

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

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

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

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

## II. Approach to Codifying the Guidelines

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

## III. Determining Importance

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

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

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

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

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