prevent or mitigate the effects of postulated Category 1 and 2 event sequences. The preclosure safety evaluation will consider:

(1) A preliminary description of the site characteristics, the surface facilities and the underground operating facilities;

(2) A preliminary description of the design bases for the operating facilities and a preliminary description of any associated limits on operation;

(3) A preliminary description of potential hazards, event sequences, and their consequences; and

(4) A preliminary description of the structures, systems, components, equipment, and operator actions intended to mitigate or prevent accidents.

### § 963.14 Preclosure suitability criteria.

DOE will evaluate preclosure suitability using the following criteria:

(a) Ability to contain radioactive material and to limit releases of radioactive materials;

(b) Ability to implement control and emergency systems to limit exposure to radiation;

(c) Ability to maintain a system and components that perform their intended safety functions; and

(d) Ability to preserve the option to retrieve wastes during the preclosure period.

### § 963.15 Postclosure suitability determination.

DOE will apply the method and criteria described in §§ 963.16 and 963.17 to evaluate the suitability of the Yucca Mountain site for the postclosure period. If DOE finds that the results of the total system performance assessments conducted under § 963.16 show that the Yucca Mountain site is likely to meet the applicable radiation protection standard, DOE may determine the site suitable for the postclosure period.

### § 963.16 Postclosure suitability evaluation method.

(a) DOE will evaluate postclosure suitability using the total system performance assessment method. DOE will conduct a total system performance assessment to evaluate the ability of the geologic repository to meet the applicable radiation protection standard under the following circumstances:

(1) DOE will conduct a total system performance assessment to evaluate the ability of the Yucca Mountain disposal system to limit radiological doses and radionuclide concentrations in the case where there is no human intrusion into the repository. DOE will model the performance of the Yucca Mountain disposal system using the method described in paragraph (b) of this section and the criteria in § 963.17. DOE will consider the performance of the system in terms of the criteria to evaluate whether the Yucca Mountain disposal system is likely to comply with the applicable radiation protection standard.

(2) DOE will conduct a separate total system performance assessment to evaluate the ability of the Yucca Mountain disposal system to limit radiological doses in the case where there is a human intrusion as specified by 10 CFR 63.322. DOE will model the performance of the Yucca Mountain disposal system using the method described in paragraph (b) of this section and the criteria in § 963.17. If required by applicable NRC regulations regarding a human intrusion standard, § 63.321, DOE will consider the performance of the system in terms of the criteria to evaluate whether the Yucca Mountain disposal system is likely to comply with the applicable radiation protection standard.

(b) In conducting a total system performance assessment under this section, DOE will:

(1) Include data related to the suitability criteria in § 963.17;

(2) Account for uncertainties and variabilities in parameter values and provide the technical basis for parameter ranges, probability distributions, and bounding values;

(3) Consider alternative models of features and processes that are consistent with available data and current scientific understanding, and evaluate the effects that alternative models would have on the estimated performance of the Yucca Mountain disposal system ;

(4) Consider only events that have at least one chance in 10,000 of occurring over 10,000 years;

(5) Provide the technical basis for either inclusion or exclusion of specific features, events, and processes of the geologic setting, including appropriate details as to magnitude and timing regarding any exclusions that would significantly change the dose to the reasonably maximally exposed individual;

(6) Provide the technical basis for either inclusion or exclusion of degradation, deterioration, or alteration processes of engineered barriers, including those processes that would adversely

affect natural barriers, (such as degradation of concrete liners affecting the pH of ground water or precipitation of minerals due to heat changing hydrologic processes), including appropriate details as to magnitude and timing regarding any exclusions that would significantly change the dose to the reasonably maximally exposed individual;

(7) Provide the technical basis for models used in the total system performance assessment such as comparisons made with outputs of detailed process-level models and/or empirical observations (for example, laboratory testing, field investigations, and natural analogs);

(8) Identify natural features of the geologic setting and design features of the engineered barrier system important to isolating radioactive waste;

(9) Describe the capability of the natural and engineered barriers important to isolating radioactive waste, taking into account uncertainties in characterizing and modeling such barriers;

(10) Provide the technical basis for the description of the capability of the natural and engineered barriers important to isolating radioactive waste;

(11) Use the reference biosphere and reasonably maximally exposed individual assumptions specified in applicable NRC regulations; and

(12) Conduct appropriate sensitivity studies.

### § 963.17 Postclosure suitability criteria.

(a) DOE will evaluate the postclosure suitability of a geologic repository at the Yucca Mountain site through suitability criteria that reflect both the processes and the models used to simulate those processes that are important to the total system performance of the geologic repository. The applicable criteria are:

(1) Site characteristics, which include:

(i) Geologic properties of the site—for example, stratigraphy, rock type and physical properties, and structural characteristics;

(ii) Hydrologic properties of the site—for example, porosity, permeability,moisture content, saturation, and potentiometric characteristics;

(iii) Geophysical properties of the site—for example, densities, velocities and water contents, as measured or deduced from geophysical logs; and

(iv) Geochemical properties of the site—for example, precipitation, dissolution characteristics, and sorption properties of mineral and rock surfaces.

(2) Unsaturated zone flow characteristics, which include:

(i) Climate—for example, precipitation and postulated future climatic conditions;

(ii) Infiltration—for example, precipitation entering the mountain in excess of water returned to the atmosphere by evaporation and plant transpiration;

(iii) Unsaturated zone flux—for example, water movement through the pore spaces, or flowing along fractures or through perched water zones above the repository;

(iv) Seepage—for example, water dripping into the underground repository openings from the surrounding rock.

(3) Near field environment characteristics, which include:

(i) Thermal hydrology—for example, effects of heat from the waste on water flow through the site, and the temperature and humidity at the engineered barriers.

(ii) Near field geochemical environment—for example, the chemical reactions and products resulting from water contacting the waste and the engineered barrier materials.

(4) Engineered barrier system degradation characteristics, which include:

(i) Engineered barrier system component performance—for example, drip shields, backfill, coatings, or chemical modifications, and

(ii) Waste package degradation—for example, the corrosion of the waste package materials within the near-field environment.

(5) Waste form degradation characteristics, which include:

(i) Cladding degradation—for example, corrosion or break-down of the cladding on the spent fuel pellets;

(ii) Waste form dissolution—for example, the ability of individual radionuclides to dissolve in water penetrating breached waste packages.

(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.
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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

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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

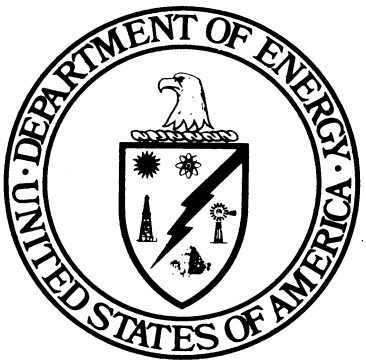
(2) Production, inventory and loan records relating to items specified in paragraph (a)(1) of this section; and

(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

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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, Public Law 89–487, as amended by Public Law 93–502, 88 Stat. 1561, by Public Law 94–409, 90 Stat. 1241, by Public Law 99–570, 100 Stat. 3207–49, by Public Law 104–231, 110 Stat. 3048, by Public Law 110–175, 121 Stat. 2524, Public Law 111–83 §564, 123 Stat. 2142, 2184, and by Public Law 114–185, 130 Stat. 538. 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 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 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, 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.

[81 FR 94918, Dec. 27, 2016]

### §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 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 Act Officer and officials who report directly to either the Office of the Secretary or a Secretarial Officer as defined. In the field offices, the term refers to the head of a field location identified in paragraph (h) of this section and the heads of field offices to which they provide administrative support and have delegated this authority. In the National Nuclear Security Administration (NNSA), the term refers to the official appointed at such location as identified in paragraph (h)(8) of this section.

(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 3621CHI–7, Portland, OR 97208–3621.

(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, 15013 Denver West Parkway, Mail Stop RSF DOE Golden, CO 80401.

(6) Headquarters, Department of Energy, 1000 Independence Avenue SW., 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.

(9) National Energy Technology Laboratory, 626 Cochrans Mill Road, P.O. Box 10940, Pittsburgh, PA 15236–0940.

(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 62, Oak Ridge, TN 37830.

(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(e) 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. In the NNSA, the term refers to the NNSA General Counsel, or any attorney designated by the NNSA General Counsel for counseling the NNSA on Freedom of Information Act matters, as provided for in section 3217 of the National Nuclear Security Administration Act, 50 U.S.C. 2407, Pub. L. 106–65. The NNSA General Counsel is not a Secretarial Officer.

(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 or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. 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 are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ''news'') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; DOE may also consider the past publication record of the requester in making such a determination.

(n) *Review* refers to the process of examining documents located in response to a commercial use request (see paragraph (c) of this section) 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 prepare 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; 81 FR 94919, Dec. 27, 2016]

### § 1004.3 Public inspection in an electronic format and policy on contractor records.

(a) DOE will maintain, for public inspection in an electronic format, the materials which are required by 5 U.S.C. 552(a)(2) to be made available for public inspection and copying. An electronic public reading room can be accessed via *www.energy.gov* and *nnsa.energy.gov*.

(b) *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) Notwithstanding paragraph (b)(1) of this section, records owned by the Government under contract that contain information or technical data having commercial value as defined in paragraph (b)(4) of this section 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 paragraph (b)(2) of this section, ''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; 81 FR 94919, Dec. 27, 2016]

### § 1004.4 Elements of a request.

(a) *Addressed to the FOIA Officer*. A request for a record of DOE which is not available for public inspection in an electronic format, as described in § 1004.3, shall be: Addressed to the Headquarters or appropriate field FOIA Officer at DOE at a location listed in § 1004.2(h), and both the envelope and the letter shall be clearly marked ''Freedom of Information Act Request;'' or submitted via facsimile or electronically, on an appropriate agency Web site. Except as provided in paragraph (e) of this section, a request will be considered to be received by 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 ten days after receipt by a designated FOIA Officer at any location in § 1004.2(h). Requests delivered after regular business hours 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 manageable 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; 81 FR 94919, Dec. 27, 2016]

### §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); or

(5) Informing the requester that responsive records cannot be located or do not exist. The written response shall also notify the requester of the right to seek dispute resolution services from the DOE FOIA Public Liaison(s) or the Office of Government Information Services.

(c) Where a request involves records that are in the custody of or are the concern of more than one Authorizing Official, the FOIA Officer will identify all concerned Authorizing Officials that can reasonably be expected to have custody of the requested records. Upon identification of the appropriate Authorizing Officials, the FOIA Officer will forward them a copy of the request and a request for action. The Authorizing Officials will prepare a DOE response to the requester consistent with paragraph (b) of this section. The response will identify the Authorizing Official having responsibility for the determination to release or deny records.

(d) *Time for processing requests.* (1) Action pursuant to paragraph (b) of this section will be taken within 20 days of a request for DOE records being received (''received'' 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 ten days. In cases where the Authorizing Official determines that unusual circumstances exist, the requester shall be notified in writing of the right to seek dispute resolution services from the DOE FOIA Public Liaison(s) or the Office of Government Information Services.

(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 administrative 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 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; and the requester's right to seek remedy through the courts, but will 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 ten days after receipt of the request. The requester will be notified of the determination and informed that any denial may be appealed within 90 calendar days to the Office of Hearings and Appeals.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, Apr. 25, 2014; 81 FR 94920, Dec. 27, 2016]

### § 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 or 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 90 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 90 calendar days to the Office of Hearings and Appeals.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, Apr. 25, 2014; 81 FR 94920, Dec. 27, 2016]

### § 1004.8 Appeal of initial denials.

(a) *Appeal to Office of Hearings and Appeals.* When the Authorizing or Denying Official or FOIA Officer 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 FOIA Officer has denied a request for expedited processing consistent with §1004.5(d) or for waiver of fees consistent with §1004.9, the requester may, within 90 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, commercial delivery service, or by electronic mail to *OHA.Filings@hq.doe.gov*. The appeal must contain a concise statement of the 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 should also 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 the regular business hours of the Office of Hearings and Appeals are considered received on the next regular business day.

(d) *Action within 20 days.* (1) The Appeal Authority will act upon the appeal within 20 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 ten 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. Notification will be sent by electronic mail, when possible, or by letter.

(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; 81 FR 94920, Dec. 27, 2016]

### § 1004.9 Fees for providing records.

(a) *Fees to be charged*. DOE may charge fees that recoup the full allowable direct costs incurred. DOE will use the most efficient and least costly methods to comply with requests for documents made under FOIA. 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, DOE will ensure that the ultimate cost to the requester is no greater than it would be if DOE itself had performed these tasks. In no case will DOE contract out responsibilities which 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 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 Publishing 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*. DOE will charge at the actual direct cost of providing the service.

(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 pursuant to 5 U.S.C. 552(a)(4)(A)(iv), 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 ten 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 ''8½ × 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 or electronic search*. To apply this term, DOE will calculate the hourly rates of the subject matter expert and/or FOIA analysts conducting the search plus 16 percent.

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

(iii) Except as provided in paragraph (a)(6)(iv) of this section, DOE will not assess any search fees (or in the case of a requester who is an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media, duplication fees) under this paragraph (a)(6)(iii) if DOE has failed to comply with any time limit under § 1004.5(d).

(iv)(A) If DOE has determined that unusual circumstances apply (as the term is defined in § 1004.5(d)(2)) and DOE provided a timely written notice to the requester in accordance with § 1004.5(d)(1)(iii), a failure described in paragraph (a)(6)(iii) of this section is excused for an additional 10 days. If DOE fails to comply with the extended time limit, DOE may not assess any search fees (or in the case of a requester described under paragraph (a)(6)(iii) of this section, duplication fees).

(B) If DOE has determined that unusual circumstances (as that term is defined in § 1004.5(d)(2)) apply and more than 5,000 pages are necessary to respond to the request, DOE may charge search fees (or in the case of a requester described under paragraph (a)(6)(iii) of this section, duplication fees) if DOE has provided a timely written notice to the requester in accordance with § 1004.5(d)(1)(iii) and DOE has discussed with the requester via written mail, electronic mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii).

(C) If a court has determined that unusual circumstances exist (as that term is defined in § 1004.5(d)(2)), a failure described in paragraph (a)(6)(iv) of this of this section shall be excused for the length of time provided by the court order.

(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.* 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 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. FOIA prescribes specific levels of fees for each of these categories:

(1) *Commercial use requesters.* When 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. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. 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 to those requesters who fail to pay fees. DOE will begin to assess interest charges on the amount billed on the 31st calendar 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.* DOE may 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 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) A requester has previously failed to pay a fee in a timely fashion (*i.e.,* within 30 calendar days of the date of the billing). 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.

(B) When DOE acts under paragraphs (b)(8) (i) or (ii) of this section, the administrative time limits prescribed in section (a)(6) of FOIA (*i.e.,* 20 days from receipt of initial requests and 20 days

from receipt of appeals from initial denials, plus permissible extensions of these time limits) will begin only after DOE has received fee payments described.

(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; 81 FR 94921, Dec. 27, 2016]

**§ 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 that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(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) DOE shall withhold information under this section only if—

(1) The agency reasonably foresees that disclosure would harm an interest protected by an exemption described in paragraph (b) of this section; or

(2) Disclosure is prohibited by law. DOE shall consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible and take reasonable steps necessary to segregate and release nonexempt information. Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure by paragraph (b)(3) of this section.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22859, Apr. 25, 2014; 81 FR 94922, Dec. 27, 2016]

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

(a) Whenever a document submitted to DOE contains information which may be exempt from public disclosure, it will be handled in accordance with the procedures in this section. While DOE is responsible for making the final determination with regard to the disclosure or nondisclosure of information contained in requested documents, 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 DOE, in the course of responding to a Freedom of Information Act 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, DOE will notify the submitter of the intended discretionary release no less than seven (7) calendar days prior to the 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; 81 FR 94922, Dec. 27, 2016]

### §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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1008.2 Definitions.
1008.3 Employee standards of conduct with regard to privacy.
1008.4 Procedures for identifying the individual making a request for access to or amendment of records.
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## Subpart C—Disclosure to Third Parties

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## Subpart D—Maintenance and Establishment of Systems of Records

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 paragraph (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.

1013.1 Basis and purpose.
1013.2 Definitions.
1013.3 Basis for civil penalties and assessments.
1013.4 Investigation.
1013.5 Review by the reviewing official.
1013.6 Prerequisites for issuing a complaint.
1013.7 Complaint.
1013.8 Service of complaint.
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1013.12 Notice of hearing.
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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.

(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 $10,957 for each such claim.

(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 $10,957 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 $10,957 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; 81 FR 41795, June 28, 2016; 81 FR 96353, Dec. 30, 2016]

### § 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.
1014.6 Limitation on authority.
1014.7 Referral to Department of Justice.
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).

# PART 1015—COLLECTION OF CLAIMS OWED THE UNITED STATES

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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

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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 note.

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 $258,811 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; 81 FR 41796, June 28, 2016; 81 FR 96353, Dec. 30, 2016]

### § 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.

[73 FR 32641, June 10, 2008, as amended at 81 FR 41796, June 28, 2016; 81 FR 96353, Dec. 30, 2016]

## 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 nonnative 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.

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### A14 APPROVAL OF TECHNICAL EXCHANGE ARRANGEMENTS

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with other countries or international organizations (including, but not limited to, assistance in identifying and analyzing another country's energy resources, needs and options).

A15 INTERNATIONAL AGREEMENTS FOR ENERGY RESEARCH AND DEVELOPMENT

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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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C1 [RESERVED]

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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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D8 IMPORT OR EXPORT OF NATURAL GAS INVOLVING MAJOR NEW FACILITIES

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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

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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]

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JUDICIAL REVIEW

1040.131 Judicial review.

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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AUTHORITY: 29 U.S.C. 794.

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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

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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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1046.16 SPO physical readiness qualification standards and procedures.
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1046.18 Access authorization.
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 Associate Under Secretary for the Office of Environment, Health, Safety and Security (AU–1) 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 AU or its successor organization. AU–1 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 Associate Under Secretary for Environment, Health, Safety and Security. The documentation must include timelines and resources needed to fully implement this part.

[78 FR 55184, Sept. 10, 2013,, as amended at 80 FR 57082, Sept. 22, 2015]

**§ 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. AU–1 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 AU–1 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.

[78 FR 55184, Sept. 10, 2013,, as amended at 80 FR 57082, Sept. 22, 2015]

### § 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 AU–1 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 AU–1 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 AU–1, 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 AU–1, 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 AU–1, 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 AU–1 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 AU–1, 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. AU–1 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 AU–1 reporting on the current credentials of the PPMD recommending retention or replacement. Immediate notification must be made to the AU–1 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 AU–1 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 AU–1 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 AU–1 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 AU–1. The PPMD must comply with applicable DOE requirements specifying report content.

[78 FR 55184, Sept. 10, 2013,, as amended at 80 FR 57082, Sept. 22, 2015]

### § 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 AU–1 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 AU–1.

(d) *Self reporting.* The self-reporting requirements of § 1046.4(d) must be followed by incumbent Designated Physicians.

[78 FR 55184, Sept. 10, 2013,, as amended at 80 FR 57083, Sept. 22, 2015]

## 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 AU–1 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).

[78 FR 55184, Sept. 10, 2013,, as amended at 80 FR 57083, Sept. 22, 2015]

### § 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 AU–1 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) AU–1, 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 AU–1.

(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 AU–1.

(4) Within ten working days of receipt of a copy of the request for an Independent Review, the disqualified individual's employer must provide AU–1 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 AU–1 may request.

(5) AU–1 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 AU–1. 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 AU–1 for review. AU–1 must then recommend a final determination confirming or reversing the medical certification disqualification. The recommendation of AU–1 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 AU–1.

(8) AU–1 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 AU–1 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. AU–1 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.

[78 FR 55184, Sept. 10, 2013,, as amended at 80 FR 57083, Sept. 22, 2015]

### § 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 AU–1 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.

[78 FR 55184, Sept. 10, 2013, as amended at 80 FR 57083, Sept. 22, 2015]

### § 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).

(iii) *Assaulting, resisting, or impeding certain officers or employees—18 U.S.C. 111.* Both the felony and misdemeanor level offenses may only be enforced by protective force officers that are federal employees.

(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.

(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.

[50 FR 30929, July 31, 1985, as amended at 80 FR 23692, Apr. 29, 2015]

### § 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.

[1] These offenses are considered by the Department of Energy to pose a significant threat of death or serious bodily harm.

(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).

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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1050.103 Definitions.
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## Subpart B—Guidelines for Acceptance of Foreign Gifts or Decorations

1050.201 Policy against accepting foreign gifts or decorations.
1050.202 Allowable acceptance of gifts.
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## Subpart C—Procedures and Enforcement

1050.301 Reports.
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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 $19,621.

[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; 81 FR 41796, June 28, 2016; 81 FR 96353, Dec. 30, 2016]

## 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:<br><br>Approximate Value | 7b. Description of Other Travel Expenses Provided:<br><br>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]

# CHAPTER XIII—NUCLEAR WASTE TECHNICAL REVIEW BOARD


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## PARTS 1300–1302 [RESERVED]

## PART 1303—PUBLIC INFORMATION AND REQUESTS

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AUTHORITY: 5 U.S.C. 301, 5 U.S.C. 552 as amended, Executive Order 12600 (3 CFR 1988 Comp., p. 235)

SOURCE: 70 FR 47080, Aug. 12, 2005, unless otherwise noted.

### § 1303.101 Scope

This part sets forth the policies and procedures of the U.S. Nuclear Waste Technical Review Board (Board) regarding public access to documents under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The provisions in the Act shall take precedence over any part of the Board's regulations in conflict with the Act. This part gives the procedures the public may use to inspect and obtain copies of Board records under the FOIA, including administrative procedures which must be exhausted before a request invokes the jurisdiction of an appropriate United States District Court for the Board's failure to respond to a proper request within the statutory time limits, for a denial of Board records or challenges to the adequacy of a search, or for denial of fee waiver.

### § 1303.102 Definitions.

For words used in this part, unless the context varies otherwise, singular includes the plural, plural includes the singular, present tense includes the future tense, and words of one gender include the other gender.

(a)(1) Agency records—include materials that are in the control of the Board and associated with Board business, as follows:

(i) Materials produced by the Board.

(ii) Materials produced a consultant for the Board.

(iii) Materials distributed by presenters at a Board meeting.

(2) All references to records, include both the entire record, or any part of the record.

(b) Board—The U.S. Nuclear Waste Technical Review Board.

(c) Chairman—The Chairman of the Board as designated by the President.

(d) Designated FOIA Officer—The person named by the Board to administer the Board's activities in regard do the regulations in this part. The FOIA Officer also shall be:

(1) The Board officer having custody of, or responsibility for, agency records in the possession of the Board.

(2) The Board officer having responsibility for authorizing or denying production of records from requests filed under the Freedom of Information Act.

(e) Executive Director—The chief operating officer of the Board.

(f) Member—An individual appointed to serve on the Board by the President of the United States.

(g) Days—Standard working days, excluding weekends and federal holidays.

### § 1303.103 Public reading area.

(a) A public reading area is available at the Board office located at 2300 Clarendon Blvd., Suite 1300, Arlington, Virginia 22201. To use the reading area, contact the Director of Administration by:

(1) Letter to the address in this paragraph (a):

(2) Telephone: 703–235–4473;

(3) A request to the Board's Web site at *http://www.nwtrb.gov*; or

(4) Fax: 703–532–4495.

(b) Documents also may be requested through the Board's Web site or by letter or fax. Please ensure that the records sought are clearly described. Materials produced by the Board are in the public domain unless otherwise noted.

(c) Many Board records are available electronically at the Board's Web site (*http://www.nwtrb.gov*).

(d) Records of the Board available for inspection and copying include:

(1) The rules and regulations of the Board.

(2) Statements of policy adopted by the Board.

(3) Board reports to the U.S. Congress and the U.S. Secretary of Energy.

(4) Board correspondence with Congress and the Department of Energy (DOE).

(5) Transcripts of Board meetings.

(6) Biographical information about current Board members.

(7) Copies of records released in response to FOIA requests.

(e) The cost of copying information available in the Board office shall be imposed in accordance with the provisions of § 1303.108.

### § 1303.104 Board records exempt from public disclosure.

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

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

(b) Related solely to the internal personnel rules and practices of the Board.

(c) Specifically exempted from disclosure by another federal statute, provided that such statute:

(1) Requires that records be withheld from the public in such a manner that leaves no discretion on the issue; or

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

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

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

(f) Personnel, medical, or similar files that disclosing would constitute a clearly unwarranted invasion of personal privacy.

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

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

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

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

(4) Could reasonably be expected to disclose the identity of any 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 agency in the course of a criminal investigation or by an agency conducting a lawful security intelligence investigation, information furnished by a confidential source;

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

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

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

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

### § 1303.105 Requests for Board records.

(a) A written FOIA request must be submitted. You may:

(1) Write: NWTRB Designated FOIA Officer, 2300 Clarendon Boulevard, Suite 1300, Arlington, VA 22201;

(2) Send an e-mail request to *foia@nwtrb.gov* and specify that this is a FOIA request in the subject line; or

(3) Fax: 703–235–4495.

(b) When making a request for records about a person, Privacy Act regulations also may apply. Please check the regulations for additional requirements before submitting a request. When making a request for records about someone other than yourself, you must include either:

(1) Written authorization signed by the person permitting you to see the records; or

(2) Proof that the individual is deceased (e.g., a death certificate or an obituary).

(c) A request will be considered received for purposes of § 1303.107 on the date that it is received by the Board's FOIA office. For prompt handling, write ''Freedom of Information Act Request'' on the letter and envelope or in the subject line of the Web request or fax.

(d) Each request must clearly describe the desired records in sufficient detail to enable Board personnel to locate them with reasonable effort. Response to requests may be delayed if the records are not clearly described.

(e) Whenever possible, requests should include specific information about each record sought, such as date, title or name, author, recipient, and subject.

(f) If the FOIA Officer determines that the request does not clearly describe the records sought, he or she will either advise you of the additional needed to locate the record or otherwise state why the request is insufficient. The requestor will then be given the opportunity to provide additional information or to modify their request.

(g) Submitting a FOIA request shall be considered a commitment by the requestor to pay all applicable fees required under § 1303.108 unless the requestor seeks a waiver of fees. When making a request, you may specify a willingness to pay fees up to a specific amount.

(h) The FOIA does not require the Board to:

(1) Compile or create records solely for the purpose of satisfying a request for records.

(2) Provide records not yet in existence, even if such records may be expected to come into existence at some time in the future.

(3) Restore records destroyed or otherwise disposed of, except that the FOIA Officer must notify the requestor that the records have been destroyed or otherwise disposed of.

**§ 1303.106 Responsibility, form, and content of responses.**

The Board's Executive Director of his/her designated FOIA Officer is authorized to grant or deny any request for a record and determine appropriate fees. When determining which records are responsive to a request, the Board will include only records in its possession as of the date of the search.

(a) If no records are responsive to the request, the FOIA Officer will notify the requestor in writing.

(b) When a FOIA Officer denies a request in whole or in part he/she will notify the requestor in writing. The response will be signed by the FOIA Officer and will include:

(1) The name and title or position of the person making the denial;

(2) A brief statement of the reasons for the denial, including the FOIA exemption(s) that the FOIA Officer has relied on the denying the request; and

(3) A statement that the denial may be appealed under § 1303.114 and a description of the requirements of that section.

(c) *Consultations and referrals*. When a request for a record not produced by the Board is received, the Board shall refer the requestor to the issuing agency in writing. The Board may hold records that contain or refer to non-public information obtained from other federal agencies (co-mingled records). If those co-mingled records are requested, the Board shall determine whether the portion of those records produced by the Board can be released. Before any portion of a co-mingled record is released, the Board shall redact the non-public information obtained from other federal agencies. The Board shall inform the requestor of the reason for the redaction and shall refer the requestor to the issuing agency in writing.

(d) *Notice of referral*. When the Board refers all or part of a request to another agency, it shall give the requestor the address of the agency contact and the section(s) referred.

(e) *Timing of responses to requests sent to other agencies.* The Board shall provide, within the FOIA deadline, responses only to those parts of the request not referred. Requests will be referred to other agencies and the requestor notified as soon as it is determined that a referral is appropriate.

(f) *Agreements on consultations and referrals.* The Board may make agreements with other agencies to eliminate the need for consultations or referrals for particular types of records.

**§ 1303.107 Timing of responses to requests.**

(a) *General.* The Board shall normally respond to requests in the order of their receipt.

(b) *Acknowledgement of requests.* On receipt of a request, the Board shall send an acknowledgment letter or an e-mail confirming the requestor's agreement to pay fees under § 1303.108 and providing a request number for further reference.

(c) *Granting requests.* The Board shall have 20 business days from when a request is received to determine whether to grant or deny it. Once the Board determines whether it can grant a request entirely or in part, it shall notify the requestor in writing. The Board shall advise the requestor of any fees to be charged under § 1303.108 and shall disclose records promptly on payment of the fees. Records disclosed in part shall be marked or annotated to show the amount of information deleted unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted also shall be indicated on the record when technically feasible.

(d) *Unusual circumstances:*

(1) If the statutory time limits for processing a request cannot be met because of ''usual circumstances'' as defined in the FOIA, the Board shall promptly notify the requestor in writing, explaining the circumstances and giving the date by which the request can be completed or if the Board cannot complete the request. If the extension is for more than 10 working days, the Board shall provide the requestor with an opportunity either to:

(i) Modify the request so that it can be processed within the time limits; or

(ii) Arrange an alternative time period for processing the original request.

(2) If the Board believes that multiple requests submitted by a requestor or by requestors acting in concert constitute a single request that would otherwise involve unusual circumstances, and if the requests involve clearly related matters, they may be aggregated. Multiple requests involving unrelated matters will not be aggregated.

(e) *Expedited processing:*

(1) Requests and appeals shall be taken out of order and given expedited processing whenever it is determined that they involve:

(i) Circumstances that could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

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

(2) Requests for expedited processing may be made either at the time of the initial request or at a later time.

(3) Requests for expedited processing must include a statement explaining in detail the basis for requesting expedited processing. For example, a requestor under § 1303.108 must demonstrate that their professional activity involves news reporting or otherwise disseminating information to the public, although this need not be their sole occupation. A requestor also must establish a particular urgency to inform the public about government activity involved in the request, beyond the public's right to know about government activity generally.

(4) Within 10 calendar days of receipt of a request for expedited processing, the Board shall decide whether to grant the request and notify the requestor of its decision. If a request for expedited treatment is granted, the request shall be processed as soon as practicable. If a request for expedited processing is denied, an appeal of that decision shall be acted on expeditiously.

**§ 1303.108 Fees.**

(a) *General.* The Board shall charge for processing requests the FOIA in accordance with paragraph (c) of this section, except where fees are limited

under § 1303.109 or where a waiver or reduction of fees is granted under § 1303.111. Fees must be paid before the copies of records are sent. Fees may be paid by check or money order payable to the Treasury of the United States.

(b) Definitions for this section:

(1) Commercial use request—A request from, or on behalf of, a person who seeks information for a purpose that furthers their commercial, trade, or profit interests including furthering those interests through litigation. The Board shall try to determine the use to which a record will be put. When the Board believes that a request is for commercial use either because of the nature of the request or because the Board has cause to doubt the stated use, the Board shall ask the requestor for clarification.

(2) Direct costs—Expenses that the Board incurs in searching for, duplicating, and, for some requests, reviewing records in response to a FOIA. Direct costs include the full salary of the employee performing the work and the cost of duplication of the records. Overhead expenses, such as the costs of space, heating, and lighting, are not included.

(3) Duplication—Making a copy of a record or the information in the record, to respond to a FOIA. Copies can be in paper, microform, electronic, or other format. The Board shall honor a requestor's preference for format if the record is readily reproducible in that format at a reasonable cost.

(4) Educational institution—A public or private school, an undergraduate, graduate, professional or vocational school, that has a program of scholarly research. For a request to be in this category, a requestor must show that the request is authorized by and made under the auspices of the qualifying institution and that the records will be used for scholarly research.

(5) Noncommercial scientific institution—An institution that is not operated on a commercial basis, as defined in paragraph (b)(1) of this section and is operated solely for conducting scientific research that does not promote any particular product or industry. For a request to be in this category, the requestor must show that the request is authorized by and made under the auspices of the qualifying institution and that the records will be used to further scientific research.

(6) Representative of the news media—Any person actively reporting for an entity that provides news to the public. The term ''news'' means information about current events or of current interest to the public. Examples include: Television and radio stations broadcasting to the public; and publishers of periodicals who make their news products available to the general public. For freelance journalists to be regarded as working for a news organization, they must demonstrate a sold basis for expecting publication through that organization. The Board may use a publication contract or past publication records to make their determination. The requestor must not be seeking records for a commercial use; however, a request solely supporting the news-dissemination function is not considered a commercial use.

(7) Review—Examining a record to determine whether any part of its is exempt from disclosure, and processing a record for disclosure. Review costs are recoverable even if a record is to disclosed. Review time includes time spent considering any formal objection to disclosure made by a business submitter under paragraph (c)(3) of this section but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) Search—The process of looking for and retrieving records, including page-by-page or line-by-line identification of information within records and reasonable efforts to locate and retrieve information from records maintained in electronic form. The Board shall ensure that searches are done in the most efficient and least expensive way that is reasonably possible.

(c) *Fees*. In responding to FOIA requests, the Board shall charge the following fees unless a waiver or a reduction of fees has been granted under § 1303.111:

(1) *Search* (i) Search fees shall be charged for all requests subject to the limitations of § 1303.109. The Board may charge for time spent searching even if no responsive record is located, or if

the record(s) located are withheld as exempt from disclosure.

(ii) For each quarter hour spent by clerical personnel in searching for and retrieving a requested record, the fee will be $5. If a search and retrieval requires the use of professional personnel the fee will be $8 for each quarter hour. If the time of managerial personnel is required, the fee will be $10 for each quarter hour.

(iii) For computer searches of records, requestors will be charged the direct costs of conducting the search, although certain requestors (see § 1303.109(a)) will be charged no search fee and certain other requestors (see § 1303.109(b)) will be entitled to two hours of manual search time without charge. Direct costs include the cost of operating a computer for the search time for requested records and the operator salary for the search.

(2) *Duplication*. Duplication fees for paper copies of a record will be 10 cents per page for black and white and 20 cents per page for color. For all other forms of duplication, the Board shall charge the direct costs of producing the copy. All charges are subject to the limitations of § 1303.109 and § 1303.111.

(3) *Review*. When a commercial use request is made, review fees shall be charged as stated in paragraph (c)(1) of this section. These fees apply only to the initial record review, when the Board determines whether an exemption applies to a particular record. Charges shall not be imposed for review at the administrative appeal level if an exemption is applied. However, records withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies. The cost of that review shall be charged. All review fees shall be charged at the same rates as those charged in paragraph (c)(1) of this section.

### § 1303.109 Restrictions on charging fees.

(a) When determining search or review fees:

(1) No search or review fee shall be charged for requests by educational institutions, noncommercial scientific institutions, and representatives of the news media.

(2) The Board shall provide without charge, to all but commercial users.

(i) The first 100 pages of black and white duplication (or the cost equivalent); and

(ii) The first two hours of search by a clerical staff member (or the cost equivalent).

(3) When the total fee for a request will be $14.00 or less for any request, no fee shall be charged.

(b) The Provisions of paragraphs (a)(2) and (a)(3) of this section work together. All requestors seeking records for a non-commercial use shall not be charged unless the total cost for the request exceeds by more than $14.00, the cost of a two hour clerical search, plus the cost of duplication over the 100 page exemption.

### § 1303.110 Notice of anticipated fees.

(a) *General*. The Board shall advise the requetor in writing of any applicable fees. If only a part of the fee can be estimated readily, the Board shall advise the requestor that this may be only a part of the total fee. After the requestor has been sent a fee estimate, the request shall not be considered received until the requestor makes a firm commitment to pay the anticipated total fee. Any such agreement must be made by the requestor in writing and must be received within 60 days of the Board's notice. If the requestor does not provide a firm commitment to pay the anticipated fee within 60 days of the notice, the request shall be closed. The requestor may be given an opportunity to work with the Board to change the requests and lower the cost.

(b) *Charges for other services*. When the Board chooses as a matter of administrative discretion to provide a special service, such as certifying that records are true copies or sending them by other than ordinary mail, the Board shall pay the costs of providing the service unless previous arrangements have been made with the requestor.

(c) *Charging interest*. The Board may charge interest on any unpaid bill starting on the 31st day following the date of billing. Interest charges shall be assessed at the rate provided in 31 U.S.C. 3717 and shall accrue from the

date of the billing until payment is received by the Board. The Board shall follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended.

(d) *Aggregating requests.* If the Board reasonably believes that a requestor or a group of requestors acting together is trying to divide a request into a series of smaller requests for the purpose of avoiding fees, the Board may aggregate the requests and charge accordingly. The Board shall assume that multiple requests of the same type made within a 30-day period have been made in order to avoid fees. If requests are separated by a longer period, the Board shall aggregate them only if there is a solid basis for determining that aggregation is warranted. Multiple requests involving unrelated matters shall not be aggregated.

(e) *Advance payments.* Where a requestor has previously failed to pay promptly a properly charged FOIA fee to the Board or another agency, the Board shall require proof that full payment has been made to that agency before it begins to process that requestor's FOIA. The Board shall also require advance payment of the full amount of the anticipated fee. When advance payment is required, the request is not considered received until payment has been made.

### § 1303.111 Requirements for waiver or reduction of fees.

(a) Records shall be furnished without charge or at a reduced charge if the Board determined that:

(1) Disclosure is in the public interest and the information is likely to contribute significantly to public understanding of the activities of the government; and

(2) Disclosure is not primarily in the commercial interest of the requestor.

(b) In determining whether the first requirement is met, the Board shall consider:

(1) Subject: Do the requested records concern identifiable activities of the federal government?

(2) Informative value: Will the disclosure contribute to an understanding of government activities? Do records contain information on activities ''likely to contribute'' to an increased public understanding? If the information or similar information is already in the public domain, the record(s) would not increase the public's understanding.

(3) Would the disclosure contribute to the understanding of a reasonably broad audience, as opposed to the individual understanding of the requestor? A requestor's expertise in the subject and intention to convey information to the public shall be considered. Being a valid representative of the news media shall satisfy this consideration.

(4) Is the disclosure likely to contribute significantly to public understanding of government activities? The level of understanding after the disclosure versus that before the disclosure must be enhanced to a significant extent. However, the Board shall not make value judgments about whether information contributing to public understanding of government activities is important enough to release.

(c) In determining whether the second requirement is met, the Board shall consider:

(1) The existence and extent of the commercial interest: Would a commercial interest be substantially furthered by the disclosure? The Board shall consider the commercial interest (see paragraph (a)(2) of this section) of either the requestor or of any person on whose behalf they may be acting that would be furthered by the disclosure. During the administrative process, requestors shall be given an opportunity to provide additional information about this concern.

(2) The primary interest for disclosure: Whether the commercial interest of the requestor is sufficiently large in comparison to the public interest, that disclosure is ''primarily in the commercial interest of the requestor.'' A fee waiver is justified if the public interest standard under paragraph (b) of this section is satisfied and if that public interest is greater than any commercial interest. The Board shall presume that when news media requestors satisfy this standard, primarily the public interest is served.

(d) If only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted only for those records.

(e) Requests for a waiver or a reduction of fees must address the factors listed in paragraphs (a) and (b) of this section only as they apply to each request. The Board also shall consider their administrative resources when responding to requests and may negotiate with the requestor to find the best way to optimize their resources in responding to the request when deciding whether to grant waivers or reductions of fees.

**§ 1303.112 Denials.**

(a) When denying a request in any respect, the Board shall notify the requestor of that determination in writing. The types of denials include:

(1) Denials of requests, consisting of a determination:

(i) To withhold any requested record in whole or in part;

(ii) That a requested record does not exist or cannot be located;

(iii) That a record is not readily reproducible in the form or format sought;

(iv) That what has been requested is not a record subject to the FOIA; and

(v) That the material requested is not a Board record (e.g., material produced by another agency or organization).

(2) A determination on any disputed fee matter, including a denial of a request for a fee waiver.

(3) A denial of a request for expedited processing.

(b) The denial letter shall be signed by the Director of Administration, the Deputy Director, or their designee, and shall include all of the following:

(1) The name and title of the person responsible for the denial.

(2) A brief statement of the reason(s) for the denial, including any FOIA exemptions applied in denying the request.

(3) An estimate of the volume of records withheld, in number of pages or in some other reasonable form of estimation. This estimate does not need to be provided if it would harm an interest protected by an applicable exemption.

(4) A statement that the denial may be appealed under § 1303.114 and a description of the requirements of § 1303.114.

**§ 1303.113 Business information.**

(a) *In general.* Business information obtained by the Board from a submitter shall be disclosed under the FOIA only under this section.

(b) *Definitions.* For purposes of this section:

(1) Business information—commercial or financial records obtained by the Board that may be protected from disclosure under Exemption 4 of the Freedom of Information Act (FOIA).

(2) Submitter—any person or entity from which the Board obtains business records, either directly or indirectly. The term includes, but is not limited to, corporations, and state, local, tribal, and foreign governments.

(c) *Designation of business information.* Submitters of business information shall designate any part of the record considered to be protected from disclosure under Exemption 4 of the FOIA by appropriately marking the material. This may be done either at the time the record is submitted or at a reasonable time thereafter. This designation lasts for 10 years after submittal unless the submitter requests and provides justification for a longer period.

(d) *Notice to submitters.* The Board shall provide a business submitter with prompt written notice of any FOIA request or appeal that seeks its business information under paragraph (e) of this section, except as provided in paragraph (h) of this section, to give the submitter an opportunity to object to that disclosure under paragraph (f) of this section. The notice shall either describe the records requested or include copies of the records.

(e) *Required notice.* Notice shall be given to a submitter when:

(1) The submitter has designated that the information is considered protected from disclosure under Exemption 4 of the FOIA; or

(2) The Board has reason to believe that the information may be protected from disclosure under Exemption 4 of the FOIA.

(f)(1) *Objecting to disclosure.* A submitter shall have 30 days to respond to the notice described in paragraph (d) of this section. If a submitter has an objection to disclosure, they are required to submit a detailed written statement including:

(i) All grounds for withholding any of the information under any exemption of the FOIA, and

(ii) In the case of Exemption 4, the reason why the information is a trade secret, commercial, or financial information that is privileged or confidential.

(2) If a submitter fails to respond to the notice in paragraph (d) of the section within 30 days, the Board shall assume that the submitter has no objection to disclosure. The Board shall not consider information not received by the Board until after a disclosure decision has been made. Information provided by a submitter under this paragraph might itself be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose.* The Board shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the business records. Whenever the Board decides to disclose business records over the objection of a submitter, it shall give the submitter written notice, that will include:

(1) A statement of the reason(s) the submitter's objections were not sustained;

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

(3) A specified disclosure date at a reasonable time subsequent to the notice.

(h) *Exceptions to notice requirements.* The notice requirements in paragraphs (d) and (g) of this section shall not apply if:

(1) The Board determines that the information should not be disclosed;

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

(3) Disclosure of the information is required by another statute or by a regulation issued in accordance with Executive Order 12600 (3 CFR, 1988 Comp., p. 235); or

(4) The objection made by the submitter under paragraph (f) of this section appears frivolous. In such a case, the Board shall promptly notify the submitter of its decision using the guidelines in paragraph (g) of this section.

(i) *Notice of FOIA lawsuit.* When a requestor files a lawsuit seeking to compel the disclosure of business information, the Board shall promptly notify the submitter.

(j) *Corresponding notice to requestors.* When the Board provides a submitter with either notice and an opportunity to object to disclosure under paragraph (d) of this section or with its intent to disclose requested information under paragraph (g) of this section, the Board also shall notify the requestor(s). When a submitter files a lawsuit seeking to prevent the disclosure of business information, the Board shall notify the requestor(s).

**§ 1303.114 Appeals.**

(a)(1) *Appeals of adverse determinations.* If you are dissatisfied with the Board's response to your request, you may appeal to the Board's Executive Director:

(i) By mail to: U.S. Nuclear Waste Technical Review Board, 2300 Clarendon Boulevard, Suite 1300, Arlington, VA 22201;

(ii) By e-mail to: *foia@nwtrb.gov* specifying that this is a FOIA request in the subject line; or

(iii) By fax to: 703–235–4495.

(2) The appeal must be in writing and must be received within 30 days of the date of the Board's response. The appeal letter, e-mail, or fax may include as much or as little related information as you wish, as long is it clearly identifies the Board determination that you are appealing, including the assigned request number, if known. For prompt handling, please mark your appeal ''Freedom of Information Act Appeal.''

(b) *Responses to appeals.* Requestors shall be notified in writing of the decision on the appeal. A decision affirming an adverse determination shall include a statement of the reason(s) for the affirmation, including any FOIA exemption(s) applied, and shall include the FOIA provisions for court review of the decision. If the adverse determination is reversed or modified on appeal, the request shall be reprocessed in accordance with that appeal decision.

(c) *When appeal is required.* If a review by a court or any adverse determination is desired, the determination must first be appealed under this section.

(d) *Denial of appeal.* An adverse determination by the Executive Director shall be the final action of the Board.

(e) *Unacceptable appeals.* An appeal will not be acted on if the request becomes a matter of FOIA litigation.

### § 1303.115 Preservation of records.

The Board shall preserve all correspondence pertaining to the requests that it receives under this part, as well as copies of all requested records, until disposition or destruction is authorized by title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 14. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit.

### § 1303.116 Other rights and services.

Nothing in this part shall be construed to entitle any person, as a right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

## PART 1304—PRIVACY ACT OF 1974

Sec.

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AUTHORITY: 5 U.S.C. 552a(f).

SOURCE: 72 FR 8879, Feb. 28, 2007, unless otherwise noted.

### § 1304.101 Purpose and scope.

This part sets forth the policies and procedures of the U.S. Nuclear Waste Technical Review Board (Board) regarding access to systems of records maintained by the Board under the Privacy Act of 1974, Public Law 93–579, 5 U.S.C. 552a. The provisions in the Act shall take precedence over any part of the Board's regulations in conflict with the Act. These regulations establish procedures by which an individual may exercise the rights granted by the Privacy Act to determine whether a Board system contains a record pertaining to him or her; to gain access to such records; and to request correction or amendment of such records. These regulations also set identification requirements and prescribe fees to be charged for copying records.

### § 1304.102 Definitions.

The terms used in these regulations are defined in the Privacy Act of 1974, 5 U.S.C. 552a. In addition, as used in this part:

(a) *Agency* means any executive department, military department, government corporation, or other establishment in this executive branch of the Federal Government, including the Executive Office of the President or any independent regulatory agency;

(b) *Individual* means any citizen of the United States or an alien lawfully admitted for permanent residence;

(c) *Maintain* means to collect, use, store, or disseminate records as well as any combination of these recordkeeping functions. The term also includes exercise of control over, and therefore responsibility and accountability for, systems of records;

(d) *Record* means any item, collection, or grouping of information about an individual that is maintained by the Board and contains the individual's name or other identifying information, such as a number or symbol assigned to the individual or his or her fingerprint, voice print, or photograph. The term includes, but is not limited to, information regarding an individual's education, financial transactions, medical history, and criminal or employment history;

(e) *System of records* means a group of records under the control of the Board from which information is retrievable by use of the name of the individual or by some number, symbol, or other identifying particular assigned to the individual;

(f) *Routine use* means, with respect to the disclosure of a record, the use of a record for a purpose that is compatible with the purpose for which it was collected;

(g) *Designated Privacy Act Officer* means the person named by the board to administer the Board's activities in regard to the regulations in this part. The Privacy Act Officer also shall be the following:

(1) The Board officer having custody of, or responsibility for, agency records in the possession of the Board.

(2) The Board officer having responsibility for authorizing or denying production of records from requests filed under the Privacy Act.

(h) *Executive Director* means the chief operating officer of the Board;

(i) *Member* means an individual appointed to serve on the Board by the President of the United States;

(j) *Days* means standard working days, excluding weekends and federal holidays; and

(k) *Act* refers to the Privacy Act of 1974.

### § 1304.103 Privacy Act inquiries.

(a) *Requests regarding the contents of record systems.* Any person wanting to know whether the Board's systems of records contains a record pertaining to him or her may file a request in person or in writing, via the internet, or by telephone.

(b) *Requests in persons* may be submitted at the Board's headquarters located at 2300 Clarendon Blvd., Suite 1300; Arlington, VA. Requests should be marked ''Privacy Act Request'' on each page of the request and on the front of the envelope and directed to the Privacy Act Officer.

(c) *Requests in writing* may be sent to: Privacy Act Officer, U.S. Nuclear Waste Technical Review Board, 2300 Clarendon Blvd., Suite 1300, Arlington, VA 22201. ''Privacy Act Request'' should be written on the envelope and each page of the request.

(d) *Requests via the internet* may be made on the Board's Web site at *www.nwtrb.gov*, using the ''Contact NWTRB'' icon on the bottom of the Home page. The words ''Privacy Act'' should appear on the subject line.

(e) *Telephone requests* may be made by calling the Board's Privacy Act Officer at 703–235–4473.

### § 1304.104 Privacy Act records maintained by the Board.

(a) The Board shall maintain only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by Executive Order of the President. In addition, the Board shall maintain all records that are used in making determinations about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to ensure fairness to that individual in the making of any determination about him or her. However, the Board shall not be required to update retired records.

(b) The Board shall not maintain any record about any individual with respect to or describing how such individual exercises rights guaranteed by the First Amendment of the Constitution of the United States, unless expressly authorized by statute or by the subject individual, or unless pertinent to and within the scope of an authorized law enforcement activity.

### § 1304.105 Requests for access to records.

(a) All requests for records should include the following information:

(1) Full name, address, and telephone number of requester.

(2) The system of records containing the desired information.

(3) Any other information that the requester believes would help locate the record.

(b) *Requests in writing.* A person may request access to his or her own records in writing by addressing a letter to: Privacy Act Officer; U.S. Nuclear Waste Technical Review Board; 2300 Clarendon Blvd., Suite 1300; Arlington, VA 22201.

(c) *Requests via the internet.* Internet requests should be transmitted through the Board's Web site at *www.nwtrb.gov*, using the ''Contact NWTRB'' icon on the bottom of the main page. The words ''Privacy Act'' should appear on the subject line.

(d) *Requests in person.* Any person may examine and request copies of his

or her own records on the Board's premises. The requester should contact the Board's offices at least one week before the desired appointment date. This request may be made to the Privacy Act Officer in writing, via the Internet, or by calling 703–235–4473.

(e) Before viewing the records, proof of identification, must be provided. The identification should be a valid copy of one of the following:

A government ID,

A driver's license,

A passport, or

Other current identification that contains both an address and a picture of the requester.

### § 1304.106 Processing of requests.

Upon receipt of a request for information, the Privacy Act Officer will ascertain:

Whether the records identified by the requester exist, and

Whether they are subject to any exemption under § 1304.115. If the records exist and are not subject to exemption, the Privacy Officer will provide the information.

(a) *Requests in writing, including those sent by e-mail, via the Web site, or by Fax.* Within five working days of receiving the requests the Privacy Act Officer will acknowledge its receipt and will advise the requester of any additional information that may be needed. Within 15 working days of receiving the request, the Privacy Act Officer will send the requested information or will explain to the requester why additional time is needed for a response.

(b) *Requests in person or by telephone.* Within 15 days of the initial request, the Privacy Act Officer will contact the requestor and arrange an appointment at a mutually agreeable time when the records can be examined. The requester may be accompanied by one person. The requestor should inform the Privacy Act Officer that a second individual will be present and must sign a statement authorizing disclosure of the records to that person. The statement will be kept with the requester's records. At the appointment, the requester will be asked to present identification as stated in § 1304.105.

(c) *Excluded information.* If a request is received for information compiled in reasonable anticipation of litigation, the Privacy Officer will inform the requester that the information is not subject to release under the Privacy Act (*see* 5 U.S.C. 552a(d)(5)).

### § 1304.107 Fees.

A fee will not be charged for searching, reviewing, or making corrections to records. A fee for copying will be assessed at the same rate established for Freedom of Information Act requests. Duplication fees for paper copies of a record will be 10 cents per page for black and white and 20 cents per page for color. For all other forms of duplication, the Board will charge the direct costs of producing the copy. However, the first 100 pages of black-and-white copying or its equivalent will be free of charge.

### § 1304.108 Appealing denials of access.

If access to records is denied by the Privacy Act Officer, the requester may file an appeal in writing. The appeal should be directed to Executive Director; U.S. Technical Review Board; 2300 Clarendon Blvd., Suite 1300; Arlington, VA 22201. The appeal letter must:

Specify the denied records that are still sought; and

State why denial by the Privacy Act Officer is erroneous.

The Executive Director or his or her designee will respond to such appeals within 20 working days of the receipt of the appeal letter in the Board offices. The appeal determination will explain the basis of the decision to deny or grant the appeal.

### § 1304.109 Requests for correction of records.

(a) *Correction requests.* Any person is entitled to request correction of his or her record(s) covered under the Act. The request must be made in writing and should be addressed to Privacy Act Officer; U.S. Nuclear Waste Technical Review Board; 2300 Clarendon Blvd., Suite 1300; Arlington, VA 22201. The letter should clearly identify the corrections desired. In most circumstances, an edited copy of the record will be acceptable for this purpose.

(b) *Initial response.* Receipt of a correction request will be acknowledged

by the Privacy Act Officer in writing within 5 working days. The Privacy Act Officer will endeavor to provide a letter to the requester within 20 working days stating whether the request for correction has been granted or denied. If the Privacy Act Officer denies any part of the correction request, the reasons for the denial will be provided to the requester.

**§ 1304.110 Disclosure of records to third parties.**

(a) The Board will not disclose any record that is contained in a system of records to any person or agency, except with a written request by or with the prior written consent of the individual whose record is requested, unless disclosure of the record is:

(1) Required by an employee or agent of the Board in the performance of his/her official duties.

(2) Required under the provisions of the Freedom of Information Act (5 U.S.C. 552). Records required to be made available by the Freedom of Information Act will be released in response to a request in accordance with the Board's regulations published at 10 CFR part 1303.

(3) For a routine use as published in the annual notice in the FEDERAL REGISTER.

(4) To the Census Bureau for planning or carrying out a census, survey, or related activities pursuant to the provisions of Title 13 of the United States Code.

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

(6) To the National Archives and Records Administration as a record that has sufficient historical or other value to warrant its continued preservation by the United States government, or for evaluation by the Archivist of the United States, or his or her 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 Board for such records specifying the particular part desired and the law enforcement activity for which the record is sought. The Board also may disclose such a record to a law enforcement agency on its own initiative in situations in which criminal conduct is suspected, provided that such disclosure has been established as a routine use, or in situations in which the misconduct is directly related to the purpose for which the record is maintained.

(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 the extent of matters within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress, or subcommittee of any such joint committee.

(10) To the Comptroller General, or any of his or her authorized representatives, in the course of the performance of official duties of the Government Accountability Office.

(11) Pursuant to an order of a court of competent jurisdiction. In the event that any record is disclosed under such compulsory legal process, the Board shall make reasonable efforts to notify the subject individual after the process becomes a matter of public record.

(12) To a consumer reporting agency in accordance with 31 U.S.C. 3711(e).

(b) Before disseminating any record about any individual to any person other than a Board employee, the Board shall make reasonable efforts to ensure that the records are, or at the time they were collected were, accurate, complete, timely, and relevant. This paragraph (b) does not apply to disseminations made pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552) and paragraph (a)(2) of this section.

### § 1304.111 Maintaining records of disclosures.

(a) The Board shall maintain a log containing the date, nature, and purpose of each disclosure of a record to any person or agency. Such accounting also shall contain the name and address of the person or agency to whom or to which each disclosure was made. This log will not include disclosures made to Board employees or agents in the course of their official duties or pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552).

(b) The Board shall retain the accounting of each disclosure for at least five years after the accounting is made or for the life of the record that was disclosed, whichever is longer.

(c) The Board shall make the accounting of disclosures of a record pertaining to an individual available to that individual at his or her request. Such a request should be made in accordance with the procedures set forth in § 1304.105. This paragraph (c) does not apply to disclosures made for law enforcement purposes under 5 U.S.C. 552a(b)(7) and § 1304.110(a)(7).

### § 1304.112 Notification of systems of Privacy Act records.

(a) *Public notice.* On November 22, 1996, the Board published a notice of its systems of records in the FEDERAL REGISTER (Vol. 61, Number 227, pages 59472–69473). It is updating and republishing the notice in this issue of the FEDERAL REGISTER. The Board periodically reviews its systems of records and will publish information about any significant additions or changes to those systems. Information about systems of records maintained by other agencies that are in the temporary custody of the Board will not be published. In addition, the Office of the Federal Register biennially compiles and publishes all systems of records maintained by all federal agencies, including the Board.

(b) At least 30 days before publishing additions or changes to the Board's systems of records, the Board will publish a notice of intent to amend, providing the public with an opportunity to comment on the proposed amendments to its systems of records.

### § 1304.113 Privacy Act training.

(a) The Board shall ensure that all persons involved in the design, development, operation, or maintenance of any Board systems are informed of all requirements necessary to protect the privacy of individuals. The Board shall ensure that all employees having access to records receive adequate training in their protection and that records have adequate and proper storage with sufficient security to ensure their privacy.

(b) All employees shall be informed of the civil remedies provided under 5 U.S.C. 552a(g)(1) and other implications of the Privacy Act and of the fact that the Board may be subject to civil remedies for failure to comply with the provisions of the Privacy Act and the regulations in this part.

### § 1304.114 Responsibility for maintaining adequate safeguards.

The Board has the responsibility for maintaining adequate technical, physical, and security safeguards to prevent unauthorized disclosure or destruction of manual and automatic record systems. These security safeguards shall apply to all systems in which identified personal data are processed or maintained, including all reports and output from such systems that contain identifiable personal information. Such safeguards must be sufficient to prevent negligent, accidental, or unintentional disclosure, modification, or destruction of any personal records or data; must minimize; to the extent practicable, the risk that skilled technicians or knowledgeable persons could improperly obtain access to modify or destroy such records or data; and shall further ensure against such casual entry by unskilled persons without official reasons for access to such records or data.

(a) *Manual systems.* (1) Records contained in a system of records as defined in this part may be used, held, or stored only where facilities are adequate to prevent unauthorized access by persons within or outside the Board.

(2) Access to and use of a system of records shall be permitted only to persons whose duties require such access to the information for routine uses or for such other uses as may be provided in this part.

(3) Other than for access by employees or agents of the Board, access to records within a system of records shall be permitted only to the individual to whom the record pertains or upon his or her written request.

(4) The Board shall ensure that all persons whose duties require access to and use of records contained in a system of records are adequately trained to protect the security and privacy of such records.

(5) The disposal and destruction of identifiable personal data records shall be done by shredding and in accordance with rules promulgated by the Archivist of the United States.

(b) *Automated systems.* (1) Identifiable personal information may be processed, stored, or maintained by automated data systems only where facilities or conditions are adequate to prevent unauthorized access to such systems in any form.

(2) Access to and use of identifiable personal data associated with automated data systems shall be limited to those persons whose duties require such access. Proper control of personal data in any form associated with automated data systems shall be maintained at all times, including maintenance of accountability records showing disposition of input and output documents.

(3) All persons whose duties require access to processing and maintenance of identifiable personal data and automated systems shall be adequately trained in the security and privacy of personal data.

(4) The disposal and disposition of identifiable personal data and automated systems shall be done by shredding, burning, or, in the case of electronic records, by degaussing or by overwriting with the appropriate security software, in accordance with regulations of the Archivist of the United States or other appropriate authority.

### § 1304.115 Systems of records covered by exemptions.

The Board currently has no exempt systems of records.

### § 1304.116 Mailing lists.

The Board shall not sell or rent an individual's name and/or address unless such action is specifically authorized by law. This section shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

## PARTS 1305–1399 [RESERVED]

# CHAPTER XVII—DEFENSE NUCLEAR FACILITIES SAFETY BOARD


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## PARTS 1700–1702 [RESERVED]

## PART 1703—PUBLIC INFORMATION AND REQUESTS

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AUTHORITY: 5 U.S.C. 552; Executive Order 12600, 3 CFR, 1987 Comp., p. 235; 42 U.S.C. 2286, 2286b(c).

SOURCE: 56 FR 21261, May 8, 1991, unless otherwise noted.

### § 1703.101 Scope.

This part contains the Board's regulations implementing the Freedom of Information Act, 5 U.S.C. 552.

### § 1703.102 Definitions; words denoting number, gender and tense.

*Agency record* is a record in the possession and control of the Board that is associated with Board business. Agency records do not include records such as:

(1) Publicly available books, periodicals, or other publications that are owned or copyrighted by non-federal sources;

(2) Records solely in the possession and control of Board contractors;

(3) Personal records in the possession of Board personnel that have not been circulated, were not required by the Board to be created or retained, and may be retained or discarded at the author's sole discretion. In determining whether such records are agency records the Board shall consider whether, and to what extent, the records were used in agency business;

(4) Records of a personal nature that are not associated with any Board business; or

(5) Non-substantive information in the calendar or schedule books of the Chairman or Members, uncirculated except for typing or recording purposes.

*Board* means the Defense Nuclear Facilities Safety Board.

*Chairman* means the Chairman of the Board.

*Designated FOIA Officer* means the person designated by the Board to administer the Board's activities pursuant to the regulations in this part. The Designated FOIA Officer shall also be the Board officer having custody of or responsibility for agency records in the possession of the Board and shall be the Board officer responsible for authorizing or denying production of records upon requests filed pursuant to § 1703.105.

*General Counsel* means the chief legal officer of the Board.

*General Manager* means the chief administrative officer of the Board.

*Member* means a Member of the Board.

In determining the meaning of any provision of this part, unless the context indicates otherwise: the singular includes the plural; the plural includes the singular; the present tense includes the future tense; and words of one gender include the other gender.

### § 1703.103 Requests for board records available through the public reading room.

(a) A Public Reading Room will be maintained at the Board's headquarters and will be open between 8:30 a.m. and 4:30 p.m. Mondays through Fridays, with the exception of legal holidays. Documents may be obtained in person or by written or telephonic request from the Public Reading Room by reasonably describing the records sought. The purpose of the Public Reading Room is to provide easy accessibility to a substantial portion of the Board's records. The Board considers that documents available through the Public Reading Room have been placed in the public domain.

(b) The public records of the Board that are available for inspection and

copying upon request in the Public Reading Room include:

(1) The Board's rules and regulations;

(2) Statements of policy adopted by the Board.

(3) Board recommendations; the Secretary of Energy's response, any final decision, and implementation plans regarding Board recommendations; and interested person's comments, data, views, or arguments to the Board concerning its recommendations and the Secretary of Energy's response and final decision;

(4) Transcripts of public hearings and any Board correspondence related thereto;

(5) Recordings or transcripts of Board meetings that were closed under 10 CFR part 1704, where the Board subsequently determines under 10 CFR 1704.9 that the recordings or transcripts may be made publicly available;

(6) Board orders, decisions, notices, and other actions in a public hearing;

(7) Board correspondence, except that which is exempt from mandatory public disclosure under § 1703.104;

(8) Copies of the filings, certifications, pleadings, records, briefs, orders, judgments, decrees, and mandates in court proceedings to which the Board is a party and the correspondence with the courts or clerks of court;

(9) Those of the Board's Administrative Directives that affect members of the public;

(10) Index of the documents identified in this section, but not including drafts thereof; and

(11) Annual reports to Congress in which the Board's operations during a past fiscal year are described.

(12) Copies of records released pursuant to FOIA requests, along with an index to these records. The format will generally be the same as the format of the released records.

[56 FR 21261, May 8, 1991, as amended at 62 FR 66815, Dec. 22, 1997]

### § 1703.104 Board records exempt from public disclosure.

The following records are exempt from public disclosure:

(a)(1) Records specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and

(2) Which are in fact properly classified pursuant to such Executive Order;

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

(c) Records specifically exempted from disclosure by statute, provided that such statute:

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

(2) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

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

(e) Interagency or intraagency memoranda or letters which would not be available by law to a party other than an agency in litigation with the Board;

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

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

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

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

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

(4) Could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution 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,

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

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

**§ 1703.105 Requests for board records not available through the public reading room (FOIA requests).**

(a) Upon the request of any person, the Board shall make available for public inspection and copying any reasonably described agency record in the possession and control of the Board, but not available through the Public Reading Room, subject to the provisions of this part. If a member of the public files a request with the Board under the FOIA for records that the Board determines are available through the Public Reading Room, the Board will treat the request under the simplified procedures of § 1703.103.

(b)(1) A person may request access to Board records that are not available through the Public Reading Room by using the following procedures:

(i) The request must be in writing and must describe the records requested to enable Board 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 Board personnel who have been contacted regarding the request prior to the submission of the written request.

(ii) 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. The request must enable the Board to identify and locate the records by a process that is not unreasonably burdensome or disruptive of Board operations.

(2) The request should be addressed to the Designated FOIA Officer and clearly marked ''Freedom of Information Act Request.'' The address for such requests is: Designated FOIA Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., suite 700, Washington, DC 20004. For purposes of calculating the time for response to the request under § 1703.108, the request shall not be deemed to have been received until it is in the possession of the Designated FOIA Officer or his designee.

(3) The request must include:

(i) A statement by the requester of a willingness to pay the fee applicable under § 1703.107(b), or to pay that fee not to exceed a specific amount, or

(ii) A request for waiver or reduction of fees.

(4) No request shall be deemed to have been received until the Board has:

(i) Received a statement of willingness to pay, as indicated in § 1703.105(b)(3)(i), or

(ii) Received and approved a request for waiver or reduction of fees. However, the FOIA request shall be deemed to have been received if the request for waiver or reduction of fees includes a statement of willingness to pay the fee anticipated to be incurred in processing the request under this section, or to pay that fee not to exceed a specific amount, should the request for fee waiver or reduction be denied.

(c) with respect to records in the files of the Board that have been obtained from other federal agencies:

(1) Where the record originated in another federal agency, the Designated FOIA Officer shall refer the request to that agency and so inform the requester, unless the originating agency agrees to direct release by the Board.

(2) Requests for Board records containing information received from another agency, or records prepared jointly by the Board and other agencies, shall be treated as requests for Board records. The Designated FOIA Officer shall, however, 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, shall cite the other agency Denying Official as well as the Designated FOIA Officer if a denial by the Board is also involved.

(d) If a request does not reasonably describe the records sought, as provided in paragraph (b) of this section, the Board response shall specify the reasons why the request failed to meet those requirements and shall offer the requester the opportunity to confer with knowledgeable Board personnel in an attempt to restate the request. If additional information is needed from the requester to render records reasonably described, any restated request submitted by the requester shall be treated as an initial request for purposes of calculating the time for response under § 1703.108.

(e)(1) *Expedited processing*. A person may request expedited processing of an FOIA request when a compelling need for the requested records has been shown. ''Compelling need'' means:

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

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if the request is made by a person primarily engaged in disseminating information; or

(iii) The records pertain to an immediate source of risk to the public health and safety or worker safety at a defense nuclear facility under the Board's jurisdiction.

(2) A requester seeking expedited processing should so indicate in the initial request, and should state all facts supporting the need to obtain the requested records rapidly. The requester must also state that these facts are true and correct to the best of the requester's knowledge and belief.

(3) When a request for expedited processing is received, the Board will respond within ten calendar days from the date of receipt of the request, stating whether or not the request has been granted. If the request for expedited processing is denied, any appeal of that decision will be acted upon expeditiously.

[56 FR 21261, May 8, 1991, as amended at 62 FR 66815, Dec. 22, 1997]

**§ 1703.106 Requests for waiver or reduction of fees.**

(a) The Board shall collect fees for record requests made under § 1703.105, as provided in § 1703.107(b), unless a requester submits a request in writing for a waiver or reduction of fees. The Designated FOIA Officer shall make a determination on a fee waiver or reduction request within five working days of the request coming into his possession. No determination shall be made that a fee waiver or reduction request should be denied, until the Designated FOIA Officer has consulted with the General Counsel's Office. If the determination is made that the written request for a waiver or reduction of fees does not meet the requirements of this section, the Designated FOIA Officer shall inform the requester that the request for waiver or reduction of fees is being denied and set forth his appeal rights under § 1703.109.

(b) A person requesting the board to waive or reduce search, review, or duplication fees shall:

(1) Describe the purpose for which the requester intends to use the requested information;

(2) Explain the extent to which the requester will extract and analyze the substantive content of the agency record;

(3) Describe the nature of the specific activity or research in which the agency records will be used and the specific qualifications the requester possesses to utilize information for the intended use in such a way that it will contribute to public understanding;

(4) Describe the likely impact of disclosure of the requested records on the public's understanding of the subject as compared to the level of understanding of the subject existing prior to disclosure;

(5) Describe the size and nature of the public to whose understanding a contribution will be made;

(6) Describe the intended means of dissemination to the general public;

(7) Indicate if public access to information will be provided free of charge or provided for an access or publication fee; and

(8) Describe any commercial or private interest the requester or any

other party has in the agency records sought.

(c) The Board shall waive or reduce fees, without further specific information from the requester if, from information provided with the request for agency records made under § 1703.105, it can determine that disclosure of the information in the agency records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester.

(d) In making a determination regarding a request for a waiver or reduction of fees, the Board shall consider the following factors:

(1) Whether the subject of the requested agency records concerns the operations or activities of the Government;

(2) Whether disclosure of the information is likely to contribute significantly to public understanding of Government operations or activities;

(3) Whether, and the extent to which, the requester has a commercial interest that would be furthered by the disclosure of the requested agency records; and

(4) 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.

**§ 1703.107 Fees for record requests.**

(a) Fees for records available through the Public Reading Room.

(1) With the exception of copies of transcripts of Board public hearings addressed in paragraph (a)(2) of this section, the fees charged shall be limited to costs of duplication of the requested records. The Board shall either duplicate the requested records or have them duplicated by a commercial contractor. If the Board duplicates the records, it shall not charge the requester for the associated labor costs. A schedule of fees for this duplication service shall be prescribed in accordance with paragraph (b)(6) of this section. A person may obtain a copy of the schedule of fees in person or by mail from the Public Reading Room. There shall be no charge for responses consisting of ten or fewer pages.

(2) Transcripts of Board public hearings are made by private contractors. Interested persons may obtain copies of public hearing transcripts from the contractor at prices set in the contract, or through the duplication service noted in paragraph (a) of this section, if the particular contract so permits. Copies of the contracts shall be available for public inspection in the Public Reading Room.

(3) Requests for certification of copies of official Board records must be accompanied by a fee of $5.00 per document. Inquiries and orders may be made to the Public Reading Room in person or by mail.

(b) Fees for records not available through the Public Reading Room (FOIA requests).

(1) *Definitions*. For the purpose of paragraph (b) of this section:

*Commercial use* request means a request from or on behalf of one who seeks information for a use or purpose that furthers commercial, trade, or profit interests as these phrases are commonly known or have been interpreted by the courts in the context of the FOIA;

*Direct costs* means those expenditures which the Board incurs in search, review and duplication, as applicable to different categories of requesters, to respond to requests under § 1703.105. Direct costs include, for example, the average hourly salary and projected benefits costs of Board employees applied to time spent in responding to the request and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as cost of space, and heating or lighting the facility in which the Board records are stored.

*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 of scholarly research;

*Noncommercial scientific institution* refers to an institution that is not operated on a commercial basis 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;

*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 the periodicals can qualify as disseminations 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 may be included in this category. A ''freelance'' journalist may be regarded as working for a news organization if the journalist can demonstrate a solid basis for expecting publication through that organization, even though the journalist is not actually employed by the news organization. A publication contract would be the clearest proof, but the Board may also look to the past publication record of a requester in making this determination.

(2) *Fees.* (i) If documents are requested for commercial use, the Board shall charge the average hourly pay rate for Board employees, plus the average hourly projected benefits cost, for document search time and for document review time, and the costs of duplication as established in the schedule of fees referenced in paragraph (b)(6) of this section.

(ii) If documents are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research, or a representative of the news media, the Board's charges shall be limited to the direct costs of duplication as established in the schedule of fees referenced in paragraph (b)(6) of this section. There shall be no charge for the first 100 pages of duplication.

(iii) For a request not described in paragraphs (b)(2) (i) or (ii) of this section the Board shall charge the average hourly pay rate for Board employees, plus the average hourly projected benefits cost, for document search time, and the direct costs of duplication as established in the schedule of fees referenced in paragraph (b)(6) of this section. There shall be no charge for document review time and the first 100 pages of reproduction and the first two hours of search time will be furnished without charge.

(iv) [Reserved]

(v) The Board, or its designee, may establish minimum fees below which no charges will be collected, if it determines that the costs of routine collection and processing of the fees are likely to equal or exceed the amount of the fees. If total fees determined by the Board for a FOIA request would be less than the appropriate threshold, the Board shall not charge the requesters.

(vi) Payment of fees must be by check or money order made payable to the U.S. Treasury.

(vii) Requesters may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When the Board 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 assessment of fees, the Board may aggregate any such requests and charge the requester accordingly. The Board shall not, however, aggregate multiple requests on unrelated subjects from a requester.

(viii) Whenever the Board estimates that duplication or search costs are likely to exceed $25, it shall notify the requester of the estimated costs, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer the requester an opportunity to confer with the Board personnel with the object of reformulating the request

to meet the requester's needs at a lower cost.

(3) *Fees for unsuccessful search.* The Board may assess charges for time spent searching, even if it fails to locate the records, or if records located are determined to be exempt from disclosure.

(4) *Advance payments.* (i) If the Board estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250, the Board shall notify such requester of the estimated cost and either require satisfactory assurance of full payment where the requester has a history of prompt payment of fees, or require advance payment of the charges if a requester has no payment history.

(ii) If a requester has previously failed to pay a fee charged in a timely fashion, the Board shall require the requester to pay the full amount owed plus any applicable interest, and to make an advance payment of the full amount of the estimated fee before the Board will begin to process a new request or a pending request from that requester.

(iii) When the Board requires advance payment under this paragraph, the administrative time limits prescribed in § 1703.108(b) will begin only after the Board has received the fee payments.

(5) *Debt collection.* The Board itself may endeavor to collect unpaid FOIA fees, or may refer unpaid FOIA invoices to the General Services Administration, or other federal agency performing financial management services for the Board, for collection.

(6) *Annual adjustment of fees*—(i) *Update and publication.* The Board, by its designee, the General Manager, shall promulgate a schedule of fees and the average hourly pay rates and average hourly projected benefits cost and will update that schedule once every twelve months. The General Manager shall publish the schedule for public comment in the FEDERAL REGISTER.

(ii) *Payment of updated fees.* The fee applicable to a particular FOIA request will be the fee in effect on the date that the request is received.

[56 FR 21261, May 8, 1991, as amended at 62 FR 66816, Dec. 22, 1997]

**§ 1703.108 Processing of FOIA requests.**

(a) Where a request complies with § 1703.105 as to specificity and statement of willingness to pay or request for fee waiver or reduction, the Designated FOIA Officer shall acknowledge receipt of the request and commence processing of the request. The Designated FOIA Officer shall prepare a written response:

(1) Granting the request,

(2) Denying the request,

(3) Granting or denying it in part,

(4) Stating that the request has been referred to another agency under § 1703.105, or

(5) Informing the requester that responsive records cannot be located or do not exist.

(b) Action pursuant to this section to provide access to requested records shall be taken within twenty working days. This time period may be extended up to ten additional working days, in unusual circumstances, by written notice to the requester. If the Board will be unable to satisfy the request in this additional period of time, the requester will be so notified and given the opportunity to—

(1) Limit the scope of the request so that it can be processed within the time limit, or

(2) Arrange with the Designated FOIA Officer an alternative time frame for processing the original request or a modified request.

(c) For purposes of this section and § 1703.109, the term *unusual circumstances* may include but is not limited to the following:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the Board's Washington, DC offices:

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

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency pursuant to § 1703.105(d).

(d) If no determination has been made at the end of the ten day period,

or the last extension thereof, the requester may deem his administrative 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 Board will nevertheless continue to process the request. If the Board is unable to provide a response within the statutory period, the Designated FOIA Officer shall inform the requester of the reason for the delay; the date on which a determination may be expected to be made; and that the requester can seek remedy through the courts, but shall ask the requester to forgo such action until a determination is made.

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

(f) The procedure for appeal of denial of a request for Board records is set forth in § 1703.109.

[56 FR 21261, May 8, 1991, as amended at 62 FR 66816, Dec. 22, 1997]

### § 1703.109 Procedure for appeal of denial of requests for board records and denial of requests for fee waiver or reduction.

(a)(1) A person whose request for access to records or request for fee waiver or reduction is denied in whole or in part may appeal that determination to the General Counsel within 30 days of the determination. Appeals filed pursuant to this section must be in writing, directed to the General Counsel at the address indicated in § 1703.105(b)(2) and clearly marked ''Freedom of Information Act Appeal.'' Such an appeal received by the Board not addressed and marked as indicated in this paragraph will be so addressed and marked by Board personnel as soon as it is properly identified and then will be forwarded to the General Counsel. Appeals taken pursuant to this paragraph will be considered to be received upon actual receipt by the General Counsel.

(2) The General Counsel shall make a determination with respect to any appeal within 20 working days after the receipt of such appeal. If, on appeal, the denial of the request for records or fee reduction is in whole or in part upheld, the General Counsel shall notify the person making such request of the provisions for judicial review of that determination.

(b) In unusual circumstances, as defined in § 1703.108(c), the time limits prescribed for deciding an appeal pursuant to this section may be extended by up to ten working days, by the General Counsel, who will send written notice to the requester setting forth the reasons for such extension and the expected determination date.

### § 1703.110 Requests for classified records.

The Board may at any time be in possession of classified records and Unclassified Controlled Nuclear Information (UCNI) received from the Department of Energy or other federal agencies. The Board shall refer requests under § 1703.105 for such records or information to the Department of Energy or other originating agency without making an independent determination as to the releasability of such documents. The Board shall refer requests for classified records in a manner consistent with Executive Order 12356, ''National Security Information,'' 3 CFR, 1982 Comp., p. 166, or any superseding Executive Order. The Board shall refer requests for UCNI in a manner consistent with 42 U.S.C. 2168 and the Department of Energy's implementing regulations in 10 CFR part 1017 or any successor regulations.

### § 1703.111 Requests for privileged treatment of documents submitted to the board.

(a) *Scope.* Any person submitting a document to the Board may request privileged treatment by claiming that some or all of the information contained in the document is exempt from the mandatory public disclosure requirements of FOIA and should otherwise be withheld from public disclosure.

(b) *Procedures.* A person claiming that information is privileged under paragraph (a) of this section must file:

(1) An application, accompanied by an affidavit, requesting privileged treatment for some or all of the information in a document, and stating the justification for nondisclosure of the information and addressing the factors set forth in paragraph (e) of this section;

(2) The original document, boldly indicating on the front page ''Contains Privileged Information—Do Not Release'' and identifying within the document the information for which the privileged treatment is sought;

(3) Three copies of the redacted document (*i.e.*, without the information for which privileged treatment is sought) and with a statement indicating that information has been removed for privileged treatment; and

(4) The name, title, address, telephone number, and telecopy information of the person or persons to be contacted regarding the request for privileged treatment of documents submitted to the Board.

(c) *Effect of privilege claim.* (1) The Designated FOIA Officer shall place documents for which privileged treatment is sought in accordance with paragraph (b) of this section in a nonpublic file, while the request for confidential treatment is pending. By placing documents in a nonpublic file, the Board is not making a determination on any claim for privilege. The Board retains the right to make determinations with regard to any claim of privilege, and the discretion to release information as necessary to carry out its responsibilities.

(2) The Designated FOIA Officer shall place the request for privileged treatment described in paragraph (b)(1) of this section and a copy of the redacted document described in paragraph (b)(3) of this section in a public file while the request for privileged treatment is pending.

(d) *Notification of request and opportunity to comment.* When a FOIA requester seeks a document for which privilege is claimed, the Designated FOIA Officer shall so notify the person who submitted the document and give that person an opportunity (at least five days) in which to comment in writing on the request. A copy of this notice shall be sent to the FOIA requester.

(e) *Factors to be considered by Board.* In determining whether to grant the document privileged status and to deny the request for the document the Board shall consider:

(1) Whether the information has been held in confidence by its owner;

(2) Whether the information is of a type customarily held in confidence by its owner and whether there is a rational basis therefor;

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

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

(5) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

(f) *Notification before release.* Notice of a decision by the Designated FOIA Officer to deny a claim of privilege, in whole or in part, shall be given to any person claiming that information is privileged no less than five days before public disclosure. The decision shall be made only after consultation with the General Counsel's Office. The notice shall briefly explain why the person's objections to disclosure were not sustained. A copy of this notice shall be sent to the FOIA requester.

(g) *Notification of suit in Federal courts.* When a FOIA requester brings suit to compel disclosure of confidential commercial information, the Board shall notify the person who submitted documents containing such confidential commercial information of the suit.

### § 1703.112 Computation of time.

In computing any period of time under this part, the day of the Board's action is not included. The last day of the period is included unless it is a Saturday, Sunday or legal holiday, in which case the period runs until the

end of the next working day. Whenever a person has the right or is required to take some action within a prescribed period after notification by the Board and the notification is made by mail, five days shall be added to the prescribed period. Only two days shall be added when a notification is made by express mail.

## PART 1704—RULES IMPLEMENTING THE GOVERNMENT IN THE SUNSHINE ACT

Sec.

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AUTHORITY: 5 U.S.C. 552b; 42 U.S.C. 2286, 2286b(c).

SOURCE: 56 FR 9609, Mar. 7, 1991, unless otherwise noted.

### § 1704.1 Applicability.

(a) This part implements the provisions of the Government in the Sunshine Act (5 U.S.C. 552b). These procedures apply to meetings, as defined herein, of the Members of the Defense Nuclear Facilities Safety Board (Board). The Board may waive the provisions set forth in this part to the extent authorized by law.

(b) Requests for all documents other than the transcripts, recordings, and minutes described in §1704.8 shall be governed by Board regulations pursuant to the Freedom of Information Act (5 U.S.C. 552).

### § 1704.2 Definitions.

As used in this part:

(a) *Chairman* and *Vice Chairman* mean those Members designated by the President to serve in said positions, pursuant to 42 U.S.C. 2286(c).

(b) *Defense Nuclear Facilities Safety Board* means the Board established under the National Defense Authorization Act, Fiscal Year 1989.

(c) *General Counsel* means the Board's principal legal officer, or an attorney serving as Acting General Counsel.

(d) *Meeting* means the deliberations of three or more Members where such deliberations determine or result in the joint conduct or disposition of official Board business. A meeting does not include:

(1) Notation voting or similar consideration of business for the purpose of recording of votes, whether by circulation of material to the Members individually in writing or by a polling of the Members individually by telephone.

(2) Action by three or more Members to:

(i) Open or to close a meeting or to release or to withhold information pursuant to §1704.5;

(ii) Set an agenda for a proposed meeting(s);

(iii) Call a meeting on less than seven days' notice as permitted by §1704.6(b); or

(iv) Change the subject matter or the determination to open or to close a publicly announced meeting under §1704.7(b).

(3) A session attended by three or more Members for which the purpose is to have the Board's staff or expert consultants to the Board brief or otherwise provide information to the Board concerning any matters within the purview of the Board under its authorizing statute, provided that the Board does not engage in deliberations that determine or result in the joint conduct or disposition of official Board business on such matters.

(4) A session attended by three or more Members for which the purpose is to have the Department of Energy (including its contractors) or other persons or organizations brief or otherwise provide information to the Board concerning any matters within the purview of the Board under its authorizing statute, provided that the Board does not engage in deliberations that determine or result in the joint conduct or

disposition of official Board business on such matters.

(5) A gathering of Members for the purpose of holding informal preliminary discussions or exchange of views which do not effectively predetermine official action.

(e) *Member* means an individual duly appointed and confirmed to the collegial body, known as ''the Board.''

### § 1704.3 Open meetings requirement.

(a) Any meetings of the Board, as defined in § 1704.2, shall be conducted in accordance with this part. Except as provided in § 1704.4, the Board's meetings, or portions thereof, shall be open to public observation.

(b) The General Counsel or his designee will attend and monitor briefings described in § 1704.2(d) (3)–(4) and informal preliminary discussions described in § 1704.2(d)(5) to assure that those gatherings do not proceed to the point of becoming deliberations and ''meetings'' within the meaning of the Sunshine Act.

(c) The General Counsel or his designee will inform the Board Members if developing discussions at a briefing or gathering should be deferred until a notice of an open or closed meeting can be published in the FEDERAL REGISTER, and a meeting conducted pursuant to the Sunshine Act and these regulations.

### § 1704.4 Grounds on which meetings may be closed or information may be withheld.

Except in a case where the Board finds that the public interest requires otherwise, a meeting may be closed and information pertinent to such meeting otherwise required by §§ 1704.5, 1704.6, and 1704.7 to be disclosed to the public may be withheld if the Board properly determines that such meeting or portion thereof or the disclosure of such information is likely to:

(a) Disclose matters that are:

(1) Specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy; and

(2) In fact properly classified pursuant to such Executive order. In making the determination that this exemption applies, the Board shall rely upon the classification assigned to a document by the Department of Energy or other originating agency;

(b) Relate solely to the internal personnel rules and practices of the Board;

(c)(1) Disclose matters specifically exempted from disclosure by statute (other than 5 U.S.C. 552): *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; or

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

(2) This exemption applies to Board meetings, or portions of meetings, involving deliberations regarding recommendations which, under 42 U.S.C. 2286d(b) and (h)(3), may not be made publicly available until after they have been received by the Secretary of Energy or the President, respectively; Defense Nuclear Facilities Safety Board.

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

(e) Involve accusing any person of a crime, or formally censuring any person;

(f) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(g) Disclose investigatory records compiled for law enforcement purposes, or information which, if written, would be contained in such records, but only to the extent that the production of such records or information would;

(1) Interfere with enforcement proceedings;

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

(3) Constitute an unwarranted invasion of personal privacy;

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

(5) Disclose investigative techniques and procedures; or

(6) Endanger the life or physical safety of law enforcement personnel;

(h) Disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed action of the Board, except that this subsection shall not apply in any instance where the Board has already disclosed to the public the content or nature of its proposed action, or where the Board is required by law to make such disclosure on its own initiative prior to taking final action on such proposal;

(i) Specifically concern the Board's issuance of a subpoena, or the Board's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the Board of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing; or

(j) Disclose other information for which the Government in the Sunshine Act provides an exemption to the open meeting requirements of that Act.

[56 FR 9609, Mar. 7, 1991, as amended at 79 FR 42181, July 21, 2014]

### § 1704.5 Procedures for closing meetings, or withholding information, and requests by affected persons to close a meeting.

(a) A majority of all Members may vote to close a meeting or withhold information pertaining to that meeting. A separate vote shall be taken with respect to any action under § 1704.4. A majority of the Board may act by taking a single vote with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular subject matters and is scheduled to be held no more than thirty days after the initial meeting in such series. Each Member's vote under this paragraph shall be recorded and proxies are not permitted.

(b) Any person whose interest may be directly affected if a portion of a meeting is open may request the Board to close that portion on any of the grounds referred to in § 1704.4 (e), (f), or (g). Requests, with reasons in support thereof, should be submitted to the General Counsel, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., suite 700, Washington, DC 20004. On motion of any Member, the Board shall determine by recorded vote whether to grant the request.

(c) Within one working day of any vote taken pursuant to this section, the Board shall make available a written copy of such vote reflecting the vote of each Member on the question, and if a portion of a meeting is to be closed to the public a full written explanation of its action closing the meeting and a list of all persons expected to attend and their affiliation.

(d) For every closed meeting, the General Counsel of the Board shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemption provision. If the General Counsel invokes the exemption for classified or sensitive unclassified information under § 1704.4(a), he shall rely upon the classification or designation assigned to the document containing such information by the Department of Energy or other originating agency. A copy of such certification, together with a statement setting forth the time and place of the meeting and the persons present, shall be retained by the Board as part of the transcript, recording, or minutes required by § 1704.8.

### § 1704.6 Procedures for public announcement of meetings.

(a) For each meeting, the Board shall make public announcement, at least one week before the meeting, of the:

(1) Time of the meeting;

(2) Place of the meeting;

(3) Subject matter of the meeting;

(4) Whether the meeting is to be open or closed; and

(5) The name and business telephone number of the official designated by the Board to respond to requests for information about the meeting.

(b) The one week advance notice required by paragraph (a) of this section may be reduced only if:

(1) A majority of all Members determines by recorded vote that Board

business requires that such meeting be scheduled in less than seven days; and

(2) The public announcement required by paragraph (a) of this section is made at the earliest practicable time.

(c) Immediately following each public announcement required by this section, or by §1704.7, the Board shall submit a notice of public announcement for publication in the FEDERAL REGISTER.

### §1704.7 Changes following public announcement.

(a) The time or place of a meeting may be changed following the public announcement only if the Board publicly announces such change at the earliest practicable time. Members need not approve such change.

(b) The subject matter of a meeting or the determination of the Board to open or to close a meeting, or a portion thereof, to the public may be changed following public announcement if:

(1) A majority of all Members determines by recorded vote that Board business so requires and that no earlier announcement of the change was possible; and

(2) The Board publicly announces such change and the vote of each Member thereon at the earliest practicable time.

(c) The deletion of any subject matter announced for a meeting is not a change requiring the approval of the Board under paragraph (b) of this section.

### §1704.8 Transcripts, recordings, or minutes of closed meetings.

Along with the General Counsel's certification and presiding officer's statement referred to in §1704.5(d), the Board shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or a portion thereof, closed to the public. The Board may maintain a set of minutes in lieu of such transcript or recording for meetings closed pursuant to §1704.4(i). Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote.

### §1704.9 Availability and retention of transcripts, recordings, and minutes, and applicable fees.

The Board shall make promptly available to the public in the Public Reading Room the transcript, electronic recording, or minutes of the discussion of any item on the agenda or of any testimony received at a closed meeting, except for such item, or items, of discussion or testimony as determined by the Board to contain matters which may be withheld under the exemptive provisions of §1704.4. Copies of the nonexempt portions of the transcript or minutes, or transcription of such recordings disclosing the identity of each speaker, shall be furnished to any person at the actual cost of transcription or duplication. If at some later time the Board determines that there is no further justification for withholding a portion of a transcript, electronic recording, or minutes or other item of information from the public which has previously been withheld, such portion or information shall be made publicly available. The Board shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or a portion thereof, closed to the public for at least two years after such meeting, or until one year after the conclusion of any Board proceeding with respect to which the meeting, or a portion thereof, was held, whichever occurs later.

### §1704.10 Severability.

If any provision of this part or the application of such provision to any person or circumstances, is held invalid, the remainder of this part or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

## PART 1705—PRIVACY ACT

Sec.

1705.01 Scope.
1705.02 Definitions.
1705.03 Systems of records notification.

1705.04 Requests by persons for access to their own records.
1705.05 Processing of requests.
1705.06 Appeals from access denials.
1705.07 Requests for correction of records.
1705.08 Appeals from correction denials.
1705.09 Disclosure of records to third parties.
1705.10 Fees.
1705.11 Exemptions.

AUTHORITY: 5 U.S.C. 552a(f).

SOURCE: 56 FR 47144, Sept. 18, 1991, unless otherwise noted.

### § 1705.01 Scope.

This part contains the Board's regulations implementing the Privacy Act of 1974, Public Law 93–579, 5 U.S.C. 552a.

### § 1705.02 Definitions.

The following terms used in these regulations are defined in the Privacy Act, 5 U.S.C. 552a(a): *agency*, *individual*, *maintain*, *record*, *system of records*, *statistical record*, and *routine use*. The Board's use of these terms conforms with the statutory definitions. References in this part to ''the Act'' refer to the Privacy Act of 1974.

### § 1705.03 Systems of records notification.

(a) *Public notice*. The Board has published in the FEDERAL REGISTER its systems of records. The Office of the Federal Register biennially compiles and publishes all systems of records maintained by all Federal agencies, including the Board.

(b) *Requests regarding record systems*. Any person who wishes to know whether a system of records contains a record pertaining to him or her may file a request in person or in writing. Written requests should be directed to: Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004. Telephone requests should be made by calling the Board at 202–208–6400, and asking to speak to the Privacy Act Officer.

### § 1705.04 Requests by persons for access to their own records.

(a) *Requests in writing*. A person may request access to his or her own records in writing by addressing a letter to: Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., suite 700, Washington, DC 20004. The request should contain the following information:

(1) Full name, address, and telephone number of requester,

(2) Proof of identification, which should be a copy of one of the following: Valid driver's license, valid passport, or other current identification which contains both an address and picture of the requester,

(3) The system of records in which the desired information is contained, and

(4) At the requester's option, authorization for copying expenses (see § 1705.10 below).

(b) *Requests in person*. Any person may examine his or her own records on the Board's premises. To do so, the person should call the Board's offices at 202–208–6400 and ask to speak to the Privacy Act Officer. This call should be made at least two weeks prior to the time the requester would like to see the records. During this call, the requester should be prepared to provide the same information as that listed in paragraph (a) of this section, except for proof of identification.

### § 1705.05 Processing of requests.

(a) *Requests in writing*. The Privacy Act Officer will acknowledge receipt of the request within five working days of its receipt in the Board's offices. The acknowledgment will advise the requester if any additional information is needed to process the request. Within fifteen working days of receipt of the request, the Privacy Act Officer will provide the requested information or will explain to the requester why additional time is needed for response.

(b) *Requests in person*. Following the initial call from the requester, the Privacy Act Officer will determine (1) whether the records identified by the requester exist, and (2) whether they are subject to any exemption under § 1705.11 below. If the records exist and are not subject to exemption, the Privacy Act Officer will call the requester and arrange an appointment at a mutually agreeable time when the records can be examined. The requester may be accompanied by one person of his or her own choosing, and should state

during this call whether or not a second individual will be present at the appointment. At the appointment, the requester will be asked to present identification as stated in § 1705.04(a)(2).

(c) *Excluded information*. If a request is received for information compiled in reasonable anticipation of litigation, the Privacy Act Officer will inform the requester that this information is not subject to release under the Privacy Act (*see* 5 U.S.C. 552a(d)(5)).

### § 1705.06 Appeals from access denials.

When access to records has been denied by the Privacy Act Officer, the requester may file an appeal in writing. This appeal should be directed to The Chairman, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue NW., suite 700, Washington, DC 20004. The appeal letter must (a) specify those denied records which are still sought, and (b) state why the denial by the Privacy Act Officer is erroneous. The Chairman or his designee will respond to such appeals within twenty working days after the appeal letter has been received in the Board's offices. The appeal determination will explain the basis for continuing to deny access to any requested records.

### § 1705.07 Requests for correction of records.

(a) *Correction requests*. Any person is entitled to request correction of a record pertaining to him or her. This request must be made in writing and should be addressed to Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004. The letter should clearly identify the corrections desired. An edited copy of the record will usually be acceptable for this purpose.

(b) *Initial response*. Receipt of a correction request will be acknowledged by the Privacy Act Officer in writing within five working days of receipt of the request. The Privacy Act Officer will endeavor to provide a letter to the requester within thirty working days stating whether or not the request for correction has been granted or denied. If the Privacy Act Officer decides to deny any portion of the correction request, the reasons for the denial will be provided to the requester.

### § 1705.08 Appeals from correction denials.

(a) When amendment of records has been denied by the Privacy Act Officer, the requester may file an appeal in writing. This appeal should be directed to The Chairman, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004. The appeal letter must (1) specify the records subject to the appeal, and (2) state why the denial of amendment by the Privacy Act Officer is erroneous. The Chairman or his designee will respond to such appeals within thirty working days (subject to extension by the Chairman for good cause) after the appeal letter has been received in the Board's offices.

(b) The appeal determination, if adverse to the requester in any respect, will: (1) Explain the basis for denying amendment of the specified records, (2) inform the requester that he or she may file a concise statement setting forth reasons for disagreeing with the Chairman's determination, and (3) inform the requester of his or her right to pursue a judicial remedy under 5 U.S.C. 552a(g)(1)(A).

### § 1705.09 Disclosure of records to third parties.

Records subject to the Privacy Act that are requested by any person other than the individual to whom they pertain will not be made available except in the following circumstances:

(a) Their release is required under the Freedom of Information Act in accordance with the Board's FOIA regulations, 10 CFR part 1703;

(b) Prior consent for disclosure is obtained in writing from the individual to whom the records pertain; or

(c) Release is authorized by 5 U.S.C. 552a(b) (1) or (3) through (11).

### § 1705.10 Fees.

A fee will not be charged for search or review of requested records, or for correction of records. When a request is made for copies of records, a copying fee will be charged at the same rate established for FOIA requests. *See* 10 CFR

1703.107. However, the first 100 pages of copying will be free of charge.

### § 1705.11 Exemptions.

Pursuant to 5 U.S.C. 552a(k), the Board has determined that system of records DNFSB–3, ''Drug Testing Program Records,'' is partially exempt from 5 U.S.C. 552(a)(c)(3), (d), (e)(1), (e)(4)(G), (H), (I), and (f). The exemption pertains to portions of these records which would identify persons supplying information on drug abuse by Board employees or contractors.

## PART 1706—ORGANIZATIONAL AND CONSULTANT CONFLICTS OF INTERESTS

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1706.1 Scope; statement of policy.
1706.2 Definitions.
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1706.4 Head of the contracting activity.
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1706.11 Organizational conflicts of interest certificate—Advisory or assistance services.

AUTHORITY: 42 U.S.C. 2286b(c).

SOURCE: 57 FR 44652, Sept. 29, 1992, unless otherwise noted.

### § 1706.1 Scope; statement of policy.

(a) *Scope*. This part sets forth the guidelines, requirements, and procedures the Defense Nuclear Facilities Safety Board will follow in determining whether a contractor or offeror has an organizational or consultant conflict of interest (OCI) and in avoiding, neutralizing, or mitigating OCIs.

(b) *Policy*. It is the policy of the Board to identify and then avoid or mitigate organizational and consultant conflicts of interest. Normally, the Board will not award contracts to offerors who have OCIs and will terminate contracts where OCIs are identified following contract award. In exceptional circumstances, the Board reserves the right to waive conflicts of interest if it determines that such action is in the best interests of the Government, pursuant to §1706.8, and to take such mitigating measures as it deems appropriate pursuant to such section.

### § 1706.2 Definitions.

*Advisory or assistance services* means services acquired by contract to advise or assist the Board, whether with respect to its internal functions or its oversight of defense nuclear facilities, or otherwise to support or improve policy development or decisionmaking by the Board, or management or administration of the Board, or to support or improve the operation of the Board's management systems. Such services may take the form of the provision of information, advice, reports, opinions, alternatives, conclusions, recommendations, training, direct assistance, or performance of site visits, technical reviews, investigation of health and safety practices or other appropriate services.

*Affiliates* means associated business concerns or individuals if, directly or indirectly, either one controls or can control the other or a third party controls or can control both.

*Board* means, as the context requires, the Defense Nuclear Facilities Safety Board, its Chairman, or any other officer of the Defense Nuclear Facilities Safety Board to whom the appropriate delegation has been made under 42 U.S.C. 2286(c)(3).

*Contract* means any contract, agreement, or other arrangement with the Board, except as provided in §1706.3.

*Contractor* means any person, firm, unincorporated association, joint venture, co-sponsor, partnership, corporation, or other entity, or any group of one or more of the foregoing, which is a party to a contract with the Board, and the affiliates and successors in interest of such party. The term ''contractor'' also includes the chief executive and directors of a party to a contract with the Board, the key personnel of such party identified in the contract, and current or proposed consultants or subcontractors to such party. The term ''contractor'' shall also include consultants engaged directly by the Board through the use of a contract.

*Defense nuclear facility* means any United States Department of Energy

(DOE) defense nuclear facility, as defined in 42 U.S.C. 2286g, subject to the Board's oversight.

*Evaluation activities* means activities that involve evaluation of some aspect of defense nuclear facilities.

*Mitigating* means, with respect to an organizational or consultant conflict of interest, reducing or counteracting the effects of such a conflict of interest on the Board, but without eliminating or avoiding the conflict of interest.

*National Laboratories* means laboratories operated by educational institutions or business entities under management and operating contracts with DOE.

*Offeror* means any person, firm, unincorporated association, joint venture, partnership, corporation, or other entity, or any group of one or more of the foregoing, submitting a bid or proposal to the Board, solicited, unsolicited or otherwise invited by the Board, to obtain a contract, and the affiliates and successors in interest of such a bidder or proposer. The term ''offeror'' also includes the chief executive and directors of such a bidder or proposer, the key personnel of a bidder or proposer identified in the bid or proposal, and proposed consultants or subcontractors to such bidder or proposer.

*Organizational or consultant conflict of interest* means that, because of other past, present, or future planned activities or relationships, an offeror or contractor is unable, or potentially unable, to render impartial assistance or advice to the Board, or the objectivity of such offeror or contractor in performing contract work for the Board is or might be otherwise impaired, or such offeror or contractor has or would have an unfair competitive advantage. The term ''organizational or consultant conflict of interest'' shall include, but not be limited to, actions or situations that would preclude the award or extension of a contract under, or would be prohibited by, § 1706.5.

*Potential organizational or consultant conflict of interest* means a factual situation that indicates or suggests that an actual organizational or consultant conflict of interest may exist or arise from award of a proposed contract or from continuation of an existing contract. The term is used to signify those situations that merit conflicts review prior to contract award or that must be reported to the contracting officer for conflicts review if they arise during contract performance.

*Research* means any scientific, engineering, or other technical work involving theoretical analysis, exploration, or experimentation.

*Subcontractor* means any subcontractor of any tier which performs work under a prime contract with the Board.

*Task order contract* means a Board contract that contains a broad scope of work but does not authorize the contractor to perform specific tasks within that broad scope until the contracting officer issues task orders.

*Unfair competitive advantage* means an advantage obtained by an offeror or contractor to the Board by virtue of the relationship of the offeror or contractor with the Board or access to information not available to other offerors or contractors, and recognized in appropriate legal precedent as unfair.

In determining the meaning of any provision of this part, unless the context indicates otherwise, the singular includes the plural; the plural includes the singular; the present tense includes the future tense; and words of one gender include the other gender.

### § 1706.3 Applicability.

(a) *General applicability*. This part applies to contractors and offerors only, except as otherwise herein provided. This part shall be incorporated by reference and made a part of all Board contracts in excess of the small purchases threshold, except as provided in the last sentence of this § 1706.3(a). In addition, if determined appropriate by the contracting officer for the Board, this part may be incorporated by reference and made a part of Board contracts below the small purchases threshold, except as provided in the last sentence of this § 1706.3(a). This part does not apply to the acquisition of services, including, without limitation, consulting services, through the personnel appointment process or to Board agreements with other federal government agencies, but shall apply

to Board agreements with the management and operating contractors (and subcontractors and consultants thereto) of the National Laboratories.

(b) *Subcontractors and consultants.* The requirements of this part shall also apply to subcontractors and consultants proposed for, or working on, a Board contract, in each case where the amount of the subcontract or consultant agreement under which such subcontractor or consultant is or will be working is expected to exceed $10,000, and in each other case where the contracting officer for the Board deems it appropriate to make the requirements of this part applicable to a subcontractor or consultant proposed for, or working on, a Board contract. The certificates or disclosures submitted by offerors or contractors pursuant to this part shall include certificates or disclosures from all subcontractors and consultants to contractor or offerors in those cases where this part applies by its terms to such subcontractors or consultants or has been applied to such persons by the contracting officer. Contractors and offerors shall assure that contract clauses giving effect to this § 1706.3(b), satisfactory to the contracting officer, are included in subcontracts and consultant agreements of any tier involving performance of work under a prime contract covered by this part.

[57 FR 44652, Sept. 29, 1992; 58 FR 13684, Mar. 12, 1993]

### § 1706.4 Head of the contracting activity.

The head of the contracting activity for the Board shall be the General Manager.

### § 1706.5 General rules.

(a) *Award of Contracts.* Contracts shall generally not be awarded to an offeror:

(1) For any services where the award would result in the offeror evaluating products or services it has provided to the Board, is then providing to the Board, or is then offering to provide for the Board;

(2) For evaluation activities or research related to the Board's oversight of defense nuclear facilities, where the award would result in the offeror evaluating products or services it has provided, is then providing, or is then offering to provide to DOE or to contractors or subcontractors for defense nuclear facilities; or

(3) For any other services (the acquisition of which is otherwise covered by this part), where the Board has determined, pursuant to § 1706.7, that an actual or potential OCI exists and cannot be avoided, and the Board does not waive that OCI. Paragraphs (a) (1) and (2) of this section also apply when award would result in evaluation of products or services of another entity where the offeror has been, is, or would be substantially involved in the development of the product or performance of the service, or has other substantial involvement regarding the product or services.

(b) *Subsequent related contracts.* (1) A Board contractor under a Board contract shall normally be ineligible to participate in Board contracts or subcontracts that stem directly from the contractor's performance of work under a previous Board contract, where the Board determines that an OCI would exist because:

(i) The expectation of receiving the subsequent contract is likely to diminish the contractor's capacity to give impartial assistance and advice, or otherwise result in a biased work product; or

(ii) An offeror on the subsequent contract would have an unfair competitive advantage by virtue of having performed the first contract.

(2) If a contractor under a Board contract prepares a complete or essentially complete statement of work or specifications in the performance of a contract, the contractor shall be ineligible to perform or participate in the initial contractual effort that is based on such statement of work or specifications. The contractor shall not incorporate its products or services in such statement of work or specifications.

(c) *National Laboratory personnel.* The Board may engage personnel of the National Laboratories who have expertise needed by the Board in the performance of its oversight responsibilities, provided that prior to each such engagement, the Board determines either:

(1) That the nature of work performed by such personnel for DOE does not pose actual or potential OCIs with respect to the particular work covered by the Board contract; or

(2) That such engagement is in the Government's best interests and that a waiver should be granted pursuant to § 1706.8. In all cases involving National Laboratory personnel, notice of the circumstances of the contract, stating the rationale for use of the personnel, shall be published in the FEDERAL REGISTER.

(d) *Work for others.* During the term of any Board contract, the contractor may not enter into consulting or other contractual arrangements with other persons or entities, the result of which could give rise to an OCI with respect to the work being performed under the contract. The prime contractor shall ensure that all of its employees, subcontractors, and consultants under the contract abide by this paragraph. If the contractor has reason to believe that any proposed arrangement with other persons or entities may involve an actual or potential OCI, it shall promptly inform the Board in writing of all pertinent facts regarding such proposed arrangement. In the case of task order contracts, this paragraph applies, subject to § 1706.7(c), only to specific ongoing tasks that the contracting officer authorizes the contractor to perform.

(e) *Contractor protection of Board information that is not publicly available.* If the contractor in the performance of a Board contract obtains access to information, such as Board plans, policies, reports, studies, or financial plans, or internal data protected by the Privacy Act (5 U.S.C. 552a), proprietary information, or any other data which has not been released to the public, the contractor shall not:

(1) Use such information for any private purpose until the information has been released or is otherwise made available to the public;

(2) Compete for work for the Board based on such information for a period of six months after either the contract has been completed or such information has been released or otherwise made available to the public, whichever occurs first, or submit an unsolicited proposal to the Government based on such information until one year after such information is released or otherwise made available to the public, unless a waiver permitting such action has been granted pursuant to § 1706.8; or

(3) Release the information without prior written approval of the contracting officer, unless such information has previously been released or otherwise made available to the public by the Board.

[57 FR 44652, Sept. 29, 1992; 58 FR 13684, Mar. 12, 1993]

### § 1706.6 Solicitation provisions.

(a) *Advisory or assistance services.* There shall be included in all formal Board solicitations for advisory or assistance services where the contract amount is expected to exceed $25,000 (or the then applicable small purchases threshold), a provision requiring a certificate representing whether award of the contract to the offeror would present actual or potential OCIs. Apparent successful offerors will be required to submit such certificates, but the Board may also require such a certificate to be submitted in other circumstances, such as:

(1) Where the contracting officer has identified certain offerors who have passed an initial screening and has determined that it is appropriate to request the identified offerors to file the certificate in order to expedite the award process; or

(2) In the case of modifications for additional effort under Board contracts, except those issued under the ''changes'' clause. If a certificate has been previously submitted with regard to the contract being modified, only an updating of such statement shall be required for a contract modification.

In addition, if determined appropriate by the contracting officer for the Board, such certificates may be required in connection with any other contracts subject to this part or in which this part has been incorporated by reference.

(b) *Marketing consultant services.* There shall further be included in all Board solicitations, except sealed bids, where the contract amount is expected to exceed $200,000, a provision requiring an organizational conflicts of interest

certificate from any marketing consultants engaged by an offeror in support of the preparation or submission of an offer for a Board contract by that offeror.

[57 FR 44652, Sept. 29, 1992; 58 FR 13684, Mar. 12, 1993]

### § 1706.7 Procedures.

(a) *Pre-award disclosure and resolution of OCIs.* If a certificate under § 1706.6 indicates, or the Board otherwise learns, that actual or potential OCIs could be, or would appear to be, created by contract award to a particular offeror, the Board shall afford the affected offeror an opportunity to provide in writing all relevant facts bearing on the certificate. If the Board thereafter determines that an actual or potential OCI exists, one of the following actions shall ultimately be taken:

(1) Disqualify the offeror;

(2) Include in the contract appropriate terms and conditions which avoid the conflict, in which case no waiver is required; or

(3) Make a finding that it is in the best interests of the Government to seek award of the contract under the waiver provisions of § 1706.8, and, where reasonably possible, include contract terms and conditions or take other measures which mitigate such conflicts.

(b) *Post-award disclosure and resolution of OCIs.* (1) If, after contract award, the contractor discovers actual or potential OCIs with respect to the contract, it shall make an immediate and full disclosure in writing to the contracting officer. This statement shall include a description of the action that the contractor has taken or proposes to avoid or mitigate such conflicts.

(2) If a disclosure under this section indicates, or the Board otherwise learns, that actual or potential OCIs exist, the Board may afford the contractor an opportunity to provide all relevant facts bearing upon the problem. If at any time the Board determines that an actual or potential OCI exists, one of the following actions shall ultimately be taken:

(i) Terminate the contract, or, in the case of a task order contract, terminate the particular task;

(ii) Insist on appropriate contract terms and conditions which avoid the OCIs, in which case no waiver is required; or

(iii) Make a finding that it is in the best interests of the Government to permit the contractor to continue to perform the contract (or task) under the waiver provisions of § 1706.8, and, where reasonably possible, insist on appropriate contract terms and conditions or take other measures which mitigate the OCIs.

(c) *Task order contracts.* (1) Because a task order contract generally entails a broad scope of work, apparent successful offerors shall be required to identify in their certificates filed in accordance with § 1706.6 any actual or potential OCIs that come within the full scope of the contract. The Board may decline to award a task order contract to an offeror based upon such information or it may decline to approve performance of a particular task by the contractor if an actual or potential OCI is subsequently identified with respect to that particular task. The Board may also take the other actions identified in § 1706.7(a) to avoid or mitigate such conflicts.

(2) Contractors performing task order contracts for the Board shall disclose to the contracting officer any new work for others they propose to undertake that may present an actual or potential OCI with regard to the performance of any work under the full scope of the Board contract. Such disclosure shall be made at least 15 days prior to the submission of a bid or proposal for the new work. The disclosure shall include the statement of work and any other information necessary to describe fully the proposed work and contemplated relationship.

(3) If the Board has issued a task order or a letter request for proposal under the contract with a contractor who has disclosed to the contracting officer that it proposes to undertake new work for persons other than the Board as described in § 1706.7(c)(2), for services in the same technical area and/or at the same defense nuclear facility that is the subject of the proposed new work (including overlap based upon generic work performed for others by the contractor), the Board

shall inform the contractor that entering into a contract for the new work may result in termination by the Board of the task order contract, if the Board determines that such work would give rise to an OCI and the Board does not grant a waiver.

(d) *Decisions on OCIs*. The contracting officer shall make recommendations to the General manager regarding disqualification or actions to be taken by the Board to avoid or mitigate any actual or potential OCI.

(1) The General Manager shall have the authority to approve, modify, or disapprove such recommendations regarding avoidance of an actual or potential OCI. If an offeror or contractor disagrees with the actions approved by the General Manager and requests review of the action, the Chairman shall make the decision on the actions to be taken by the Board.

(2) Any recommended action respecting the best interests of the Government and mitigation measures to be taken with respect to an actual or potential OCI must be approved by the Chairman in conjunction with the decision to grant a waiver pursuant to §1706.8, and any recommended action to terminate a contract or a particular task on account of an actual or potential OCI must be approved by the Chairman.

(3) Decisions on OCIs by the General Manager or the Chairman shall be made with the advice of the Office of the General Counsel.

[57 FR 44652, Sept. 29, 1992; 58 FR 13684, Mar. 12, 1993]

### §1706.8 Waiver.

(a) *Waiver of OCIs*. The need for a waiver of any OCI in connection with the award or continuation of specific contracts may be identified either by the contracting officer for the Board or other Board employee or by a written request filed by an offeror or contractor with the contracting officer. The request may be combined with the certificate or disclosure required under §§1706.6 or 1706.7, or with additional statements filed under §1706.7 regarding matters raised in the certificate or disclosure. The contracting officer shall review all of the relevant facts brought to his attention and shall bring the matter to the General Manager, who shall make a written recommendation to the Chairman of the Board regarding whether a waiver should be granted for a contract award or for continuation of an existing contract.

(b) *Criteria for Waiver of OCIs*. (1) The Chairman is authorized to waive any OCI (and the corresponding provision of §1706.5 where applicable) upon a determination that awarding or extending the particular contract, or not terminating the particular contract, would be in the best interests of the Government. Issuance of a waiver shall ordinarily be limited to those situations in which:

(i) The work to be performed under contract is vital to the Board program;

(ii) The work cannot be satisfactorily performed except by a contractor or offeror whose interests give rise to a question of OCI; and

(iii) Contractual and/or technical review and supervision methods can be employed by the Board to mitigate the conflict.

(2) The Chairman is also authorized to waive any OCI (and the corresponding provision of §1706.5 where applicable), without regard to the foregoing factors, if the Chairman determines, notwithstanding the existence of the OCI, that it is in best interests of the Government to award or extend the particular contract, or not to terminate it, without compliance with §1706.8(b)(1).

(c) *Waiver of Rules or Procedures*. The Chairman is also authorized to waive any rules or procedures contained in this part upon a determination that application of the rules or procedures in a particular situation would not be in the best interests of the Government. Any request for such a waiver must be in writing and shall describe the basis for the waiver.

(d) *Office of General Counsel*. Waivers of OCIs or of any rule or procedure contained in this part shall be made after consultation with the Office of General Counsel.

(e) *Federal Register*. Except as otherwise provided in §1706.8(c), notice of each waiver granted under this section shall be published in the FEDERAL REGISTER with an explanation of the basis

for the waiver. In the discretion of the Board, notices of instances of avoidance of OCIs may also be published in the FEDERAL REGISTER.

**§ 1706.9 Examples.**

The examples in this section illustrate situations in which questions concerning OCIs may arise. The examples are not all inclusive, but are intended to provide offerors and contractors with guidance on how this subpart will be applied.

(a) *Circumstances*—(1) *Facts*. A Board contractor for technical assistance in the review of a safety aspect of a particular defense nuclear facility proposes to use the services of an expert who also serves on an oversight committee for a contractor of other defense nuclear facilities.

(2) *Guidance*. Assuming the work of the oversight committee has no direct or indirect relationship with the work at the facility that is the subject of the Board's contract, there would not be an OCI associated with the use of this expert in the performance of the Board contract.

(b) *Circumstances*—(1) *Facts*. A Board contractor studying the potential for a chemical explosion in waste tanks at a defense nuclear facility advises the Board that it has been offered a contract with DOE to study the chemical composition of the waste in the same tanks.

(2) *Guidance*. The contractor would be advised that accepting the DOE contract would result in termination of its performance under its contract with the Board.

(c) *Circumstances*—(1) *Facts*. The Board issues a task order under an existing contract for the evaluation of the adequacy of fire protection systems at a defense nuclear facility. The contractor then advises the Board that it is considering making an offer on a solicitation by DOE to evaluate the same matter.

(2) *Guidance*. The contractor would be advised that entering into a contract with DOE on that solicitation could result in the contract with the Board being terminated.

(d) *Circumstances*—(1) *Facts*. A firm responding to a formal Board solicitation for technical assistance provides information regarding a contract it currently has with DOE. The effort under the DOE contract is for technical assistance work at DOE facilities not subject to Board oversight and outside its jurisdiction.

(2) *Guidance*. The Board would analyze the work being performed for DOE to ensure no potential or actual conflict of interest would be created through award of the Board contract. Should the Board determine that no potential or actual conflict of interest exists, the contractor would be eligible for award. If the Board determines that a potential or actual conflict of interest would arise through a contract award, it may disqualify the firm or, if the Board determines that such action is in the best interests of the Government, the Board may waive the conflict or the rules and procedures and proceed with the award.

(e) *Circumstances*—(1) *Facts*. The Board discovers that a firm competing for a contract has a number of existing agreements with DOE in technical areas which are unrelated to the Board's oversight authority. While these contracts may not represent a potential or actual conflict of interest regarding the substance of the technical effort, their total value constitutes a significant portion of the firm's gross revenues.

(2) *Guidance*. A conflict of interest may exist due to the firm's substantial pecuniary dependence upon DOE. Consequently, the Board may question the likelihood that the contractor would provide unbiased opinions, conclusions, and work products because of this extensive financial relationship. The Board will review and consider the extent of the firm's financial dependence on DOE, the nature of the proposed Board contract, the need by the Board for the services and expertise to be provided by the firm and the availability of such services and expertise elsewhere, and whether the likelihood of the firm's providing objective technical evaluations and opinions to the Board could be influenced in view of its DOE relationship. Based on this analysis, the Board may either determine that there is no conflict and make the

award, waive the conflict if one is identified and establish procedures to mitigate it where possible, or disqualify the offeror.

(f) *Circumstances*—(1) *Facts*. The Board discovers that a firm competing for a contract has a substantial business relationship in technical areas unrelated to the Board's oversight authority with a contractor operating a defense nuclear facility under a DOE contract. Similar to the situation described in paragraph (e) of this section, the total value of the contracts with the DOE contractor constitutes more than half of the firm's gross revenues, even though those contracts do not represent a potential or actual conflict of interest regarding any of the particular matters to be covered by the contract with the Board.

(2) *Guidance*. The firm's substantial financial and business dependence upon the DOE contractor may give rise to a conflict of interest, in that the likelihood of the firm's rendering impartial, objective assistance or advice to the Board may be impaired by its extensive financial relationship with the DOE contractor. In this situation, the Board will review and consider the nature of the proposed Board contract, the need by the Board for the services and expertise to be provided by the firm and the availability of such services and expertise elsewhere. The Board will also review and consider the extent of the firm's financial dependence on the DOE contractor and whether the firm would be impartial and objective in providing technical evaluation and opinions to the Board, especially on matters in which the DOE contractor is involved, notwithstanding the relationship with the DOE contractor. Based on this analysis, the Board may determine that there is no actual conflict of interest and make the award. Alternatively, if the Board identifies a conflict that cannot be avoided, the Board may determine to waive the conflict in the best interests of the United States, with or without the establishment of procedures to mitigate the conflict, or it may disqualify the offeror.

[57 FR 44652, Sept. 29, 1992; 58 FR 13684, Mar. 12, 1993]

### § 1706.10 Remedies.

The refusal to provide the certificate, or upon request of the contracting officer the additional written statement, required by §§ 1706.6 and 1706.7 in connection with an award shall result in disqualification of the offeror for that award. The nondisclosure or misrepresentation of any relevant information may also result in the disqualification of the offeror for that award. If such nondisclosure or misrepresentation by an offeror or contractor is discovered or occurs after award, or in the event of breach of any of the restrictions contained in this part, the Board may terminate the contract for convenience or default, and the offeror or contractor may also be disqualified by the Board from consideration for subsequent Board contracts and be subject to such other remedial actions as provided by law or the contract.

[57 FR 44652, Sept. 29, 1992; 58 FR 13684, Mar. 12, 1993]

### § 1706.11 Organizational conflicts of interest certificate—Advisory or assistance services.

As prescribed in or permitted by § 1706.6(a), insert the following provision in Board solicitations:

ORGANIZATIONAL AND CONSULTANT CONFLICTS OF INTEREST CERTIFICATE—ADVISORY AND ASSISTANCE SERVICES (OCT. 1990)

(a) An organizational or consultant conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

(b) In order to comply with the Office of Federal Procurement Policy Letter 89–1, Conflict of Interest Policies Applicable to Consultants, the offeror shall provide the certificate described in paragraph (c) of this provision.

(c) The certificate must contain the following:

(1) Name of the agency and the number of the solicitation in question.

(2) The name, address, telephone number, and federal taxpayer identification number of the offeror.

(3) A description of the nature of the services rendered by or to be rendered on the instant contract.

(4) The name, address, and telephone number of the client or clients, a description of the services rendered to the previous client(s), and the name of a responsible officer or employee of the offeror who is knowledgeable about the services rendered to each client, if, in the 12*months preceding the date of the certification, services were rendered to the Government or any other client (including a foreign government or person) respecting the same subject matter as the instant solicitation, or directly relating to such subject matter. The agency and contract number under which the services were rendered must also be included, if applicable.

(5) A statement that the person who signs the certificate has made inquiry and that, to the best of his or her knowledge and belief, no actual or potential conflict of interest or unfair competitive advantage exists with respect to the advisory or assistance services to be provided in connection with the instant contract, or that any actual or potential conflict of interest or unfair competitive advantage that does or may exist with respect to the contract in question has been communicated in writing to the contracting officer or his or her representative; and

(6) The signature, name, employer's name, address, and telephone number of the person who signed the certificate.

(d) Persons required to certify but who fail to do so may be determined to be nonresponsible. Misrepresentation of any fact may result in suspension or debarment, as well as penalties associated with false certifications or such other provisions provided for by law or regulation.

(End of provision)

# PART 1707—TESTIMONY BY DNFSB EMPLOYEES AND PRODUCTION OF OFFICIAL RECORDS IN LEGAL PROCEEDINGS

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### Subpart D—Penalties

1707.401 Penalties.

AUTHORITY: 42 U.S.C. 2286b(c); 44 U.S.C. 3101–3107, 3301–3303a, 3308–3314.

SOURCE: 66 FR 66715, Dec. 27, 2001, unless otherwise noted.

## Subpart A—General Provisions

### § 1707.101 Scope and purpose.

(a) This part sets forth policies and procedures you must follow when you submit a demand or request to an employee of the Defense Nuclear Facilities Safety Board (DNFSB) to produce official records and information, or provide testimony relating to official information, in connection with a legal proceeding. You must comply with these requirements when you request the release or disclosure of official records and information.

(b) The Defense Nuclear Facilities Safety Board intends these provisions to:

(1) Promote economy and efficiency in its programs and operations;

(2) Minimize the possibility of involving DNFSB in controversial issues not related to our functions;

(3) Maintain DNFSB's impartiality among private litigants where DNFSB is not a named party; and

(4) Protect sensitive, confidential information and the deliberative processes of DNFSB.

(c) In providing for these requirements, DNFSB does not waive the sovereign immunity of the United States.

(d) This part provides guidance for the internal operations of DNFSB. It does not create any right or benefit, substantive or procedural, that a party

*If approved by the head of the contracting activity, this period may be increased up to 36 months.

may rely upon in any legal proceeding against the United States.

### § 1707.102 Applicability.

This part applies to demands and requests to employees for factual, opinion, or expert testimony relating to official information, or for production of official records or information, in legal proceedings whether or not the United States or the DNFSB is a named party. However, it does not apply to:

(a) Demands upon or requests for a DNFSB employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of DNFSB;

(b) Demands upon or requests for a former DNFSB employee to testify as to matters in which the former employee was not directly or materially involved while at the DNFSB;

(c) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a; and

(d) Congressional demands and requests for testimony or records.

### § 1707.103 Definitions.

*DNFSB* means the Defense Nuclear Facilities Safety Board.

*DNFSB* employee or employee means:

(1) Any current or former officer or employee of DNFSB;

(2) Any contractor or contractor employee working on behalf of the DNFSB or who has performed services for DNFSB; and

(3) Any individual who is serving or has served in any advisory capacity to DNFSB, whether formal or informal.

(4) Provided, that this definition does not include persons who are no longer employed by DNFSB and who are retained or hired as expert witnesses or who agree to testify about general matters, matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with DNFSB.

*Demand* means a subpoena, or an order or other demand of a court or other competent authority, for the production, disclosure, or release of records or for the appearance and testimony of a DNFSB employee that is issued in a legal proceeding.

*General Counsel* means the General Counsel of DNFSB or a person to whom the General Counsel has delegated authority under this part.

*Legal proceeding* means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

*Records or official records and information mean:*

(1) All documents and materials which are DNFSB agency records under the Freedom of Information Act, 5 U.S.C. 552;

(2) All other documents and materials contained in DNFSB files; and

(3) All other information or materials acquired by a DNFSB employee in the performance of his or her official duties or because of his or her official status.

*Request* means any formal or informal request, by whatever method, for the production of records and information or for testimony which has not been demanded by a court or other competent authority.

*Testimony* means any written or oral statements, including but not limited to depositions, answers to interrogatories, affidavits, declarations, interviews, and statements made by an individual in connection with a legal proceeding.

## Subpart B—Requests for Testimony and Production of Documents

### § 1707.201 General prohibition.

No employee may produce official records and information or provide any testimony relating to official information in response to a demand or request without the prior, written approval of the General Counsel.

### § 1707.202 Factors DNFSB will consider.

The General Counsel, in his or her sole discretion, may grant an employee permission to testify on matters relating to official information, or produce official records and information, in response to a demand or request. Among the relevant factors that the General

Counsel may consider in making this decision are whether:

(a) The purposes of this part are met;

(b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;

(c) DNFSB has an interest in the decision that may be rendered in the legal proceeding;

(d) Allowing such testimony or production of records would assist or hinder DNFSB in performing its statutory duties or use DNFSB resources where responding to the request will interfere with the ability of DNFSB employees to do their work;

(e) Allowing such testimony or production of records would be in the best interest of DNFSB or the United States;

(f) The records or testimony can be obtained from other sources;

(g) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand or request arose;

(h) Disclosure would violate a statute, executive order or regulation;

(i) Disclosure would reveal confidential, sensitive, or privileged information, trade secrets or similar, confidential commercial or financial information, or otherwise protected information, or would otherwise be inappropriate for release;

(j) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceedings;

(k) Disclosure would compromise constitutional rights;

(l) Disclosure would result in DNFSB appearing to favor one litigant over another;

(m) Disclosure relates to documents that were produced by another agency;

(n) A substantial Government interest is implicated;

(o) The demand or request is within the authority of the party making it; and

(p) The demand or request is sufficiently specific to be answered.

**§ 1707.203 Filing requirements for demands or requests for documents or testimony.**

You must comply with the following requirements whenever you issue demands or requests to a DNFSB employee for official records, information, or testimony.

(a) Your request must be in writing and must be submitted to the General Counsel. If you serve a subpoena on DNFSB or a DNFSB employee before submitting a written request and receiving a final determination, DNFSB will oppose the subpoena on grounds that your request was not submitted in accordance with this subpart.

(b) Your written request must contain the following information:

(1) The caption of the legal proceeding, docket number, and name and address of the court or other authority involved;

(2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document necessary to show relevance of the testimony, records, or information you seek from the DNFSB;

(3) A list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal proceeding, and a specific description of the substance of the testimony or records sought;

(4) A statement as to how the need for the information outweighs the need to maintain any confidentiality of the information and outweighs the burden on DNFSB to produce the records or provide testimony;

(5) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than a DNFSB employee, such as a retained expert;

(6) If testimony is requested, the intended use of the testimony, a general summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony;

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or testimony;

(8) The name, address, and telephone number of counsel to each party in the case; and

(9) An estimate of the amount of time that the requester and other parties will require with each DNFSB employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.

(c) The Defense Nuclear Facilities Safety Board reserves the right to require additional information to complete your request where appropriate.

(d) Your request should be submitted at least 45 days before the date that records or testimony is required. Requests submitted in less than 45 days before records or testimony is required must be accompanied by a written explanation stating the reasons for the late request and the reasons for expedited processing.

(e) Failure to cooperate in good faith to enable the General Counsel to make an informed decision may serve as the basis for a determination not to comply with your request.

### § 1707.204 Service of subpoenas or requests.

Subpoenas or requests for official records or information or testimony must be served on the General Counsel, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

### § 1707.205 Processing demands or requests.

(a) After service of a demand or request to testify, the General Counsel will review the demand or request and, in accordance with the provisions of this subpart, determine whether, or under what conditions, to authorize the employee to testify on matters relating to official information and/or produce official records and information.

(b) The Defense Nuclear Facilities Safety Board will process requests in the order in which they are received. Absent exigent or unusual circumstances, DNFSB will respond within 45 days from the date that we receive it. The time for response will depend upon the scope of the request.

(c) The General Counsel may grant a waiver of any procedure described by this subpart where a waiver is considered necessary to promote a significant interest of the DNFSB or the United States or for other good cause.

### § 1707.206 Final determination.

The General Counsel makes the final determination on demands and requests to employees for production of official records and information or testimony. All final determinations are within the sole discretion of the General Counsel. The General Counsel will notify the requester and the court or other authority of the final determination, the reasons for the grant or denial of the demand or request, and any conditions that the General Counsel may impose on the release of records or information, or on the testimony of a DNFSB employee.

### § 1707.207 Restrictions that apply to testimony.

(a) The General Counsel may impose conditions or restrictions on the testimony of DNFSB employees including, for example, limiting the areas of testimony or requiring the requester and other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal or will only be used or made available in the particular legal proceeding for which testimony was requested. The General Counsel may also require a copy of the transcript of testimony at the requester's expense.

(b) The DNFSB may offer the employee's written declaration in lieu of testimony.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the General Counsel, the employee shall not:

(1) Disclose classified, privileged, or otherwise protected information;

(2) Testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of DNFSB unless testimony is being given on behalf of the United States (see also 5 CFR 2635.805 for current employees).

**§ 1707.208 Restrictions that apply to released records.**

(a) The General Counsel may impose conditions or restrictions on the release of official records and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure. The terms of the protective order or of a confidentiality agreement must be acceptable to the General Counsel. In cases where protective orders or confidentiality agreements have already been executed, DNFSB may condition the release of official records and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the General Counsel so determines, original DNFSB records may be presented for examination in response to a demand or request, but they are not to be presented as evidence or otherwise used in a manner by which they could lose their identity as official DNFSB records, nor are they to be marked or altered. In lieu of the original records, certified copies will be presented for evidentiary purposes (see 28 U.S.C. 1733).

**§ 1707.209 Procedure when a decision is not made prior to the time a response is required.**

If a response to a demand or request is required before the General Counsel can make the determination referred to in §1707.201, the General Counsel, when necessary, will provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the demand or request is being reviewed, and seek a stay of the demand or request pending a final determination.

**§ 1707.210 Procedure in the event of an adverse ruling.**

If the court or other competent authority fails to stay the demand, the employee upon whom the demand is made, unless otherwise advised by the General Counsel, will appear at the stated time and place, produce a copy of this part, state that the employee has been advised by counsel not to provide the requested testimony or produce documents, and respectfully decline to comply with the demand, citing *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951). A written response may be offered to a request, or to a demand, if permitted by the court or other competent authority.

## Subpart C—Schedule of Fees

**§ 1707.301 Fees.**

(a) Generally. The General Counsel may condition the production of records or appearance for testimony upon advance payment of a reasonable estimate of the costs to DNFSB.

(b) Fees for records. Fees for producing records will include fees for searching, reviewing, and duplicating records, costs of attorney time spent in reviewing the demand or request, and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. Costs for employee time will be calculated on the basis of the hourly pay of the employee (including all pay, allowance, and benefits). Fees for duplication will be the same as those charged by DNFSB in its Freedom of Information Act fee regulations at 10 CFR part 1703.

(c) Witness fees. Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the Federal district court closest to the location where the witness will appear. Such fees will include cost of time spent by the witness to prepare for testimony, in travel, and for attendance in the legal proceeding.

(d) Payment of fees. You must pay witness fees for current DNFSB employees and any records certification fees by submitting to the General Counsel a check or money order for the appropriate amount made payable to the Treasury of the United States. In the case of testimony by former DNFSB employees, you must pay applicable fees directly to the former employee in accordance with 28 U.S.C. 1821 or other applicable statutes.

(e) Certification (authentication) of copies of records. The Defense Nuclear Facilities Safety Board may certify

that records are true copies in order to facilitate their use as evidence. If you seek certification, you must request certified copies from DNFSB at least 45 days before the date they will be needed. The request should be sent to the General Counsel. You will be charged a certification fee of $15.00 for each document certified.

(f) Waiver or reduction of fees. The General Counsel, in his or her sole discretion, may, upon a showing of reasonable cause, waive or reduce any fees in connection with the testimony, production, or certification of records.

(g) De minimis fees. Fees will not be assessed if the total charge would be $10.00 or less.

## Subpart D—Penalties

### § 1707.401 Penalties.

(a) An employee who discloses official records or information or gives testimony relating to official information, except as expressly authorized by DNFSB or as ordered by a Federal court after DNFSB has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Additionally, former DNFSB employees are subject to the restrictions and penalties of 18 U.S.C. 207 and 216.

(b) A current DNFSB employee who testifies or produces official records and information in violation of this part shall be subject to disciplinary action.

# PART 1708—PROCEDURES FOR SAFETY INVESTIGATIONS

Sec.

1708.100 Authority to conduct safety investigations.
1708.101 Scope and purpose of safety investigations.
1708.102 Types of safety investigations.
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1708.113 Right to submit statements.
1708.114 Official transcripts.
1708.115 Final report of safety investigation.
1708.116 Procedure after safety investigations.

AUTHORITY: 42 U.S.C. 2286b(c); 42 U.S.C. 2286a(b)(2); 44 U.S.C. 3101–3107, 3301–3303a, 3308–3314.

SOURCE: 79 FR 71010, Dec. 1, 2014, unless otherwise noted.

### § 1708.100 Authority to conduct safety investigations.

(a) The Defense Nuclear Facilities Safety Board (Board) is an independent federal agency in the executive branch of the United States Government.

(b) The Board's enabling legislation authorizes it to conduct safety investigations pursuant to the Atomic Energy Act of 1954, as amended (42 U.S.C. 2286a(b)(2)).

### § 1708.101 Scope and purpose of safety investigations.

(a) The Board shall investigate any event or practice at a Department of Energy defense nuclear facility which the Board determines has adversely affected, or may adversely affect, public health and safety.

(b) The purpose of any Board investigation shall be:

(1) To determine whether the Secretary of Energy is adequately implementing standards (including all applicable Department of Energy orders, regulations, and requirements) at Department of Energy defense nuclear facilities;

(2) To ascertain information concerning the circumstances of such event or practice and its implications for such standards;

(3) To determine whether such event or practice is related to other events or practices at other Department of Energy defense nuclear facilities; and

(4) To provide to the Secretary of Energy such recommendations for changes in such standards or the implementation of such standards (including

Department of Energy orders, regulations, and requirements) and such recommendations relating to data or research needs as may be prudent or necessary.

### § 1708.102 Types of safety investigations.

(a) The Board may initiate a preliminary safety inquiry or order a formal safety investigation.

(b) A preliminary safety inquiry means any inquiry conducted by the Board or its staff, other than a formal investigation. Where it appears from a preliminary safety inquiry that a formal safety investigation is appropriate, the Board's staff will so recommend to the Board.

(c) A formal safety investigation is instituted by an Order of Safety Investigation issued either after a recorded notational vote of Board Members or after convening a meeting in accordance with the Government in the Sunshine Act and voting in open or closed session, as the case may be.

(d) Orders of Safety Investigations will outline the basis for the investigation, the matters to be investigated, the Investigating Officer(s) designated to conduct the investigation, and their authority.

(e) The Office of the General Counsel shall have primary responsibility for conducting and leading a formal safety investigation. The Investigating Officer(s) shall report to the Board.

(f) Following a notational vote and in accordance with the Government in the Sunshine Act, the Board or an individual Board Member authorized by the Board may hold such closed or open hearings and sit and act at such times and places, and require the attendance and testimony of such witnesses and the production of such evidence as the Board or an authorized member may find advisable, or exercise any other applicable authority as provided in the Board's enabling legislation. Each Board Member shall have full access to all information relating to the matter under investigation, including attendance at closed hearings.

(g) Subpoenas in formal safety investigation hearings may be issued by the Chairman only after a notational vote of the Board. The Chairman may designate another Board Member to issue a subpoena. Subpoenas shall be served by any person designated by the Chairman, or otherwise as provided by law.

(h) A determination of a decision or action authorized to the Board by these procedures shall only be made after a notational vote of the Board with each Board Member having one vote.

### § 1708.103 Request to conduct safety investigations.

(a) Any person may request that the Board perform a preliminary safety inquiry or conduct a formal safety investigation concerning a matter within the Board's jurisdiction.

(b) Actions the Board may take regarding safety investigation requests are discretionary.

(c) The Board will offer to protect the identity of a person requesting a safety investigation to the maximum extent permitted by law.

(d) Board safety investigations are wholly administrative and investigatory in nature and do not involve a determination of criminal culpability, adjudication of rights and duties, or other quasi-judicial determinations.

### § 1708.104 Confidentiality of safety investigations and privileged safety information.

(a) Information obtained during the course of a preliminary safety inquiry or a formal safety investigation may be treated as confidential, safety privileged, and non-public by the Board and its staff, to the extent permissible under existing law. The information subject to this protection includes but is not limited to: Identity of witnesses; recordings; statements; testimony; transcripts; emails; all documents, whether or not obtained pursuant to Board subpoena; any conclusions based on privileged safety information; any deliberations or recommendations as to policies to be pursued; and all other related investigative proceedings and activities.

(b) The Board shall have the discretion to assert the safety privilege when safety information, determined by the Board as protected from release, is

sought by any private or public governmental entity or by parties to litigation who attempt to compel its release.

(c) Nothing in this section voids or otherwise displaces the Board's legal obligations with respect to the Freedom of Information Act, the Government in the Sunshine Act, or any procedures or requirements contained in the Board's regulations issued pursuant to those Acts.

### § 1708.105 Promise of confidentiality.

(a) The Investigating Officer(s) may give a promise of confidentiality to any individual who provides evidence for a safety inquiry or investigation to encourage frank communication.

(b) A promise of confidentiality must be explicit.

(c) A promise of confidentiality must be documented in writing.

(d) A promise of confidentiality may be given only as needed to ensure forthright cooperation of a witness and may not be given on a blanket basis to all witnesses.

(e) A promise of confidentiality must inform the witness that it applies only to information given to the Investigating Officer(s) and not to the same information if given to others.

### § 1708.106 Limitation on participation.

(a) A safety investigation under this rule is not a judicial or adjudicatory proceeding.

(b) No person or entity has standing to intervene or participate as a matter of right in any safety investigation under this regulation.

### § 1708.107 Powers of persons conducting formal safety investigations.

The Investigating Officer(s) appointed by the Board may take informal or formal statements, interview witnesses, take testimony, request production of documents, recommend issuance of subpoenas, recommend taking of testimony in a closed forum, recommend administration of oaths, and otherwise perform any lawful act authorized under the Board's enabling legislation in connection with any safety investigation ordered by the Board.

### § 1708.108 Cooperation: Ready access to facilities, personnel, and information.

(a) Section 2286c(a) of the Atomic Energy Act of 1954, as amended, requires the Department of Energy to fully cooperate with the Board and provide the Board with ready access to such facilities, personnel, and information as the Board considers necessary, including ready access in connection with a safety investigation.

(b) Each contractor operating a Department of Energy defense nuclear facility under a contract awarded by the Secretary is also required, to the extent provided in such contract or otherwise with the contractor's consent, to fully cooperate with the Board and provide the Board with ready access to such facilities, personnel, and information of the contractor as the Board considers necessary in connection with a safety investigation.

(c) The Board may make a written request to persons or entities relevant to the safety investigation to preserve pertinent information, documents, and evidence, including electronically stored information, in order to preclude alteration or destruction of that information.

### § 1708.109 Rights of witnesses in safety investigations.

(a) Any person who is compelled to appear in person to provide testimony or produce documents in connection with a safety investigation is entitled to be accompanied, represented, and advised by an attorney. Subpoenas in safety investigations shall issue only under signature of the Chairman or any Member of the Board designated by the Chairman. Attendance and testimony shall be before the Board or a Member authorized by the Board.

(b) If an executive branch agency employee witness is represented by counsel from that same agency, counsel shall identify who counsel represents to determine whether counsel represents multiple interests in the safety investigation.

(c) Counsel for a witness may advise the witness with respect to any question asked where it is claimed that the testimony sought from the witness is

outside the scope of the safety investigation, or that the witness is privileged to refuse to answer a question or to produce other evidence. For these permissible objections, the witness or counsel may object on the record to the question and may state briefly and precisely the grounds therefore. If the witness refuses to answer a question, then counsel may briefly state on the record that counsel has advised the witness not to answer the question and the legal grounds for such refusal. The witness and his or her counsel shall not otherwise object to or refuse to answer any question, and they shall not otherwise interrupt any oral examination.

(d) When it is claimed that the witness has a privilege to refuse to answer a question on the grounds of self-incrimination, the witness must assert the privilege personally.

(e) Any objections made during the course of examination will be treated as continuing objections and preserved throughout the further course of testimony without the necessity for repeating them as to any similar line of inquiry.

(f) Counsel for a witness may not interrupt the examination by making any unnecessary objections or statements on the record.

(g) Following completion of the examination of a witness, such witness may make a statement on the record, and that person's counsel may, on the record, question the witness to enable the witness to clarify any of the witness's answers or to offer other evidence.

(h) The Board or any Member authorized by the Board shall take all measures necessary to regulate the course of an investigative proceeding to avoid delay and prevent or restrain obstructionist or contumacious conduct or contemptuous language.

(i) If the Board or any Member authorized by the Board finds that counsel for a witness, or other representative, has refused to comply with his or her directions, or has engaged in obstructionism or contumacy, the Board or Member authorized by the Board may thereupon take action as the circumstances may warrant.

(j) Witnesses appearing voluntarily do not have a right to have counsel present during questioning, although the Board or Member authorized by the Board, in consultation with the Office of the General Counsel, may permit a witness appearing on a voluntary basis to be accompanied by an attorney or non-attorney representative.

### § 1708.110 Multiple interests.

(a) If counsel representing a witness appears in connection with a safety investigation, counsel shall state on the record all other persons or entities counsel represents in that investigation.

(b) When counsel does represent more than one person or entity in a safety investigation, counsel shall inform the Investigating Officer(s) and each client of counsel's possible conflict of interest in representing that client.

(c) When an Investigating Officer(s), or the Board, as the case may be, in consultation with the Board's General Counsel, has concrete evidence that the presence of an attorney representing multiple interests would obstruct or impede the safety investigation, the Investigating Officer(s) or the Board may prohibit that attorney from being present during testimony.

(d) The Board shall issue a written statement of the reasons supporting a decision to exclude counsel under this section within five working days following exclusion. The Board shall also delay the safety investigation for a reasonable period of time to permit retention of new counsel.

### § 1708.111 Sequestration of witnesses.

(a) Witnesses shall be sequestered during interviews, or during the taking of testimony, unless otherwise permitted by the Investigating Officer(s) or by the Board, as the case may be.

(b) No witness, or counsel accompanying any such witness, shall be permitted to be present during the examination of any other witness called in such proceeding, unless permitted by the Investigating Officer(s) or the Board, as the case may be.

### § 1708.112 Appearance and practice before the Board.

(a) Counsel appearing before the Board or the Investigating Officer(s)

must conform to the standards of ethical conduct required of practitioners before the Courts of the United States.

(b) The Board may suspend or deny, temporarily or permanently, the privilege of appearing or practicing before the Board in any way to a person who is found:

(1) Not to possess the requisite qualifications to represent others; or

(2) To have engaged in unethical or improper professional conduct; or

(3) To have engaged in obstructionism or contumacy before the Board; or

(4) To be otherwise not qualified.

(c) Obstructionist or contumacious conduct in an investigation before the Board or the Investigating Officer(s) will be grounds for exclusion of any person from such safety investigation proceedings and for summary suspension for the duration of the investigation.

(d) At the time of the finding the Board shall issue a verbal or written statement of the reasons supporting a decision to suspend or exclude counsel for obstructionism or contumacy.

(e) A witness may have a reasonable amount of time to retain replacement counsel if original counsel is suspended or excluded.

### § 1708.113 Right to submit statements.

At any time during the course of an investigation, any person may submit documents, statements of facts, or memoranda of law for the purpose of explanation or further development of the facts and circumstances relevant to the safety matter under investigation.

### § 1708.114 Official transcripts.

(a) Official transcripts of witness testimony, whether or not compelled by subpoena to appear before a Board safety investigation, shall be recorded either by an official reporter or by any other person or means designated by the Investigating Officer(s) or the Board's General Counsel.

(b) Such witness, after completing the compelled testimony, may file a request with the Board's General Counsel to procure a copy of the official transcript of that witness's testimony. The General Counsel shall rule on the request, and may deny for good cause.

(c) Good cause for denying a witness's request to procure a transcript may include, but shall not be limited to, the protection of a trade secret, non-disclosure of confidential or proprietary business information, security-sensitive operational or vulnerability information, safety privileged information, or the integrity of Board investigations.

(d) Whether or not a request is made, the witness and his or her attorney shall have the right to inspect the official transcript of the witness's own testimony, in the presence of the Investigating Officer(s) or his designee, for purposes of conducting errata review.

(e) Transcripts of testimony are otherwise considered confidential and privileged safety information, and in no case shall a copy or any reproduction of such transcript be released to any other person or entity, except as provided in paragraph (b) above or as required under the Freedom of Information Act or the Government in the Sunshine Act, or any procedures or requirements contained in Board regulations issued pursuant to those Acts.

### § 1708.115 Final report of safety investigation.

(a) The Board will complete a final report of the safety investigation fully setting forth the Board's findings and conclusions.

(b) The final report of the safety investigation is confidential and protected by the safety privilege, and is therefore not releasable.

(c) The Board, in its discretion, may sanitize the final report of the safety investigation by redacting confidential and safety privileged information so that the report is put in a publically releasable format.

(d) Nothing in this section voids or otherwise displaces the Board's legal obligations with respect to compliance with the Freedom of Information Act, the Government in the Sunshine Act, or any procedures or requirements contained in the Board's regulations issued pursuant to those Acts.

### § 1708.116 Procedure after safety investigations.

(a) If a formal safety investigation results in a finding that an event or

practice has adversely affected, or may adversely affect, public health and safety, the Board may take any appropriate action authorized to it under its enabling statute, including, but not limited to, making a formal recommendation to the Secretary of Energy, convening a hearing, or establishing a reporting requirement.

(b) If a safety investigation yields information relating to violations of federal criminal law involving government officers and employees, the Board shall expeditiously refer the matter to the Department of Justice for disposition.

(c) If in the course of a safety investigation, a safety issue or concern is found to be outside the Board's jurisdiction, that safety issue or concern shall be referred to the appropriate entity with jurisdiction for disposition.

(d) Statements made in connection with testimony provided to the Board in an investigation are subject to the provisions of 18 U.S.C. 1001.

## PARTS 1709–1799 [RESERVED]

# CHAPTER XVIII—NORTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMMISSION


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# PART 1800—DECLARATION OF PARTY STATE ELIGIBILITY FOR NORTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMPACT

Sec.
1800.10 Purpose and scope.
1800.11 Definitions.
1800.12 Procedures for declaring a state eligible for membership in the Compact.
1800.13 Conditions for becoming an eligible party state.
1800.14 Modification to and enforcement of the rules in this part.

AUTHORITY: Sec. 227, Art. IV(i)(7), Art. VII(e), Pub. L. 99–240, 99 Stat. 1842, 1914, 1921–1922.

SOURCE: 65 FR 30835, May 15, 2000, unless otherwise noted.

## § 1800.10 Purpose and scope.

Pursuant to Articles IV.i.(1), (7), (15), and VII.e. of the Northeast Interstate Low-Level Radioactive Waste Compact (enacted by the ''Omnibus Low-Level Radioactive Waste Compact Consent Act of 1985,'' Public Law 99–240, 99 Stat. 1842, Title I) (the ''Compact''), the Northeast Interstate Low-Level Radioactive Waste Commission (the ''Commission'') establishes through this part the conditions that it deems necessary and appropriate to be met by a state requesting eligibility to become a party state to this Compact. The Commission shall apply these conditions to evaluate the petition of any state seeking to be eligible to become a party state pursuant to Article VII of the Compact.

## § 1800.11 Definitions.

The definitions contained in Article II of the Compact and Article I.B. of the Commission's By Laws shall apply throughout this part. For the purposes of this part, additional terms are defined as follows:

(a) *By Laws* refers to the Commission's By Laws as adopted and amended by the Commission pursuant to Article IV.c. and Article IV.i.(7) of the Compact, most recently amended on December 10, 1998, and dated July 1999;

(b) *Person* means an individual, corporation, business enterprise or other legal entity, either public or private, and expressly includes states;

(c) *Nuclear power station* means any facility holding a license from the U.S. Nuclear Regulatory Commission under 10 CFR Part 50.

(d) *Existing party states* means Connecticut and New Jersey collectively.

## § 1800.12 Procedures for declaring a state eligible for membership in the Compact.

(a) Any state seeking to become an eligible state under the Compact shall submit to the Chairman of the Commission six copies of a petition to become an eligible state. The petition shall discuss each of the conditions specified in § 1800.13 and shall:

(1) Affirm that the petitioning state fully satisfies each condition; or

(2) Explain why the petitioning state does not or cannot fully satisfy any particular condition.

(b) Upon receipt of a petition from any state seeking to become an eligible state under the Compact, the Commission shall publish a notice in accordance with Article I.F.1. of the By Laws and shall initiate an adjudicatory proceeding to act on the petition. Any person may submit written comments on a petition, and all such comments must be received by the Commission within 30 days of notice that a petition has been submitted.

(c) The Commission shall evaluate the petition against the conditions for declaration of an eligible state specified in § 1800.13. As part of the proceeding to evaluate a petition to become an eligible state, the Commission may, in its discretion, conduct a hearing pursuant to Article IV.i.(6) of the Compact and Article V.F.1. of the Commission's By-Laws. For good cause shown, the Commission may issue an order shortening the notice period for hearings provided in Article I.F.1. of the By Laws to a period of not less than ten days.

(d) After review of the petition and after any hearing, if held, the Commission shall issue an order accepting or rejecting the petition or accepting the petition with conditions. If the Commission accepts the petition without conditions, the petitioning state shall be declared an eligible state and shall become a new party state upon passage of the Compact by its state legislature,

repeal of all statutes or statutory provisions that pose unreasonable impediments to the capability of the state to satisfy the conditions for eligibility (as determined by the Commission) and payment of (or arrangement to pay) the fee specified in Article IV.j.(1). If the Commission accepts the petition with conditions, the petitioning state may become an eligible state by satisfying all of the conditions in the Commission's order and providing an amended petition incorporating its compliance with all of the conditions in this subpart and in the Commission's order. The Commission will consider the amended petition as part of the original adjudicatory proceeding and will issue a new order accepting or rejecting the amended petition.

(e) A state that submits a petition for declaration as an eligible state that is rejected by the Commission may submit a new petition at any time. The Commission will consider the new petition without reference to the prior petition but may use evidence obtained in any prior proceeding to evaluate the new petition.

(f) The Commission's consideration of a petition for declaration of an eligible state shall be governed by the Compact, the Commission's By Laws, and this part.

### § 1800.13 Conditions for becoming an eligible party state.

The Commission shall evaluate a petition to become an eligible party state on the basis of the following conditions and criteria:

(a) To be eligible for Compact membership, a state must agree that it will be the voluntary host state upon admission to the Compact and will continue to be the voluntary host state for a least that period of time until all currently licensed nuclear power stations within the region have been fully decommissioned and their licenses (including any licenses for storage of spent nuclear fuel under 10 CFR Part 72) have been terminated.

(b) To be eligible for Compact membership, a state must agree that, so long as the petitioning state remains within the Compact, it will be the sole host state.

(c) To be eligible for Compact membership, a state must warrant the availability of a regional disposal facility that will accommodate 800,000 cubic feet of waste from generators located within the borders of the existing party states.

(d) To be eligible for Compact membership, a state must agree to establish a uniform fee schedule for waste disposal at the regional disposal facility that shall apply to all generators within the region. That uniform fee schedule, including all surcharges (except new surcharges imposed pursuant to Article V.f.3. of the Compact), shall not exceed the average fees that generators within the existing party states paid for disposal at the Barnwell, South Carolina, facility at the end of calendar year 1999, adjusted annually based on an acceptable inflation index.

(e) To be eligible for Compact membership, a state must agree with the existing states that regional generators shall be permitted to process or dispose of waste at sites outside the Compact boundaries based solely on the judgment and discretion of each regional generator.

(f) To be eligible for Compact membership, a state must agree with the existing states that the Commission may authorize importation of waste from non-regional generators for the purpose of disposal only if the host state approves and such importation does not jeopardize the warranted availability of 800,000 cubic feet of disposal capacity for waste produced by generators within the existing party states. A new party state must agree that regional generators shall not pay higher fees than non-regional generators and that all books and records related to the establishment or collection of fees shall be available for Commission review.

(g) To be eligible for Compact membership, in addition to the express limitations on non-host state and Commission liability provided in the Compact, a state must agree to indemnify the Commission or the existing party states for any damages incurred solely because of the new state's membership in the Compact and for any damages associated with any injury to persons or property during the institutional

control period as a result of the radioactive waste and waste management operations of any regional facility. The petitioning state must agree that this indemnification obligation will survive the termination of the petitioning state's membership in the Compact.

(h) To be eligible for Compact membership, a state must agree that any incentive payments made by the existing party states as an inducement for a state to join the Compact will be returned to the existing party states, with interest, on a pro rata basis if, for any reason, the regional disposal facility ceases to be available to generators in the existing party states for a period of more than six months (other than periods that have been expressly approved and authorized by the Commission) or is unavailable for disposal of 800,000 cubic feet of waste from generators within the borders of the existing states. In the event of such unavailability, the new party state must agree to return the incentive payments based on the following schedule:

(1) 75% of the incentive payment if the regional facility becomes unavailable prior to January 1, 2002;

(2) 50% of the incentive payment if the regional facility becomes unavailable on or after January 1, 2002, and prior to January 1, 2004;

(3) 30% of the incentive payment if the regional facility becomes unavailable on or after January 1, 2004, and prior to January 1, 2006;

(4) 20% of the incentive payment if the regional facility becomes unavailable on or after January 1, 2006, and prior to January 1, 2009;

(5) 10% of the incentive payment if the regional facility becomes unavailable on or after January 1, 2009, and prior to the time when all currently licensed nuclear power stations within the region have been fully decommissioned and their licenses (including any licenses for storage of spent nuclear fuel under 10 CFR Part 72) have been terminated.

(i) To be eligible for Compact membership, a state must agree with the existing states that once a new party state has been admitted to membership in the Compact pursuant to the rules in this part, declaration of any other state as an eligible party state will require the unanimous consent of all members of the Commission.

### § 1800.14 Modification to and enforcement of the rules in this part.

(a) Because of the importance of the conditions for declaration of an eligible state under the Compact, the rules in this part may only be modified, amended, or rescinded after a public hearing held pursuant to Article IV.i.(6) of the Compact and Article V.F.1. of the Commission's By Laws and by a unanimous vote of all members of the Commission.

(b) Any party state may enforce the rules in this part by bringing an action against or on behalf of the Commission in the United States District Court for the District of Columbia pursuant to Article IV.n. of the Compact.

(c) If, for any reason, any portion of the rules in this part shall be declared invalid or unenforceable, the remainder of the rules in this part shall remain in full force and effect.

## PARTS 1801–1899 [RESERVED]

# FINDING AIDS

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For changes to this volume of the CFR prior to this listing, consult the annual edition of the monthly List of CFR Sections Affected (LSA). The LSA is available at *www.fdsys.gov*. For changes to this volume of the CFR prior to 2001, see the ''List of CFR Sections Affected, 1949–1963, 1964–1972, 1973–1985, and 1986–2000'' published in 11 separate volumes. The ''List of CFR Sections Affected 1986–2000'' is available at *www.fdsys.gov*.

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