

DEPARTMENT OF ENERGY**10 CFR Part 810****Office of Arms Control and Nonproliferation Nuclear Information Export Policy; Determining Sensitive Nuclear Technology**

AGENCY: Department of Energy.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Department of Energy (Department) today begins a rulemaking proceeding to codify and, if appropriate, modify its "Guidelines for the Designation of Sensitive Nuclear Technology." These guidelines have been used since 1986 to guide the Department's staff in determining on a case-by-case basis whether information proposed for export is "sensitive nuclear technology" under the Atomic Energy Act and the Nuclear Non-Proliferation Act. The Department has now decided to initiate this rulemaking to codify the guidelines in order to make them easily available to interested members of the public and to provide an opportunity for public comments.

DATES: Comments (3 copies) are due on or before August 24, 1995.

ADDRESSES: Comments must be submitted to U.S. Department of Energy, Office of Arms Control and Nonproliferation, Export Control Division, NN-43, SNT ANOPR, Docket No. [NN-RM-810], 1000 Independence Avenue, SW., Washington, DC 20585. FAX comments will not be accepted. The administrative record on file will be located in the Department's Freedom of Information Reading Room, Room 1E-190, 1000 Independence Ave. SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Zander Hollander, Export Control Operations Division, Office of Arms Control and Nonproliferation, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-2125, or Robert Newton, Office of General Counsel, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-0806.

SUPPLEMENTARY INFORMATION:**I. Background**

The Nuclear Non-Proliferation Act, 22 U.S.C. 3203(a)(6), describes "sensitive nuclear technology" (or SNT) as any information (including information incorporated in a production or utilization facility or important component part thereof) which is not available to the public 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.

"Sensitive nuclear technology" may only be exported subject to special conditions to prevent dissemination of information which could be exploited for nuclear weapons-related purposes. Section 305 of the Nuclear Non-Proliferation Act, which amended the Atomic Energy Act by adding section 127, imposes six requirements for exports of source material, special nuclear material, production or utilization facilities, and SNT from the United States for peaceful nuclear uses. These requirements are:

(1) IAEA (International Atomic Energy Agency) safeguards as required by Article III(2) of the (Treaty on the Non-Proliferation of Nuclear Weapons) will be applied with respect to any such material or facilities proposed to be exported, to any such material or facilities previously exported and subject to the applicable agreement for cooperation, and to any special nuclear material used in or produced through the use thereof.

(2) No such material, facilities, or sensitive nuclear technology proposed to be exported or previously exported and subject to the applicable agreement for cooperation, and no special nuclear material produced through the use of such materials, facilities, or sensitive nuclear technology, will be used for any nuclear explosive device or for research on or development of any nuclear explosive device.

(3) Adequate physical security measures will be maintained with respect to such material or facilities proposed to be exported and to any special nuclear material used in or produced through the use thereof * * *.

(4) No such materials, facilities, or sensitive nuclear technology proposed to be exported, and no special nuclear material produced through the use of such material, will be retransferred to the jurisdiction of any other nation or group of nations unless the prior approval of the United States is obtained for such retransfer. In addition to other requirements of law, the United States may approve such retransfer only if the nation or group of nations designated to receive such retransfer agrees that it shall be subject to the conditions required by this section.

(5) No such material proposed to be exported and no special nuclear material produced through the use of such material will be reprocessed, and no irradiated fuel elements containing

such material removed from a reactor shall be altered in form or content, unless the prior approval of the United States is obtained for such reprocessing or alteration.

(6) No such sensitive nuclear technology shall be exported unless the foregoing conditions shall be applied to any nuclear material or equipment which is produced or constructed under the jurisdiction of the recipient nation or group of nations by or through the use of any such exported sensitive nuclear technology.

42 U.S.C. 2156

In addition, section 306 of the Nuclear Non-Proliferation Act added section 128 to the Atomic Energy Act which, subject to an exception not relevant here, requires:

As a condition of continued United States export of source material, special nuclear material, production or utilization facilities, and any sensitive nuclear technology to non-nuclear-weapon states, no such export shall be made unless IAEA safeguards are maintained with respect to all peaceful nuclear activities in, under the jurisdiction of, or carried out under the control of such state at the time of the export.

42 U.S.C. 2157

It has been the Department's experience that, as a practical matter, once information has been determined to be SNT, it has not been exported because foreign recipients were unwilling to agree to U.S. consent rights over nuclear activities within the recipient nation's borders.

The Department exercises jurisdiction over the transfer of SNT by entities other than the Department through its regulations under 10 CFR part 810, which governs authorizations of nuclear assistance to foreign atomic energy activities and defines SNT in the same manner as the Nuclear Non-Proliferation Act. In determining whether to grant or deny a request for authorization for the export of any nuclear assistance, including SNT, the Secretary of Energy must find that the proposed export "will not be inimical to the interest of the United States." 42 U.S.C. 2077 (b). The 10 CFR part 810 regulations require the Secretary to consider several factors in making this finding, including the recipient country's nuclear nonproliferation credentials, the country's acceptance of international safeguards for all their nuclear projects, the availability of comparable assistance from other sources and "any other factors that may bear upon the political, economic, or security interests of the United States." 10 CFR 810.10 (b). In addition, authorizations for the export of information which is not SNT, but

nevertheless may be proliferation sensitive, contain the requirement that the recipient nation guarantee that the information will not be retransferred. While the Department itself is not subject to the part 810 regulations, its Office of Arms Control and Nonproliferation reviews the proposed export of Department-owned information in a manner consistent with 10 CFR part 810.

After the Nuclear Non-Proliferation Act became law, from 1979 to 1986 the Department made its case-by-case determinations without the aid of any written guidance other than the terms of the statute, which are for the most part undefined. In a few cases, where there was a determination that a proposed export could involve SNT, the applicants narrowed their requests to avoid the areas that might involve SNT. Where the scope of work under part 810 authorizations had the potential to involve SNT, the authorizations were specifically conditioned to exclude such technology.

In 1986, the Department developed the guidelines for the purpose of promoting a more uniform approach to making SNT determinations on a case-by-case basis in light of prior decisions. They had the effect of formalizing the Department's prior experience and turning it into guidance for those individuals involved in the review process, thus ensuring that the reviewers operated from a common knowledge base. However, the guidelines are not controlling with respect to such a decision, and the Department has the discretion to depart from the determination suggested by the guidelines if it appears warranted in particular cases. Specifically, the Department has not used the guidelines as a definitive determinant of what constitutes SNT. An applicant for an export license is always free to dispute the merits of the Department's interpretations and policies under the law.

The Department has now decided to initiate this rulemaking to codify the guidelines in order to make them easily available to interested members of the public and to provide an opportunity for public comment. This rulemaking will not affect any decisions that have already been made. Any changes in policy the Department may adopt in the course of this rulemaking would apply prospectively, that is to say, with respect to SNT decisions made after the effective date of the rule.

II. Approach to Codifying the Guidelines

Apart from some introductory narrative material, the guidelines, which are reprinted at the end of this notice, consist of a series of inquiries and forms for completion by the Department's staff. Most of the provisions of the guidelines are self-explanatory. In this rulemaking, the Department will consider whether to redraft the guidelines in a Regulatory format and style common to most Rules in the *Code of Federal Regulations*, or to propose them in the form of narrative appendix to 10 CFR part 810, which could be done without significant change in format and style. Whichever approach to format and style the Department takes, the Department is eliciting public comment on whether any changes in the content of the guidelines and the Department's approach to SNT determinations are warranted.

III. Determining Importance

The Department anticipates that one part of the guidelines may prove to be controversial with some members of the public. Some citizen organizations have taken issue with the portion of the guidelines the Department uses to aid in determining whether the information in question 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," within the statutory definition of SNT. The guidelines provide that three types of assessments are relevant to determining importance: (1) A categorization of the information proposed to be transferred, i.e., what type of activity or equipment is proposed for transfer; (2) a technical evaluation of the proposed transfer, i.e., a determination of its significance to design, construction, operation, or maintenance of a facility covered by the statute; and (3) a judgment as to the technical significance of the information to the proposed recipient given the level of development of that country's nuclear program and other case-specific considerations bearing on such things as available intelligence regarding the proposed recipient, the proprietary value of the information, prior treatment of similar export issues, and impact on United States and international nuclear nonproliferation issues.

In some cases, the Department has concluded that certain kinds of information may not be "important" within the meaning of the statutory language if the proposed recipient is from a country with an advanced

nuclear program, even if the same information could be important to a recipient with a less advanced nuclear capability. In other words, information may be "important" to a facility in one country but not to an identical facility in another country, if the proposed recipient country did not independently possess sufficient nuclear expertise to "design, construct, fabricate, operate or maintain" the facility in the first case, but did possess such expertise in the second case.

The Nuclear Non-Proliferation Act does not define "important" and there is no controlling guidance in its legislative history. Thus, it is the Department's view that the word "important" could have a wide range of meanings in the context of the Act. The Department view in 1986 was that the most rational approach was to make this determination as a function of all the particular relevant facts and circumstances, including the state of indigenous nuclear technology in the recipient country. In making these determinations on a case-by-case basis, the Department has sought to make reasonable distinctions consistent with the underlying purposes of the Atomic Energy Act. These purposes include promoting as well as controlling the use of nuclear energy. 42 U.S.C. 2013. Likewise, the Nuclear Non-Proliferation Act sought to assure other countries dependent upon the United States for nuclear fuel and other nuclear exports that the United States would be a "reliable trading partner," while at the same time it tightened controls on those exports. The Department believes that the interpretation reflected in the guidelines has been used to develop all relevant information necessary for balancing these competing purposes in a reasonable manner.

The Department also believes that the interpretation of "important" contained in the guidelines represents an allowable exercise of its statutory authority. In the absence of clear, definitive direction from Congress, DOE applied its expertise to develop an interpretation of SNT which it believes to be both permissible and reasonable. At the same time, because the statute is silent on the issue, the Department has the discretion to adopt a different interpretation if it concludes that the nuclear nonproliferation objectives of the United States are better served by doing so. That is, the Department could conclude, as a matter of policy, that the definition of SNT needs to be applied differently in the future to address the changing circumstances presented by proliferation threats in the post-Cold War world.

The Department's interpretation of the definition of SNT has been criticized by certain citizen organizations which have argued that the Nuclear Non-Proliferation Act was intended to establish a purely objective technology-based test of what is "important" and therefore "importance" cannot lawfully be a function of the "level of expertise of the proposed recipient." As the Department interprets this view, the "importance" of technology must be judged solely on the contribution which it could make to a generic type of facility, rather than on its contribution to a specific facility of a particular proposed recipient. Although the Department has concluded that the Nuclear Non-Proliferation Act does not dictate such a conclusion, it is interested in receiving comments on whether such an approach would serve nuclear nonproliferation policy objectives better than the approach reflected in the existing guidelines.

Specifically, during this rulemaking, the Department will examine the question of whether the guidelines promote an adequate balance between the need to cooperate with other countries in the development of peaceful nuclear technologies and the requirement to assure the national defense and security through the aggressive support of U.S. nonproliferation policies. The Department specifically requests comment on whether circumstances now exist that warrant a change in the Department's approach to the evaluation of the "importance" criterion.

One of the citizen organizations, Greenpeace, Inc., that criticized the Department's interpretation of the word "important" and the related provisions of the guidelines has released a report on the Department's collaborative research with Japanese entities on plutonium reprocessing and breeder reactor technology, entitled "The Unlawful Plutonium Alliance." That report was accompanied by a legal memorandum setting forth the Greenpeace interpretation of the relevant statutory provisions. Although the particular agreements with Japanese entities are not the subject of this rulemaking and the Department does not agree with the legal arguments Greenpeace presented, the Greenpeace study is relevant to the policy question of how the determination of importance should be made and, in particular, whether it should take into account the level of expertise of the proposed recipient. It may be useful to interested members of the public to examine Greenpeace's report. Accordingly, the Department has placed a copy of the

report and of the legal memorandum in the administrative record on file in its Freedom of Information Reading Room where a copy of public comments in response to this notice will be available for public inspection. The Department has also placed in the administrative record its analysis of the Greenpeace legal memorandum, as well as a 1990 memorandum on the same subject prepared by the Department's Office of General Counsel.

IV. Procedural Matters

A. Review Under Executive Order 12866

DOE has concluded that this is not a significant regulatory action because it does not meet the criteria which define such actions under Executive Order 12866, 58 FR 51735, and is therefore exempt from regulatory review. Accordingly, no clearance of this action by the Office of Management and Budget is required.

B. Environmental Review

The Department has determined that this rulemaking is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), and therefore that neither an environmental assessment nor an environmental impact statement is required. Two categorical exclusions contained in subpart D, appendix A of the Department's regulations implementing the National Environmental Policy Act (10 CFR part 1021) apply to this rulemaking. Categorical exclusion A6 applies to rulemakings which are procedural in nature. This is a procedural rulemaking that will codify a process for determining on a case-by-case basis whether technology which is proposed to be exported constitutes SNT. Categorical exclusion A9 applies to information gathering and dissemination. The codified guidelines will be used to determine, again on a case-by-case basis, whether particular information is SNT, so that conditions required by statute are properly imposed on the dissemination—through export—of that information.

Any indirect environmental impacts which may occur when the exported technology is applied would occur beyond the borders of the United States. Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions," excludes from environmental review "actions relating to nuclear activities," unless such activities provide to a foreign nation a nuclear production, utilization or waste

management facility. The codified guidelines would apply only to the export of technology, not facilities.

C. Public Comment

Interested persons are invited to participate in this proceeding by submitting 3 copies of their comments to the address indicated in the ADDRESSES section of this notice. The deadline for receipt of comments is indicated in the DATES section of this notice. The Department reserves the discretion to consider relevant late-filed comments to the extent that time allows such consideration. Comments should be identified on the outside of the envelope and on the documents themselves with the designation "SNT ANOPR, DOCKET NO. [NN-RM-810]." In the event that any person cannot provide the required number of copies, alternative arrangements can be made in advance with the Department by contacting the information contact indicated in the FOR FURTHER INFORMATION CONTACT section at the beginning of this notice.

All written comments will be available for public inspection as part of the administrative record on file for this rulemaking in the Department's Freedom of Information Reading Room at the address provided at the beginning of this notice. If informal meetings or other contacts occur during this rulemaking, the Department may add a memorandum to the administrative record on file summarizing what transpired.

Pursuant to the provisions of 10 CFR 1004.11, any person submitting information which that person believes to be confidential and which may be exempt by law from public disclosure should submit one complete copy of the document, as well as two copies from which the information claimed to be confidential has been deleted. The Department reserves the right to determine the confidential status of the information and to treat it according to its determination.

V. The Current Guidelines

The guidelines currently provide as follows:

Guidelines for the Designation of Sensitive Nuclear Technology

I. Purpose

The purpose of these guidelines is to provide a systematic approach for DOE to use in its assessment of an application under 10 CFR part 810 to determine whether the proposed scope of work involves the transfer of sensitive nuclear technology (SNT).

II. Background

The Nuclear Non-Proliferation Act of 1978 (NNPA) created a new category of nuclear information, designated "Sensitive Nuclear Technology," the export of which from the United States is subject to certain conditions and controls specified in the legislation. Accordingly, the administration of these controls requires, as a first step, a means of identifying information proposed to be exported which falls into the category of SNT.

Under section 4(a)(6) of the NNPA, SNT is confined to information in the fields of uranium enrichment, nuclear fuel reprocessing, and heavy water production. This section also provides additional broad criteria which delineate the information which is to be designated SNT. According to these criteria, SNT is to include any information, and only that *information* which:

- Is *not* Restricted Data;
- Is *not* "available to the public;" and
- Is "*important* to the design, construction, operation, or maintenance" of a facility for *uranium enrichment, nuclear fuel reprocessing, or heavy water production.*

The fields in which SNT may exist constitute three of the four fields in which unclassified information (other than that "which is available to the public in published form") may not be transferred abroad without specific authorization by DOE. The fourth area requiring specific authorization under part 810 is plutonium (i.e., mixed oxide) fuel fabrication. Thus, while there is an obvious overlap between SNT and unclassified information whose transfer abroad requires part 810 authorization, these two categories of information are not identical. This is so not only because plutonium fuel fabrication is not among the areas which may include SNT but because the standard of "important" is not applicable to information which requires part 810 authorizations. Any information in the designated fields which is not Restricted Data and which is not available to the public in published form and assists directly or indirectly in the production of special nuclear material requires specific authorization for transfer abroad.

It is important to note that:

- *Not all* information whose export requires part 810 specific authorization is SNT, but
- *All* information which is SNT requires part 810 specific authorization for export.

III. Scope

Although the establishment of the category of SNT and the criteria for making an SNT determination as discussed below apply most frequently to private firms, the scope of their applicability is much broader.

Section 127 of the AEA (introduced by section 305 of the NNPA) states:

"The United States adopts the following criteria which * * * will govern exports * * * from the United States of * * * any sensitive nuclear technology."

The language above makes no distinction between exports by private firms, individual persons, or U.S. Government entities. Therefore, while the DOE is exempt from section 57b and the implementing regulation 10 CFR part 810, the NNPA provisions related to SNT apply equally to all agencies of the government (including DOE) as well as private firms and individuals. Because of this, DOE participation in foreign reprocessing, enrichment, or heavy water programs is reviewed by the Office of International Security Affairs, the office with responsibility for part 810 and related matters.

IV. Methodology

A part 810 application will be analyzed by careful consideration of each of the three criteria contained in the definition of SNT to determine if information to be transferred

- Does not include Restricted Data;
- Is not "available to the public"; or
- Is "important to the design,

construction, operation, or maintenance of a facility for uranium enrichment, nuclear fuel reprocessing, or heavy water production.

The first step in the process, if the application involves enrichment technology, is to determine whether the proposed transfer involves Restricted Data (the areas of reprocessing and heavy water production have been declassified and no longer contain any Restricted Data). If Restricted Data is involved, the analysis will end and no further consideration of the application under part 810 will take place. The applicant will be advised and appropriate action will be taken under other sections of the Atomic Energy Act.

The second step is a determination of whether the proposed information to be transferred is available to the public. A decision on this point must take into account paragraph (1) of Part B of Annex A of the Nuclear Supplier's Guidelines (INFCIRC/254), since the NNPA definition of SNT was drafted to be consistent with the NSG Guidelines, and allow the U.S. Government to implement its obligations under those

Guidelines. This paragraph indicates that information available to the public is that which is "for example, in published books or periodicals, or that which has been made available internationally without restrictions on its further dissemination." Data that have been made generally available to the public in any form, includes:

- Data distributed in documentary or other physical form at open conferences, lectures, trade shows, or other media open to the public; and
- Publications that may be purchased without restrictions at a nominal cost, or obtained without costs, or are readily available at libraries accessible to the public. The term "nominal cost" is intended to reflect realistically only the cost of preparing and distributing the publication and not the intrinsic value of the technical data.

If, after consideration of all the following factors, it is determined that all of the information is available to the public, the case by definition does not involve SNT. If, on the other hand, the information is not available to the public, then the determination must be made if any of the information is SNT. In determining the extent to which the information to be transferred is available to the public, the following questions should be considered:

A. Is any or all of the information contained in U.S. Government documents that would be available pursuant to a Freedom of Information Act (FOIA) request?

Note: In responding to this question it must be recognized that this goes beyond those documents that are placed on sale or given routine distribution.

B. Is any or all of the information available, for not more than a nominal fee, to the public in published documents or data banks (other than Question A) including information provided to the Nuclear Regulatory Commission (NRC) without restrictions on further dissemination?

Note: This includes government and nongovernment publications and all material which has been placed in the NRC public document room for public inspection.

C. Has any or all of the information been distributed in physical form (documents, tapes, etc.) in an open forum?

Note: This includes meetings or conferences sponsored by nationally recognized scientific or technical organizations.

D. Is any or all of the information publicly available or available internationally without restriction on further dissemination in forms other

than those considered in Questions A through C?

Note: This would include information distributed at education courses and facility visits. This question is included for completeness to ensure that all sources are explored.

In responding to these questions it is essential to determine how the information is to be transmitted. For example, will it be accompanied by other information or services which may go beyond the actual content of the available information? It should also be

recognized that the primary burden for proof of public availability rests with the applicant.

If it is determined that the information proposed to be transferred is not publicly available, then the third step is to determine if the information involves SNT. The SNT determination is divided into three parts as follows:

Part 1: Categorization of the Information Proposed To Be Transferred

A matrix similar to the one that follows will be completed in order to

indicate the type of activity and equipment covered by the information proposed to be transferred. There may be part 810 cases where the activity or equipment involved does not fit the matrix and in these cases a narrative description should be made to describe the information proposed to be transferred. The matrix that follows is for a reprocessing facility. A comparable matrix and analysis (part 2), and assessment (part 3) would be established for proposed assistance in enrichment or heavy water production.

ANAYLSIS OF NUCLEAR TECHNOLOGY TRANSFER PROPOSALS FOR WHETHER SENSITIVE NUCLEAR TECHNOLOGY IS INVOLVED

[Part 1: Categorization of information proposed to be transferred*]

Activity	Prepare design specs	Conceptual design	Design review	Detailed design	System analysis	Prepare purchase specs	Fabrication support	Prepare construction specs	Quality control	Facility startup
Unit operations. Fuel receiving & storage. Fuel shear/dissolver. Solvent extraction. PU Purification & concentration. PU storage & conversion. U purification & concentration. U storage & conversion. Waste processing. Solvent recovery. Process control & instrumentation. Process off-gas & building ventilation.										

Activity	Operational support	Maintenance and repair	Training	Regulatory support	Technology exchange	Quality control	Management support
Unit operations. Fuel receiving & storage. Fuel shear/dissolver. Solvent extraction. PU Purification & concentration. PU storage & conversion. U purification & concentration. U storage & conversion. Waste processing. Solvent recovery. Process control & instrumentation.							

Activity	Operational support	Maintenance and repair	Training	Regulatory support	Technology exchange	Quality control	Management support
Process off-gas & building ventilation.							

X—Indicates that information relevant to this area is proposed to be transferred.
 1—Example used is for a reprocessing facility.

GAS CENTRIFUGE ENRICHMENT FACILITY ANALYSIS OF NUCLEAR TECHNOLOGY TRANSFER PROPOSALS FOR WHETHER SENSITIVE NUCLEAR TECHNOLOGY IS INVOLVED

[Part 1: Categorization of information proposed to be transferred]

Activity	Process development	Prepare design specs	Conceptual design	Design review	Detailed design	System analysis	Prepare purchase specs	Fabrication support	Prepare construction specs	Construction support
Unit operations or process building. Feed & withdrawal process. Process building. Process equipment. Centrifuge machine. Recycle & assembly equip. Recycle & assembly equip. Maintenance facilities. Process controls. Utility systems.										

X—Indicates that information relevant to this area is proposed to be transferred.

Activity	Facility startup	Operational support	Maintenance and repair	Training	Regulatory support	Technology exchange	Quality control	Management support
Unit operations or process building. Feed & withdrawal process. Process building. Process equipment. Centrifuge machine. Recycle & assembly equip. Recycle & assembly equip. Maintenance facilities. Process controls. Utility systems.								

X—Indicates that information relevant to this area is proposed to be transferred.

Part 2: Significance of the Information Proposed To Be Transferred

Category: (Row): (For each box that is marked, (Column): On the matrix the following questions will be answered.)

Specific Information to be Transferred (Exclusive of information generally available from industrial sources for non-nuclear applications):

Technical Evaluation

- Will the transferred information:
1. Provide assistance of such significance that, without it the design, construction, operation, or maintenance of a facility would not be possible?
 2. Contribute significantly to the ability to carry out a facility unit operation (see examples on Part 1 chart) or key activity? If yes, how essential is

the unit operation/activity, and to what degree will the transferred information contribute to its accomplishment?

3. Solve or provide significant help in dealing with a key technical problem whose solution is critical to the ability to obtain an operational capability?

4. Supplant or significantly reduce the need to carry out costly, technically

difficult or lengthy R&D and/or test activities?

5. Provide key information that is obtainable only from entities with practical experience in the particular area on critical aspects of facility design or operation optimization?

6. Concern a key process, component or subsystem that has been the subject of extensive R&D in the U.S. or which has been a problem at U.S. or foreign facilities?

7. Contribute significantly to the design, development or effective operation of a safety feature that is essential to facility operation?

8. Contribute significantly toward enabling an otherwise inoperable facility to operate at some level and produce useable quantities of material?

9. Significantly reduce the lead time and/or costs involved in designing, constructing, operating, or maintaining a facility?

Judgment as to the Technical Significance of the Information Proposed to be Transferred

Part 3: Consideration of Other Factors

The following factors shall be considered as a further help in arriving at a determination as to whether the Part 810 activity under consideration involves the transfer of SNT.

A. Level of expertise of the information recipient:

1. At what stage of research or development is the recipient's overall program?

2. Does the country of the recipient have an operating facility of this type?

3. Is the staff of the recipient facility or country experienced in this technology area?

4. Are there technical resources in the recipient country already in possession of information of the kind proposed to be transferred?

5. Does the country of the recipient have adequate technical resources and/or operating experience to be able to proceed independently of the information to be transferred?

B. Overall relative capability of the transferor and the recipient.

C. Probable reason for recipient's interest in assistance from U.S. industry (if A and B lead to the view that there are substantially comparable

capabilities in the recipient's country or available from other foreign sources).

D. Benefit to the recipient of the information to be transferred.

Factors to be considered include:

—Whether the information proposed to be transferred represents a significant net transfer of capabilities to the recipient country

—Whether there would be a significant impact (relative to strict reliance on the recipient's indigenous capabilities) on the construction schedule or initial operational capability or on the technical or economic viability

—Whether the specific information relates to a laboratory scale or small scale pilot project

E. *Any other case specific considerations* bearing on whether information of "key technical significance" should or should not be designated "sensitive nuclear technology."

F. *Supplemental information.* In the preparation of an analysis for a particular case, useful insight can be provided by an examination of previous export matters and other factors related to the application, such as the following:

1. How does this case compare to other cases where an SNT determination was made?

2. What Department of Commerce-licensed items have been processed for this activity?

3. Is the information to be transferred considered to be proprietary by the transferor?

4. Is there any relevant intelligence information available about the activity?

5. What is known about any competing bids from foreign suppliers?

V. Summary Assessment

After a careful assessment of all the factors in Part IV (Parts 1, 2 and 3) is made and documented, the entire analysis will be examined to determine whether any portion or the overall scope of the proposed transfer involves SNT. If the proposed application involves the transfer of SNT, the conditions set forth in section 127 and 128 of the Atomic Energy Act and those in the London Nuclear Supplier's Guidelines (INFCIRC/254) must be met as a

condition of approval under part 810. If the application is found not to contain SNT, the normal procedures for processing a part 810 application will be followed.

VI. Implementation

The DOE Export Control Working Group (ECWG) is responsible for the analysis, using these Guidelines, of specified requests for authorization or advisory opinions to determine whether they involve SNT. Frequency of meetings is determined by the number of cases to be considered. The Working Group Secretary prepares and distributes an agenda prior to meetings. At the conclusion of each meeting the Secretary of the ECWG documents the proceedings.

Membership on the Working Group is determined on the basis of the business to be conducted to ensure the highest level of expertise. It normally consists of:

- Director, PMSA (Chairman)
- ECWG Secretary, PMSA
- Chief, Operations Branch, PMSA
- Appropriate Action Officer, Operations Branch, PMSA
- A representative from the Office of the General Counsel
- A representative from International Programs, Office of Nuclear Energy
 - A reprocessing, enrichment, or heavy water expert from the Office of Nuclear Energy
 - A representative from the Office of International Affairs and Energy Emergencies
 - Laboratory and contractor consultants (as needed)

The Director, PMSA is the final staff level authority for all SNT determinations.

When the preliminary review called for in section 12a of the Executive Branch Procedures is completed, ISA will transmit to the SNEC agencies the application along with any conclusion that SNT is involved.

Issued in Washington, DC, on July 18, 1995.

Kenneth E. Baker,

Acting Director, Office of Nonproliferation and National Security.

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