

DEPARTMENT OF ENERGY

Office of the Secretary

10 CFR Part 1045

RIN 1901-AA21

Nuclear Classification and Declassification

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE or Department) is publishing a final rule revising its regulations concerning the policies and procedures on the identification of classified information. These regulations establish the policies and procedures implementing the requirements of the Atomic Energy Act of 1954 for the classification and declassification of information as Restricted Data and Formerly Restricted Data and also implement those requirements of Executive Order 12958 concerning National Security Information that directly affect the public. These regulations prescribe procedures to be used by all agencies of the Federal Government in the identification of Restricted Data and Formerly Restricted Data, and describe how members of the public may request DOE National Security Information and appeal DOE classification decisions regarding such requests.

EFFECTIVE DATE: This rule becomes effective June 29, 1998.

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I. Introduction

On January 15, 1997, DOE published a Notice of Proposed Rulemaking (62 FR 2251) establishing Government-wide requirements for the classification and declassification of Restricted Data (RD) and Formerly Restricted Data (FRD) and implementing those provisions of Executive Order (E.O.) 12958 that directly affect the public. Under the Atomic Energy Act of 1954, 42 U.S.C. 2011, the Department of Energy is responsible for the classification and declassification of nuclear-related information. Such information is classified as RD. The DOE has joint responsibility with the Department of Defense (DoD) for the classification and declassification of information which relates primarily to the military utilization of nuclear weapons. Nuclear weapons related military utilization information which can be protected as National Security Information (NSI) in the United States is classified as FRD. FRD is protected in the same manner as RD when transferred to another country or regional defense organization such as NATO. These regulations specify the policies and procedures that organizations and individuals shall follow in classifying and declassifying RD and FRD.

In formulating these policies and procedures, DOE has solicited and made use of a significant number of recommendations from the public and other agencies of the Federal Government (hereafter referred to as "agencies"); and the Department has embraced the goal of "open policies openly arrived at." The resulting regulation balances the Department's commitment to maximize the amount of information made available to the public with the need to protect national security and prevent nuclear proliferation.

Section 5.6(c) of E.O. 12958, "Classified National Security Information," requires agencies that originate or handle classified information to promulgate implementing regulations which shall be published in the **Federal Register** to the extent that they affect members of the public. Subpart D of today's rule implements those requirements of the Executive order and was approved by the Information Security Oversight Office (ISOO) on July 5, 1996, in accordance with section 5.3(b)(3) of E.O. 12958.

II. Background

This regulation is written in four Subparts. Subpart A provides general information on the management of the RD classification system, including the responsibilities of DOE and all agencies with access to RD and FRD. Subpart B describes procedures for the classification and declassification of RD and FRD information (as contrasted with classification and declassification of documents containing such information). Requirements and procedures for the review, classification, and declassification of RD and FRD documents to be implemented by all agencies are described in Subpart C. Lastly, Subpart D provides DOE requirements and procedures concerning NSI to the extent that they affect the public, as required by Executive Order 12958.

This regulation incorporates recommendations of the Classification Policy Study of July 1992, the Atomic Energy Act Study of January 1994, and the National Academy of Sciences Review of 1995, as well as some of the overarching issues in the Fundamental Classification Policy Review of January 1997. Copies of these studies are available from the contact person in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

III. Discussion of Comments*a. Introduction*

In response to the Notice of Proposed Rulemaking, DOE received thirty-nine (39) written comments. Twenty-three (23) were indications of no comment or concurrences. In addition, there were two commenters at a public hearing held on February 26, 1997. This section describes comments, discusses changes to the proposed rule which are incorporated in the final regulation, and provides an explanation of the comments which were evaluated, but not adopted by the Department. This section discusses both revisions to the proposed rule made in response to public comments and also those made by the DOE Office of Declassification of its own initiative.

b. General Comments

The following describes general comments received. One commenter recommended that the regulation "address more specifically how to handle RD/FRD documents which are interspersed among documents of agencies other than DOE." DOE concurs that additional guidance in this area is needed. However, the Department does not believe that this regulation is the appropriate vehicle for providing such

detail. The External Referral Working Group of the Intelligence Community Declassification Program Manager's Council is focusing on implementing E.O. 12958 and is developing standards which will address this issue.

One commenter had a number of comments relating to definitions used in sections 1045.3, 1045.4, and 1045.13. The commenter stated that the terms "reasonably," "could be expected," "exceptionally grave damage," "serious damage," and "damage" as contained in the definitions for Top Secret, Secret and Confidential, were highly subjective and vague and recommended that these terms be deleted or replaced. All of these definitions and terms are taken directly from E.O. 12958, with the exception of "undue risk" which is taken directly from the Atomic Energy Act of 1954, as amended. While the terms in E.O. 12958 strictly apply only to NSI, the Department believes it is clearly in the national interest that the RD system, to the extent possible, preserve commonality of terms with the more widely applied NSI system. The use of subjective modifiers such as "reasonably," "exceptionally grave damage" or "undue risk" is a reflection of the fact that classification is not an exact science. These terms, together with the phrase "could be expected," indicate that decisions by well-informed, trained officials should be based on their educated analysis of the probable future impact on the national security.

This commenter also indicated that declassification means a determination and does not necessarily result in DOE releasing the information into the public domain and can often require a specific waiting period which can last for months before the information is actually released. It can indeed take time to move information or documents from the classified domain and make them accessible to the public. The Department is pursuing a number of initiatives to reduce the amount of time it takes to declassify and release information to the public. The Department does not believe that this matter should be addressed by today's regulation.

One commenter noted that the definitions for "information" and "Government information" are too broad. The definition for "information" is appropriate and is included because it is important to distinguish, within the RD system, information from the medium of conveyance, e.g., documents or pictures. The definition of "Government information" is taken directly from E.O. 12958.

The commenter also suggested that classification guides are needed to limit what information can be classified and that it was unfortunate that these guides are themselves classified and unavailable to the public. DOE agrees that classification guides are needed and relies upon them as the primary source for derivative classification decisions. Classification guides provide the approved, detailed instructions describing what specific information is or is not classified, and the rationale for the instructions. By their very nature, classification guides must contain detailed descriptions of the information they are designed to protect. This level of detail in the guides greatly enhances their sensitivity, and requires that they, for the most part, be classified. Consequently, the public disclosure of classification guides would provide information that is harmful to United States nonproliferation and national security objectives.

The commenter indicated that the term "national security" was vague. The definition for this term is derived directly from E.O. 12958. Commenting on the definition of "Restricted Data," the commenter stated that the word "concerning" is too vague and broad. The definition for "Restricted Data" is derived directly from the Atomic Energy Act. One commenter expressed concern with the definition of "Special Nuclear Material" indicating that it would allow innocuous materials to be classified. The definition for "Special Nuclear Material" is derived directly from the Atomic Energy Act. Section 51 of the Act stipulates that to determine whether other material is special nuclear material in addition to that specified in the Act's definition of special nuclear material, the Department must find the material to be capable of releasing substantial amounts of atomic energy, that such a determination is in the interest of the common defense and security, and that the President must have expressly assented in writing to the determination. Finally, such designation would be reviewed by the Congress. Based on these requirements, it is unlikely that an innocuous material could be designated as a special nuclear material.

The commenter expressed concern that the word "relating" as used in section 1045.4 (c) is overly vague. The Department will apply the plain English definition of the term "relating" in this context.

As used in section 1045.13 (d) and (e), one commenter considered the terms "concerns" and "unduly" as subjective. The DOE intends to apply the plain English definitions for these terms.

Plain English definitions of the word "concern" include: "to relate to; be connected with; be of interest or importance to; or have an important relation or bearing." This is what is meant here. The word "unduly" is used to indicate that different classification levels have different dissemination restrictions, and the classification level assigned should be appropriate to the adjudged sensitivity.

One commenter suggests that in sections 1045.4 and 1045.8, DOE is using this rule to impose its classification system throughout the Government, to avoid such steps as the automatic 25 year declassification of NSI documents required by E.O. 12958, and to exert rights to oversee the operations of other Government agencies. In particular, the commenter emphasizes his belief that the oversight function should come from outside the agency. DOE is indeed using this rule to implement its responsibility to manage the Restricted Data system Government-wide, as authorized by section 161(p) of the Atomic Energy Act. DOE welcomes public scrutiny of its operations, but cannot delegate its statutory responsibility for oversight of the RD system to the general public or another agency. Additionally, DOE is in compliance with all provisions of E.O. 12958; it is noted that RD and FRD are exempt from automatic declassification under section 6.1 of the E.O.

c. Section-by-Section Analysis

The following describes the public comments which were received, in the order of the sections to which they pertain.

One commenter recommended that the Director of Declassification, the Director of Security Affairs, and the NRC have added to their list of responsibilities a requirement that they must interact with stakeholders to better understand the public's information needs. In response to this comment, DOE has added paragraph 1045.4(a)(8) to the responsibilities of the Director of Declassification which reads, "Periodically meet with interested members of the public to solicit input for the classification and declassification program."

Commenting on section 1045.5, one commenter asked for more detail concerning what is meant by the phrase "this part." The phrase "this part" refers to the entire regulation; Part 1045 of title 10 of the Code of Federal Regulations (i.e., 10 CFR Part 1045). This commenter also requested that section 1045.5 be modified to provide further detail concerning the possible sanctions and the administrative authorities. It is not

appropriate to specify in the regulation all details concerning administrative sanctions or other penalties since they are dependent on the offense committed and the circumstances. One commenter suggested that the Openness Advisory Panel include a representative of the stakeholder community. While the composition of the panel is not indicated in section 1045.6, all of its current members are public stakeholders and the charter of the panel indicates that members will be selected from the public stakeholder community. One commenter suggested that it is important that the deliberations of the Panel be open. All Openness Advisory Panel meetings held to date have been open to the public. Minutes of the meetings are available in the Department's FOIA reading room and on the Internet at the DOE OpenNet web site.

One commenter suggested that the Openness Advisory Panel be provided with more access to the inner workings of the DOE classification system, and the panel's recommendations should be made public at an early stage. The Office of Declassification has ensured that the panel has access to any information it needs on DOE classification policies or procedures, including access to classified information since many of the panel members have security clearances. Further, DOE is working to ensure that the panel's recommendations are made available to the public as soon as they are finalized.

One commenter suggested that the Openness Advisory Panel should be involved in overseeing the individual performance of DOE personnel in classification activities. The role of the Openness Advisory Panel is advisory, not oversight.

One commenter suggested that section 1045.7 be modified to ensure that persons making suggestions or complaints do not face any adverse action. DOE accepted this suggestion and 1045.7 (d) was added, "Under no circumstances shall persons be subject to retribution for making a suggestion or complaint regarding classification and declassification policies or programs."

One commenter recommended that the Openness Coordinator, specified in section 1045.7, make available to the general public a summary of all suggestions and complaints received, and of DOE actions taken in response. DOE plans to include this information in its publicly available annual report on the implementation of this regulation.

In response to a comment that performance requirements, specifically

related to timeliness of performing classification related activities in response to public requests, be included throughout the rule, the Department has added a new section, section 1045.9., to Subpart A to ensure a system is in place which measures the individual performance of those personnel who classify or declassify RD documents on a regular basis. This provision provides the framework for individual accountability and is the basis for a more credible classification system. A similar requirement exists for NSI classification under E.O. 12958.

In a comment on section 1045.12, one commenter suggested that a publicly available log of declassification actions should be maintained. DOE has been publishing such a log under the title, "Restricted Data Declassification Decisions 1946 to the Present."

Commenting on section 1045.13, one commenter objected to the inclusion of the word "solely" regarding the prohibition on classifying information bearing solely on the physical environment or public or worker health and safety. It is DOE's intent to be as open as possible with information concerning the physical environment or public or worker health and safety. However, when information of this nature cannot be revealed without also revealing other information harmful to the national security, its classification is not prohibited under section 1045.13. The regulation allows for such circumstances while the use of the word "solely" prohibits the classification of information that only concerns the physical environment or public or worker health and safety.

One commenter noted that section 1045.15 presents presumptions concerning nuclear waste created from the production of nuclear weapons, but does not deal with the waste produced when weapons are detonated underground at the Nevada Test Site (NTS). The commenter's particular interest is in the spatial distribution of waste. Section 1045.15 (b) and (c) point out that not all areas are covered by the presumptions, and that inclusion of information in a presumption does not mean that new information in this category is or is not classified. In 1994, the Department declassified the total waste burden, by isotope, left at NTS as of January 1, 1994, by all nuclear tests detonated below or within 100 meters of the water table. To provide some spatial resolution, tests conducted on Pahute Mesa were aggregated separately from the total for all other testing areas. No additional presumptions were added in response to this comment.

Concerning section 1045.16, one commenter stated that, "guidelines will have to be more specific to ensure that old conservative habits do not prevail resulting in many documents either remaining classified unnecessarily, or classified needlessly. The guidelines also need to be clear regarding imprecise concepts such as 'significant doubt', 'whether the information is so widely known,' etc., for the same reasons." These terms and concepts are not applied to the numerous document classification and declassification decisions which are made, only to initial information classification and declassification decisions. Document classification and declassification decisions are based primarily on classification guides which indicate whether or not certain items of information are classified. DOE has not developed guidelines for these concepts and definitions, primarily because DOE uses the plain English meaning of these terms and applies them to information on a case by case basis.

Regarding section 1045.17, one commenter requested that DOE explain why it included only a limited list of examples of information which is classified at the various classification levels. The list provided in the regulation is intended to be merely illustrative, not exhaustive.

One commenter objected to section 1045.18, permitting DOE to classify newly generated information in a previously declassified subject area and suggested that it will create a massive abuse of Government classification powers and should be deleted. This authority will only allow DOE to judiciously and responsibly classify new information which truly warrants protection in the interests of national security. Information already in the public domain will not be reclassified.

One commenter recommended that, "a requirement be included that all proposals for declassification and changes in controlled status be periodically reported to the public through the **Federal Register**, and that progress in pursuing such proposals also be reported." Controlled is a term applied to information that is unclassified but not publicly releasable. This regulation does not address controlled status, but section 1045.19, requires that the DOE Director of Declassification prepare a publicly available report on an annual basis on the implementation of this regulation. This report will include information on declassification proposals and progress with such proposals.

With respect to section 1045.19, one commenter suggested that the

classifier's duty station or agency, address, and telephone number be marked on a document classified as RD or FRD. Section 1045.40 (b) (4) requires that the classifier's name and position or title be marked on the document, if not the same as the document originator or signator. DOE does not believe the additional information requested needs to be included in the marking, since DOE can determine this information if the classifier's name and position or title is provided.

DOE received three comments concerning the Department's authority to classify RD which is generated outside of the Government, as specified in section 1045.21. One commenter indicated that this provision does not adequately define what type of RD will be covered and is a violation of first amendment rights. Another commenter suggested that exercising this authority may place sensitive information at risk and recommended that elimination of the "born classified" provisions of the Atomic Energy Act be sought through Congressional action. DOE evaluated these comments and determined that under the Atomic Energy Act, the Department has the authority and the obligation to apply this section to any information properly classified as RD. It should be noted that this authority would be exercised only in the case of a very serious national security matter where no other course of action is possible. In the past 50 years, this authority has been exercised only a few times.

DOE received three comments concerning the No Comment Policy as described in section 1045.22. One commenter indicated that this section was too broad. Another commenter suggested that the policy should not apply to all persons with access to RD and FRD because they are not sufficiently knowledgeable of all classified information in the public domain and recommended that this policy be restricted to Government officials and weapon designers. DOE will apply this policy to all individuals with access to RD and FRD. DOE cannot limit this policy to apply only to Government officials and weapons designers because RD information exists in subject areas other than weapons and is in the possession of numerous cleared contractors. One commenter suggested that this section is an attempt to intimidate and quiet DOE scientists. It should be noted that the policy is not intended to restrict scientists or others from commenting on an aspect of a public statement that is clearly unclassified, such as the basic physics of a process. The purpose of this policy

is to ensure that classified information that may already be in the public domain is not officially confirmed, resulting in damage to the national security or harm to U.S. nonproliferation objectives. As a result of these comments paragraph (a) of this section has been modified to read, "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."

One commenter suggested that section 1045.35 be restructured to reflect differing training requirements depending on the type of authority an individual has. In response to this comment, the Department has revised section 1045.35(a) to read, "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." The commenter also recommended that RD classifiers be certified. The regulation requires that all RD classifiers be trained and (except within the DoD) designated. By including these requirements, DOE does not believe that an additional certification is necessary.

One commenter recommended that the rule strongly encourage, if not require, portion marking of documents by all agencies. This commenter also recommended that the bias towards using classification guides which is expressed in section 1045.32(a)(1) be modified. DOE recognizes that portion marking of documents containing NSI is required by E.O. 12958 and that portion marking is common practice in most agencies. However, DOE has made the conscious decision not to portion mark RD and FRD documents because the DOE classification system relies heavily on the use of classification guides. DOE prefers the use of classification guides over the use of source documents for derivative classification decisions, because use of guides results in more accurate and consistent classification decisions. The many individual decisions involved with using a portion marked document as a source document increase the probability for error. Further, a portion marked document is not revised to reflect changes in classification guidance and it may represent out-of-date classification policy, resulting in overclassification. A non-portion marked document should

also not be used as a source document. While it is possible that RD classifiers may attempt to use non-portion marked documents as source documents, it is less likely precisely because they are not portion marked. Therefore, DOE believes it is preferable not to portion mark in order to encourage the use of classification guides over source documents.

One commenter suggested that, "Documents containing both RD and NSI should be marked on the front page with an 'NSI Content Declassified on' date, which is the date that the document would be automatically declassified if it contained no RD." DOE considered this proposal but determined that it could not be accepted because under the Atomic Energy Act, documents containing RD information, regardless of whether they also contain NSI, must undergo a review prior to their declassification and release. At such time, the NSI content would also be reviewed and declassified if appropriate. In addition, this comment was not adopted because DOE is concerned that such a marking may be misread and result in the inadvertent disclosure of RD or FRD.

One commenter recommended that the rule contain a requirement that safety, health and environmental impact analysis/evaluations for classified facilities and activities contain both classified and unclassified versions, unless the existence of the facilities or the activities are considered RD, FRD or NSI. The commenter also suggested that the rule contain a requirement that the unclassified version contain documentation for conclusions that provisions for public and worker protection are at least comparable to that provided at unclassified facilities and that this requirement should include provisions for identifying the parts or phrases which are removed and the bases for the classification. This commenter also recommended that section 1045.41 specifically require that unclassified versions of documents be prepared for safety, health and environmental impact evaluations. In addition, another commenter made a similar suggestion indicating that when information must be classified which relates to the environment, the Department should include an analysis of the classification in the environmental documents. This commenter also recommended that the rules require in each case that the Department certify that the classified information cannot be declassified and why. This regulation cannot impose requirements on the actual content of a document, only its classification. In

response to these comments, the Department has enhanced the language in section 1045.41. A new paragraph, 1045.41(c), has been added which encourages document originators to provide a publicly releasable rationale for the classification of documents containing environmental, safety or health information, when unclassified versions cannot be prepared. In addition, one commenter recommended that DOE acknowledge the existence of a classified addendum. DOE accepted this suggestion and 1045.41(a) has been revised accordingly.

One commenter indicated that "Section 1045.52(a) proposes that any information subject to pending litigation is a basis for denial of declassification reviews", and recommended this proposal be deleted. This section indicates that if the Department has reviewed the information within the past 2 years, or the information is the subject of pending litigation, the Department shall inform the requester of this fact and of his or her appeal rights. The language in this section is derived directly from section 3.6 of E.O. 12958. DOE requested clarification from ISOO on this section and was advised that if information is subject to pending litigation, the Department should not process the request. This does not mean that the request is denied, rather that the request is not processed until the litigation is complete. Section 1045.53(a) was revised to reflect this clarification. This commenter also recommended that this section be revised to prohibit extension of appeals beyond 60 working days. While DOE makes every effort to complete appeal actions within the specified time frame, some actions may require additional time to complete because of extensive interagency coordination. Therefore, it is not practical to establish such a prohibition.

d. DOE Revisions

The following describes changes to the regulation made by DOE on its own initiative, not in response to any public comment. The title of the rule was changed from "Information Classification" to "Nuclear Classification and Declassification" in order to be more descriptive. In the preamble to the proposed rule, the Department indicated that the Openness Advisory Panel "will also serve as an independent authority to confirm for the public the validity of classification decisions in instances when the full rationale cannot be disclosed for reasons of national security." A panel of the Secretary of Energy Advisory Board (SEAB) provides advice and

recommendations to the SEAB and therefore cannot function as an "independent authority." Consequently, the Openness Advisory Panel will not function as an "independent authority" concerning the validity of classification decisions.

In section 1045.3, the definition of "contractor" was revised for accuracy to read, "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." The definition of "declassification" was modified to reflect that some information may be declassified but still require protection for national security reasons (e.g., Unclassified Controlled Nuclear Information). The definition of "information" was expanded for clarity. The definition of "National Security Information" was modified to add the words, "NSI is referred to as 'defense information' in the Atomic Energy Act." This change was made for clarity. Also, the definition of "Restricted Data classifier" was modified by adding the following words, "RD classifiers within the DoD may also declassify FRD documents." This change was made for accuracy and to be consistent with other sections of the regulation.

DOE has added language to section 1045.7(c) which reads, "DOE will make every effort to respond within 60 days." This change was made to ensure the Department is responsive to suggestions and complaints.

The Department has added language to section 1045.14(a) which requires that an RD classifier follow the process for submitting potential RD for evaluation whenever he or she is unable to locate classification guidance that can be applied to the information. Under previous procedures, RD classifiers could classify documents even though they were unable to locate classification guidance that applied to the information. This practice evolved from the "born classified" concept. This concept is now being de-emphasized since it is DOE practice that classification is not automatically prescribed. Consequently, this revision is necessary to ensure classification is not automatically applied when there is uncertainty as to the need for it. For completeness, the Department has also added paragraph (a)(1)(iv) to section 1045.14 which requires that the Director of Declassification notify classifiers of the information classification decisions made under this section.

For accuracy, DOE inserted the word, "category" after "RD classification" and

changed "Director of Declassification" to "Director of Security Affairs" in section 1045.14(c).

Section 1045.15(c) was modified to clearly state that the presumptions reflect the classification status of existing information and that new information in one of the presumption categories may or may not be classified. The Department has deleted section 1045.15(d)(2), the unclassified presumption which was worded "instruments and equipment". DOE was able to find numerous examples of classified instruments and equipment. Section 1045.15(d)(8) (now (7)), was revised by inserting the words "most of" before "their alloys." This change was made in response to DOE concerns that not all alloys and compounds are unclassified.

DOE revised proposed section 1045.15(d)(10) (now (9)), by deleting the word "all". This change was made because there is still one nuclear test yield range that remains classified. Proposed section 1045.15(d)(12) (now (11)) has been revised to add the words "not revealing size or details concerning the nuclear weapons stockpile." This revision is necessary because the presumption was too broad.

DOE revised proposed section 1045.15(d)(13) by changing the word "Operations" to "Any information." This change was made to broaden the scope of this "presumed unclassified" subject area. The original wording would have limited the scope to only those operations dealing exclusively with health, safety, and environmental matters, such as a site environmental cleanup project. The new wording includes any health, safety, and environmental information in any program regardless of its purpose.

As a result of a recent declassification action, the Department added paragraph 1045.15(d)(14), an unclassified presumption concerning the association of materials at specified DOE sites.

DOE has also added paragraph (c) to section 1045.16 for completeness, "The DOE Directors of Declassification and Security Affairs shall consider the presumptions in section 1045.15 (d) and (e) before applying the criteria in paragraph (d) of this section."

In section 1045.17(a)(1), examples are provided of RD information which warrants classification at the Top Secret level. For clarity, a more complete explanation of what type of nuclear weapons design information warrants classification at the Top Secret level is provided. Also, paragraph (a)(3) of section 1045.17 has been expanded to provide more examples of information

that warrant classification at the Confidential level.

For clarity, the sentence, "The DOE Director of Declassification shall not classify the information in such cases if it is widely disseminated in the public domain" has been added to section 1045.18.

Proposed section 1045.19(b) has been revised to include an address where persons may request the annual report on the status of the RD classification program. This report will be made available to any interested persons, including the Congress.

To ensure that the requirement to publish a **Federal Register** notice does not result in the disclosure of classified or sensitive information, section 1045.21(c) has been revised to read, "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." Depending upon the circumstances, the **Federal Register** notice could be a simple acknowledgment that DOE has exercised the authority under this section if the identification of the circumstance would be classified.

Section 1045.32(a)(1) has been revised by deleting the word "properly" from the second sentence. DOE recognizes that some source documents are improperly classified. Nonetheless, RD classifiers may presume that the classification of a document marked RD or FRD is proper where there is no conflicting guidance. Therefore, this word has been removed. Where there is doubt about the classification of a source document and there is no classification guide topic to address the information, the RD classifier should follow the process described in section 1045.14. Paragraphs (a) (1) and (4) and (b)(2) were modified to reflect that joint Agency-DOE classification guides or Agency guides coordinated with the DOE should be used in these instances. Paragraph (a)(3) has been added to section 1045.32 which states "RD classifiers shall classify only documents in subject areas in which they have programmatic expertise." The purpose of this revision is to ensure that information is derivatively classified only by those individuals who have specific program knowledge of the information being classified. This is generally an accepted practice throughout the Government. This provision merely formalizes the procedure. Paragraph (a)(4) has been added to section 1045.32 to allow RD

classifiers to upgrade or downgrade the classification level of documents.

In section 1045.34, paragraph (b) has been added to read, "All contractor organizations with access to RD and FRD, including DoD contractors, shall designate RD classifiers." This change was made to clarify that the exemption from the designation requirement in paragraph (a) applies only to DoD federal employees. This provision is consistent with the National Industrial Security Program Operating Manual.

DOE changed the words, "persons working with RD and FRD information" to "all RD classifiers" in section 1045.37(f). This change is made since only RD classifiers, not all persons with access to RD and FRD, need classification guides.

Section 1045.38(c) has been modified by adding the words "and FRD" after "RD." This change is made for accuracy since both RD and FRD are exempt from the provisions of E.O. 12958.

Concerning the marking requirements in Section 1045.40, it is noted that these provisions fall under the purview of the DOE Office of Safeguards and Security, not the DOE Office of Declassification. Section 1045.40(b)(3) has been modified to require that the date of the guide or source document used to classify the document being marked, be identified. This change is made to ensure consistency in requirements throughout the Government. In section 1045.40(b)(4) "Name or position/title" was changed to "Name and position or title."

Proposed section 1045.40(d) was deleted since it did not provide a regulatory requirement.

For accuracy, in section 1045.40(e), (now (d)), "RD classifier" is changed to "individual authorizing the declassification."

Section 1045.42 has been revised to reflect that the Interagency Security Classification Appeals Panel (ISCAP) has no jurisdiction over Freedom of Information Act appeals.

The following language has been added to section 1045.42(b)(5) in order to ensure that information that is requested by the public in the form of a mandatory or Freedom of Information Act request is formally considered for declassification, "(i) Appeal reviews of RD or FRD documents shall be based on existing classification guidance. However, the DOE Director of Declassification 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 DOE Director of Declassification shall initiate a formal

declassification action and so advise the requester."

The person responsible for ensuring that RD documents are periodically and systematically reviewed for declassification has been changed from the "DOE Director of Declassification" to "The Secretary" in section 1045.43(a). This change was made to elevate the level of the responsible agency official and to ensure this task is completed.

The Department revised section 1045.44 to read, "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." The purpose of this change is to ensure that documents intended for public release are reviewed by appropriate officials, rather than by any individual who derivatively classifies RD documents. Documents originated within the DOE are forwarded to the local classification officer for prepublication review. Documents originated outside of the DOE are processed in accordance with agency procedures and forwarded to the Director of Declassification for prepublication review.

A new section, section 1045.46, has been added to cover a situation where two or more pieces of unclassified information when associated or compiled together could reveal classified information. In the case of classification by association, two unclassified pieces of information may, when considered together, reveal classified information. For example, a shipment of an unclassified commercially available item of hardware to a contractor whose only activity is a classified project may cause the fact of the shipment to be classified. In the case of classification by compilation, a number of pieces of unclassified information that, when considered together, may contain some added value such as completeness or comprehensiveness of the information, may warrant classification. For example, individual DOE bibliographic citations of weapons data reports may be unclassified, however a complete compilation of these citations would represent all DOE weapons research conducted. Such a compilation would provide significant assistance to a potential proliferant and may therefore warrant classification. DOE determined that this section is needed to explain classification of RD or FRD by association or compilation. A similar

provision exists for classification by association and compilation for NSI under E.O. 12958.

For accuracy, the words, "Access to Information" were removed from the title of Subpart D. A new section 1045.51 entitled Applicability has been added, "This subpart applies to any person with authorized access to DOE NSI or who desires access to DOE documents containing NSI." The Purpose and Scope paragraph was modified to include the authorities for the classification of NSI. Sections 1045.51 and 52 were renumbered 1045.52 and 1045.53, respectively.

e. Comments Outside the Scope of the Rule.

The following provides a summary of comments outside the scope of this regulation. One commenter recommended that the Department examine the differing requirements within the DOE and the DoD for access to RD. This comment has been provided to the DOE Office of Safeguards and Security for consideration, since access requirements are under their purview.

Several commenters expressed concern with classification issues under the purview of the Office of Naval Reactors, Naval Nuclear Propulsion Program. Although the Office of Naval Reactors is subject to this regulation, they are responsible for implementation of their own classification program under the provisions of Executive Order 12344. Consequently, these comments were forwarded to the Office of Naval Reactors for appropriate disposition.

One commenter also provided a suggestion concerning the DOE policies for marking and use of "For Official Use Only (FOUO)" and "Unclassified Controlled Nuclear Information (UCNI)." Since the scope of this regulation does not include UCNI or FOUO, these comments will be considered for inclusion in other Departmental policies.

IV. Rulemaking Requirements

A. Review Under Executive Order 12866

One commenter suggested that the rule as proposed constitutes a "significant regulatory action" as that term is defined by Executive Order 12866. That order defines "significant regulatory action" as an action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities; (2)

create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities or the principles set forth in this Executive Order. Today's rule imposes requirements on Government agencies, contractors and their employees that are authorized to have access to RD and FRD information and documents. Costs incurred by compliance with the rule are paid directly by the Government or are reimbursed by the Government. Although the rule's effect on the economy is difficult to gauge precisely, DOE has determined that the annual effect on the economy will fall far short of the \$100 million threshold and will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. DOE has coordinated the development of the rule with numerous agencies with access to RD and FRD. DOE has sought and received input and concurrences from DoD, Department of State and other federal agencies affected by today's rule and does not expect that the rule will create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. The rule has no effect on the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. Finally, the rule raises no novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866. Based on the foregoing, DOE has determined that today's rule does not constitute a "significant regulatory action" as defined in section 3(f) of E.O. 12866.

B. Review Under Paperwork Reduction Act

No new information collection requirements subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, are imposed by today's regulatory action.

C. Review Under the National Environmental Policy Act

This regulation amends DOE's policies and procedures for the classification and declassification of information. Implementation of this rule will not affect whether such information might cause or otherwise be associated with any environmental impacts. The

Department has therefore determined that this rule is covered under the Categorical Exclusion found at paragraph A.5 of Appendix A to Subpart D, 10 CFR Part 1021, which applies to the establishment of a rulemaking interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

D. Review Under Executive Order 12612

Executive Order 12612, 52 FR 41685 (October 30, 1987), requires that rules be reviewed for any substantial direct effect on States, on the relationship between the National Government and the States, or in the distribution of power and responsibilities among various levels of Government. If there are sufficient substantial direct effects, then the Executive order requires preparation of a federal assessment to be used in all decisions involved in promulgating and implementing a policy action. Today's regulatory action amends DOE's policies and procedures on information classification and declassification. Therefore, the Department has determined that this rule will not have a substantial direct effect on the institutional interests or traditional functions of States.

E. Review Under Executive Order 12988

Section 3 of Executive Order 12988, 61 FR 4729 (February 7, 1996), instructs each agency to adhere to certain requirements in promulgating new regulations. These requirements, set forth in Section 3 (a) and (b), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards for affected legal conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation describes any administrative proceeding to be available prior to judicial review and any provisions for the exhaustion of administrative remedies. The Department has determined that today's regulatory action meets the requirements of Section 3 (a) and (b) of Executive Order 12988.

F. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 requires each Agency to assess the effects of Federal regulatory action on State, local, and tribal governments and the private sector. Today's regulatory action

amends DOE's policies and procedures on information classification and declassification. The Department has determined that today's regulatory action does not impose a Federal mandate on State, local, or tribal governments, or on the private sector.

G. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, directs agencies to prepare a regulatory flexibility analysis for each proposed rule or to certify that the rule will not have a "significant economic impact on a substantial number of small entities." Today's rule amends DOE's policies and procedures on information classification and declassification. The rule applies to all agencies, persons and entities that generate and maintain RD or FRD information or documents. The Department has identified over 50 Federal Government entities that have access to RD or FRD information or documents. Each of these Government entities may, in turn, have contractors or consultants that have access to RD or FRD information or documents.

Section 1045.35 imposes on the Government, in the person of the RD management official, the responsibility to ensure that RD classifiers are properly trained. That section further imposes on the DOE Director of Declassification the obligation to develop and review training materials related to the implementation of this regulation. The regulation imposes on non-Government entities the requirement that persons with access to RD or FRD be properly trained. The economic impact of the training requirement on non-Government entities is limited to the labor hours required to familiarize those persons with access to RD and FRD with the training materials provided by DOE and the RD management official.

Section 1045.40 requires that Government and non-Government RD classifiers clearly mark each new document generated to convey that it contains RD or FRD information. The burden of the marking requirement varies depending on the number of documents the entity generates. DOE considers the proper marking of a classified document to be an act integrated in the act of creating the document. As such, the marking of individual documents containing RD and FRD imposes minimal costs on the entity generating new RD documents.

Finally, DOE recognizes that non-Government entities that generate documents containing RD or FRD will do so pursuant to a Government contract. In those instances, any costs

incurred in compliance with the regulation will be charged back to the Government.

Based on the foregoing, DOE has determined that the rule will not have a "significant economic impact." As permitted by section 605 of the Regulatory Flexibility Act, DOE certifies that this rule will not have a significant economic impact on a substantial number of small entities.

H. Review Under Small Business Regulatory Enforcement Fairness Act of 1996

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of the rule prior to its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(3).

V. Freedom of Information Act (FOIA) Considerations

RD and FRD classified under the Atomic Energy Act fall within the scope of exemption 3 of the FOIA (5 U.S.C. 552(b)(3)). Thus RD and FRD are not subject to disclosure under the FOIA. Similarly, information that is properly classified as NSI under E.O. 12958 may be withheld from disclosure under exemption 1 of the FOIA.

DOE shall process requests for documents made under the FOIA in accordance with applicable DOE regulations and orders which implement the FOIA within the Department. DOE shall process these requests promptly and shall respond to the requester in a timely manner. DOE shall coordinate requests involving FRD information and RD information which relates primarily to the military utilization of nuclear weapons with the DoD. The Director of Security Affairs shall decide all appeals of denials of requests for classified information covered by sections 141 and 142 of the Atomic Energy Act and E.O. 12958.

List of Subjects in 10 CFR Part 1045

Classified information, Declassification, National security information.

Issued in Washington, DC, on December 22, 1997.

Federico Peña,
Secretary of Energy.

For the reasons set forth in the preamble, 10 CFR Part 1045 is revised to read as follows:

PART 1045—NUCLEAR CLASSIFICATION AND DECLASSIFICATION

Subpart A—Program Management of the Restricted Data and Formerly Restricted Data Classification System

Sec.

- 1045.1 Purpose and scope.
- 1045.2 Applicability.
- 1045.3 Definitions.
- 1045.4 Responsibilities.
- 1045.5 Sanctions.
- 1045.6 Openness Advisory Panel.
- 1045.7 Suggestions or complaints.
- 1045.8 Procedural exemptions.
- 1045.9 RD classification performance evaluation.

Subpart B—Identification of Restricted Data and Formerly Restricted Data Information

- 1045.10 Purpose and scope.
- 1045.11 Applicability.
- 1045.12 Authorities.
- 1045.13 Classification prohibitions.
- 1045.14 Process for classification and declassification of restricted data and formerly restricted data information.
- 1045.15 Classification and declassification presumptions.
- 1045.16 Criteria for evaluation of restricted data and formerly restricted data information.
- 1045.17 Classification levels.
- 1045.18 Newly generated information in a previously declassified subject area.
- 1045.19 Accountability for classification and declassification determinations.
- 1045.20 Ongoing call for declassification proposals.
- 1045.21 Privately generated restricted data.
- 1045.22 No comment policy.

Subpart C—Generation and Review of Documents Containing Restricted Data and Formerly Restricted Data

- 1045.30 Purpose and scope.
- 1045.31 Applicability.
- 1045.32 Authorities.
- 1045.33 Appointment of restricted data management official.
- 1045.34 Designation of restricted data classifiers.
- 1045.35 Training requirements.
- 1045.36 Reviews of agencies with access to restricted data and formerly restricted data.
- 1045.37 Classification guides.
- 1045.38 Automatic declassification prohibition.
- 1045.39 Challenging classification and declassification determinations.
- 1045.40 Marking requirements.
- 1045.41 Use of classified addendums.
- 1045.42 Mandatory and Freedom of Information Act reviews for declassification of restricted data and formerly restricted data documents.
- 1045.43 Systematic review for declassification.
- 1045.44 Classification review prior to public release.

1045.45 Review of unmarked documents with potential restricted data or formerly restricted data.

1045.46 Classification by association or compilation.

Subpart D—Executive Order 12958, “Classified National Security Information” Requirements Affecting the Public

1045.50 Purpose and scope.

1045.51 Applicability.

1045.52 Mandatory declassification review requests.

1045.53 Appeal of denial of mandatory declassification review requests.

Authority: 42 U.S.C. 2011; E.O. 12958, 60 FR 19825, 3 CFR, 1995 Comp., p. 333.

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.

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 Declassification means the Department of Energy Director, Office of

Declassification, or any person to whom the Director’s duties are delegated. The Director of Declassification is subordinate to the Director of Security Affairs.

Director of Security Affairs means the Department of Energy Director, Office of Security Affairs, or any person to whom the Director’s duties are delegated.

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.

§ 1045.4 Responsibilities.

(a) The DOE Director of Declassification 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 DOE Director of Security Affairs 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 military 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 DOE Director of Declassification to fulfill responsibilities under this part.

§ 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 Openness Coordinator, Department of Energy, Office of Declassification, 19901 Germantown Road, Germantown, Maryland 20874-1290.

(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.

§ 1045.8 Procedural exemptions.

(a) Exemptions to the procedural provisions of this part may be granted by the DOE Director of Declassification.

(b) A request for an exemption shall be made in writing to the DOE Director of Declassification and shall provide all relevant facts, justification, and a proposed alternate procedure.

§ 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 DOE Director of Declassification may determine whether nuclear-related information is RD.

(b) Except as provided in paragraph (c) of this section, the DOE Director of Security Affairs may declassify RD information.

(c) The DOE Director of Security Affairs, 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 DOE Director of Security Affairs jointly with the DoD may declassify FRD information.

§ 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 DOE Director of Declassification via their local classification or security office. The DOE Director of Declassification 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 DOE Director of Declassification, potential RD submitted for evaluation by authorized holders shall be protected

at a minimum as Confidential Restricted Data.

(b) *Declassification of Restricted Data.* The DOE Director of Security Affairs shall apply the criteria in § 1045.16 when determining whether RD may be declassified.

(c) *Classification of Formerly Restricted Data.* The DOE Director of Security Affairs, 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 DOE Director of Security Affairs, jointly with the DoD, shall apply the criteria in § 1045.16 when determining whether FRD may be declassified.

§ 1045.15 Classification and declassification presumptions.

(a) The DOE Directors of Declassification and Security Affairs 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 DOE Directors of Declassification and Security Affairs 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 DOE Directors of Declassification and Security Affairs 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.

§ 1045.16 Criteria for evaluation of restricted data and formerly restricted data information.

(a) The DOE Director of Declassification shall classify information as RD and the DOE Director of Security Affairs 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 DOE Director of Declassification shall not classify information and the DOE Director of Security Affairs shall declassify information if there is significant doubt about the need to classify the information.

(c) The DOE Directors of Declassification and Security Affairs 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 DOE Directors of Declassification and Security Affairs 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.

1045.17 Classification levels.

(a) *Restricted Data.* The DOE Director of Declassification 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 DOE Director of Declassification 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 DOE Director of Declassification 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 DOE Director of Declassification 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 DOE Director of Declassification, 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.

§ 1045.18 Newly generated information in a previously declassified subject area.

(a) The DOE Director of Declassification 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 DOE Director of Declassification shall not classify the information in such cases if it is widely disseminated in the public domain.

§ 1045.19 Accountability for classification and declassification determinations.

(a) Whenever a classification or declassification determination concerning RD or FRD information is made, the DOE Directors of Declassification and Security Affairs shall be able to justify the determination. For FRD and RD primarily related to military utilization, the DOE Directors of Declassification and Security Affairs 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 DOE Directors of Declassification and Security Affairs 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 DOE Director of Declassification.

(b) The DOE Director of Declassification 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 DOE Director of Declassification. Requests may be submitted to the Department of Energy, Director of Declassification, 19901 Germantown Road, Germantown, Maryland 20874-1290.

§ 1045.20 Ongoing call for declassification proposals.

The DOE Director of Security Affairs shall consider proposals for 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 Department of Energy, Director of Security Affairs, 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.

§ 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 DOE Director of Security Affairs shall examine the possibility of declassification.

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 DOE Director of Declassification 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 DOE Director of Declassification on RD and FRD classification and declassification issues.

(c) Within the DoD, an RD management official shall be appointed in each DoD agency.

§ 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 DOE Director of Declassification 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 DOE Director of Declassification shall review any RD-related training material submitted by agency and contractor representatives to ensure consistency with current policy.

§ 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 DOE Director of Declassification shall establish a standing group of all RD management officials to meet periodically.

§ 1045.37 Classification guides.

(a) The classification and declassification determinations made by the DOE Directors of Declassification and Security Affairs 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 DOE Director of Declassification 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.

§ 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 DOE Director of Declassification. In the case of FRD and RD related primarily to the military utilization of nuclear weapons, the DOE Director of Declassification 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 DOE Director of Security Affairs.

(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.

§ 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 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 DOE Director of Declassification 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 DOE Director of Declassification shall initiate a formal declassification action and so advise the requester.

(c) *Denying Official.* (1) The denying official for documents containing RD is the DOE Director of Declassification.

(2) The denying official for documents containing FRD is either the DOE Director of Declassification or an appropriate DoD official.

(d) *Appeal Authority.* (1) The appeal authority for RD documents is the DOE Director of Security Affairs.

(2) The appeal authority for FRD documents is either the DOE Director of Security Affairs, 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.

§ 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 DOE Director of Declassification (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 of Declassification, Department of Energy, 19901 Germantown Road, Germantown, MD 20874-1290.

§ 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 DOE Director of Declassification.

§ 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 Department of Energy, Director of Declassification, 19901 Germantown Road, Germantown, Maryland 20874-1290.

§ 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 Declassification 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

Director of Security Affairs, 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 DOE Director of Security Affairs.

(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 DOE Director of Security Affairs 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 DOE Director of Security Affairs' 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.

[FR Doc. 97-33949 Filed 12-30-97; 8:45 am]

BILLING CODE 6450-01-P