

- Define “exceptionally grave damage, serious damage, etc.”;
- Define “safeguards and security management system” breakdown;
- Define or eliminate “that can reasonably be expected to result in” damage to national security;
- Eliminate conduct “creating a risk” of harm (basing fee reductions on incidents that merely create risk is too subjective);
- Eliminate “or performance failures of similar import”;

Respondents also stated that since risk is always present, fee reductions should not be imposed for risk. They stated that the rule would undo current standards of acceptable risk in safeguarding classified information, which set appropriate levels of protection against risk based on vulnerability/risk analyses.

*Response:* The terms used in the proposed rule and this interim final rule are found in DOE Directives, Executive Orders, and the National Industrial Security Program. As for risk, the Department understands risk is present. The interim final rule makes it clear that fee reductions related to a security violation are only possible if there is a performance failure related to a security violation and that failure is the cause of an undesirable outcome, such as events that cause or could reasonably be expected to cause damage to the national security.

*Comment:* A number of respondents stated that the fee reductions should be tied to a site specific plan that is part of the security agreement between DOE and contractor. That plan would cite controlling directives, the contractor's security plan, and define degrees of performance failure.

*Response:* The interim final rule specifically allows for site specific performance criteria/requirements that provide additional definition, guidance for the amount of the reduction, or guidance for the applicability of mitigating factors.

#### Other Issues

*Comment:* Respondents stated that there should be a distinction in the rule between contracts that have evaluation periods of different lengths.

*Response:* DOE disagrees because the parties are free to negotiate appropriate evaluation period lengths, taking into account all the elements of the contract to include, among other things, desired outcomes, equitable allocation of risks, suitable rewards, and potential fee reductions for ES&H or security performance failures.

## V. Procedural Requirements

### A. Review Under Executive Order 12866

Today's regulatory action has been determined not to be “a significant regulatory action” under Executive Order 12866, “Regulatory Planning and Review” (58 FR 51735, October 4, 1993). Accordingly, this action is not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

### B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking” (67 FR 53461, August 16, 2002), DOE published procedures and policies to ensure that the potential impacts of its draft rules on small entities are properly considered during the rulemaking process (68 FR 7990, February 19, 2003), and has made them available on the Office of General Counsel's Web site: <http://www.gc.doe.gov>. DOE has reviewed today's rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. Because DOE is contractually obligated to reimburse contractors for the cost of complying with regulatory requirements, the rule will not have a significant economic impact on small entities. Since it is clear that the rule will not have an adverse economic impact, there is no need to determine the exact number of small contractors that might be affected by the new requirements. On the basis of the foregoing, DOE certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. Accordingly, DOE did not prepare a regulatory flexibility analysis for this rule.

### C. Review Under the 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.

### D. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this rule falls into a class of actions that would not individually or cumulatively have a significant impact on the human environment, as determined by DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this rule deals only with agency procedures, and, therefore, is covered under the Categorical Exclusion in paragraph A6 to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

### E. Review Under Executive Order 13132

Executive Order 13132, “Federalism” (64 FR 43255, August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined today's rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

### F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform” (61 FR 4729, February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of