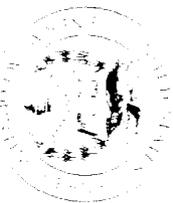


GAO

United States General Accounting Office
Report to the Chairman, Committee on
Governmental Affairs, U.S. Senate

July 1991

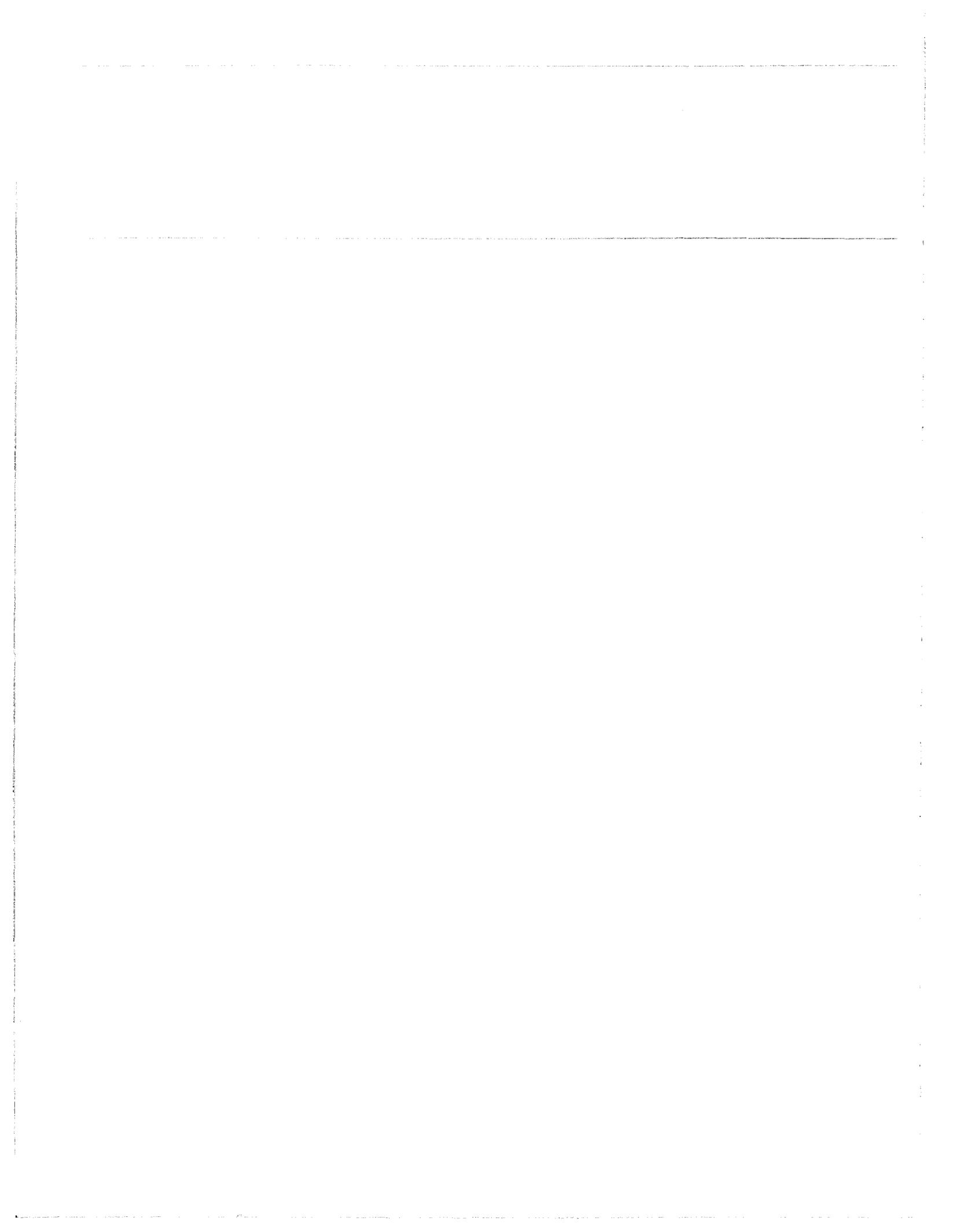
NUCLEAR SECURITY
DOE Original
Classification
Authority Has Been
Improperly Delegated



144587

RESTRICTED

RESTRICTED—Not to be released outside the
General Accounting Office unless specifically
approved by the Office of Congressional
Relations.



Resources, Community, and
Economic Development Division

B-244369

July 5, 1991

The Honorable John Glenn
Chairman, Committee on
Governmental Affairs
United States Senate

Dear Mr. Chairman:

This report responds to your May 1991 request that we determine whether the Department of Energy (DOE) may use contractors to make original classification determinations about national security information and the extent to which DOE uses contractors for this purpose. National security information is information that requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States.

To assign the proper classification level to national security information and documents containing such information, two types of classification authority are granted—original and derivative. Specifically, persons with original classification authority may make the initial determination that national security information should be classified when existing classification guides do not cover a specific subject area or do not indicate the proper classification to be assigned to a specific item of information. In contrast, persons with derivative classification authority may only classify documents or material that is, in substance, the same as information already classified.

Results in Brief

Executive Order 12356 does not allow the use of contractors to make original classification determinations about national security information. Specifically, the order, effective August 1, 1982, limits original classification authority to agency heads and selected subordinate agency officials. Yet, DOE has delegated original classification authority to over 50 contractor personnel. Most of these individuals are employees of DOE's government-owned, contractor-operated national laboratories and are either senior level managers or members of the contractor classification staff.

According to DOE data, contractors have not used this authority extensively. For example, from fiscal year 1985 through fiscal year 1990, contractor employees made 192 original classification determinations out of

a total of 3,283 such determinations. Even though the contractor determinations constitute only about 6 percent of the total original classification determinations made during this period, the significance of this percentage should not be negated. The misclassification of national security information could seriously impact and threaten U.S. national security interests.

Furthermore, according to the executive branch office with oversight responsibility for DOE's information security program, the National Security Council's Information Security Oversight Office, the exercise of original classification authority constitutes an inherent government function. That is, decisions affecting the nation's security lie with the government, not with nongovernment entities. Consequently, unless the original classification determinations made by contractors have been reviewed and approved by an authorized federal official, they are void. DOE officials could not tell us the extent to which such determinations have been reviewed and approved, but acknowledged that a systematic, timely review of classification determinations is not made. As a result, in those instances where review and approval have not been made, DOE cannot provide assurance that U.S. national security interests have been or are being adequately protected.

Background

Executive Order 12356 defines and establishes the requirements for the classification of national security information. The President delegates authority for classifying information as national security information to executive branch agencies or organizations. The Secretary of Energy has been granted classification authority for national security information under DOE's jurisdiction. The Secretary has further delegated his power to authorize original classification authority to the Director of the Office of Classification, within the Office of Security Affairs. DOE Order 5650.2A contains the implementing directives for classifying and controlling national security information within the Department.

The National Security Council provides overall policy direction for the executive branch's information security program. The Information Security Oversight Office, directed by the Council, is charged with maintaining oversight of the information security program's implementation by executive branch agencies. This includes, among other things, monitoring agency classification practices, reviewing agency implementing directives, and conducting on-site inspections of agency information security practices to ensure effective compliance with the Executive order.

Within DOE, all requests for original classification authority must be submitted to and approved by the headquarters Office of Classification. Approval of such authority is granted on a selective basis. That is, in accordance with DOE Order 5650.2A, original classification authority is to be granted only to specified individuals in specified positions with a "proven or anticipated need" for such authority. Interpretation of which positions meet this proven or anticipated need is judgmentally made by the Office of Classification. In general, according to DOE Office of Classification officials, the positions that have been granted such authority are senior level positions at facilities that deal with large volumes of classified information. Among such facilities are the national laboratories, where major research and development efforts are on-going. As of May 7, 1991, 142 persons throughout DOE, including over 50 contractor employees, had been granted this authority. Original classification authority is not transferred with an individual when he or she transfers to another position.

Classification of Information Is Vital to U.S. National Security

Classification of information is a vital aspect of national security. As discussed in DOE's June 1987 information booklet entitled Understanding Classification, classification is the process of identifying certain information that needs to be protected in the interest of national security; by classifying important information "we are able to deny it to potential enemies while allowing our own scientists, engineers, and statesmen to profit from the information."¹

As further described in the booklet, before national security information may be classified by an original classifier, two determinations must be made:

First, does it concern one or more of the subject areas specifically related to national security as identified by Executive Order 12356 . . .² Second, could unauthorized disclosure of the information reasonably be expected to cause damage to national security? If both tests are met (and classification of the information is not otherwise prohibited), then the information may be classified as National Security Information with one of the three classification levels (Top Secret, Secret, or Confidential).

¹National security information is only one of three categories of classified information that DOE handles. The other two categories—restricted data and formerly restricted data—are classified under the Atomic Energy Act and constitute the majority of classified information within DOE. Original classification authority applies only to national security information.

²These areas include, among others, military plans, weapons, or operations; intelligence activities; and government programs for safeguarding nuclear materials or facilities.

Top Secret is the level assigned to information of utmost importance to the national defense and security. As defined by Executive Order 12356, its unauthorized disclosure could reasonably be expected to cause "exceptionally grave damage" to national security. Similarly, the unauthorized disclosure of Secret information could reasonably be expected to cause "serious damage" to national security while the unauthorized disclosure of Confidential information could be expected to cause "damage" to national security.

Original Classification Authority for DOE Contractor Employees Is Improper

Most of the DOE contractors with original classification authority work in the national laboratories and are either senior level managers or members of the contractor classification staff. Approximately 14 percent of these employees have been delegated original classification authority at the Top Secret level. The remaining 86 percent have been delegated original classification authority at the Secret and Confidential levels. According to DOE data, DOE contractor employees used this delegated authority during fiscal years 1985 through 1990 to make 3 determinations at the Top Secret level and another 189 determinations at either the Secret or Confidential level. For this same period, a total of 3,091 original classification determinations were made by DOE employees.

According to DOE Office of Classification officials, the use of contractors to originally classify information is acceptable for two reasons. First, in a May 1991 written statement these officials commented that

Because of the long-standing and unique relationship between the Department of Energy . . . and its Government-owned contractor-operated . . . facilities, the practice of granting a limited form of original classification authority to certain contractor employees has been found to be useful for many years. This practice is appropriate and necessary because our contractors operate Government facilities and laboratories that develop sensitive information that warrants classification, but where classification guides are not always available.

Second, these officials maintain that although DOE contractor personnel may make original classification decisions, these decisions do not establish DOE policy. And only if these preliminary decisions are found to be valid by the appropriate government officials are they promulgated to others through the issuance of classification guides. Therefore, in their opinion, contractor original classification determinations are interim, not final, decisions. Final decision-making occurs only when and if the original decision is promulgated as agency policy in a classification

guide. At the point of guide approval, in their opinion, ratification of the original contractor classification determination occurs.

Despite the reasons given by DOE for using contractors to originally classify national security information, this practice is not allowable under the provisions of Executive Order 12356. Section 1.2 of the Executive order sets forth who is authorized to classify documents. Classification authority is limited to those agency heads and their subordinate officials with a demonstrable need for original classification authority.

Agency is defined for the purposes of the order as including any executive department, military department, government corporation, government-controlled corporation, or other establishment in the executive branch of the government, or any independent regulatory agency. Thus, as a matter of definition an agency official is someone within the executive branch of government or an employee of a government-owned or controlled corporation. A contractor employee is not an executive branch employee. And because only agency officials may hold original classification authority, it follows that contractors may not.

Similarly, the Executive order does not address and thereby does not recognize the "long-standing and unique relationship" between DOE and its government-owned, contractor-operated facilities as a reason for not complying with the requirements of the Executive order. Nor does the order allow the practice because it may be useful to DOE.

Furthermore, the fact that federal employees review and approve original decisions that are promulgated as agency policy in a guide does not legitimize the practice of delegating original classification authority to contractors. Under DOE's current operating procedures, contractors advise DOE officials as to what information they believe should be included in classification guidance. If a contractor decides that an original classification determination need not be put into a classification guide, DOE's Office of Classification is not informed of the content of that original determination or the contractor's justification for not including it in the guidance. To this extent, contractors are making final, not interim, decisions.

More importantly, according to DOE officials, most original classification determinations made by contractors are not suggested for incorporation into classification guidance and, therefore, are never incorporated into the guides. Yet, these original determinations continue to be applicable

at the local level and are controlled and safeguarded as classified information. As such, they constitute original determinations impermissible under the provisions of Executive Order 12356.

DOE is drafting a revised version of DOE Order 5650.2A that will require all original determinations to be forwarded to the Office of Classification to be worked into the classification guidance. However, DOE officials are unsure as to when the revised order will be issued, and how and when, once the order is issued, they will incorporate the review and approval of all original determinations into their operating procedures. As a result, even if issued, it is unclear whether the revised draft order will effectively eliminate the use of contractors to make original classification decisions about national security information.

The Improper Delegation of Original Classification Authority Is Not New

The improper delegation of original classification authority to contractors is not a new problem. The same problem was noted in 1986 by the Information Security Oversight Office following an on-site review/inspection of DOE's information security programs. At that time, the Oversight Office reported that DOE had delegated original classification authority to certain contractor employees. The inspection report stated that "the exercise of such authority is an inherently governmental function" and that Executive Order 12356 does not authorize the appointment of nongovernment personnel as original classifiers. As a result of this finding, the Oversight Office urged DOE to reconsider this policy and recommended that, in its place, a mechanism be provided for a contractor to forward information it believes cannot be classified on the basis of a guide or source document to a DOE official with original classification authority.

According to Office of Classification officials, DOE reconsidered, as recommended, the use of contractors to originally classify information. DOE concluded, for the same reasons provided to us, that this practice was acceptable and, as a result, did not change the practice of granting original classification authority to contractors. They added that the Information Security Oversight Office did not follow up on the 1986 recommendation in its subsequent 1988 on-site review. Because the Oversight Office did not follow up on the previously noted deficiency, the officials believed that the practice of using contractors to make original classification determinations was acceptable.

In response, however, the Director of the Information Security Oversight Office told us that he was not aware that DOE contractors were continuing to implement actual original classification authority. It was his understanding, based on discussions with DOE Office of Classification officials in 1986, that DOE was requiring the ratification of all contractor original determinations by a DOE official, thus making DOE contractor classifications actually derivative or preliminary. Under these circumstances, he believed that DOE had taken steps to respond positively to the 1986 recommendation on a de facto basis. Therefore, the Information Security Oversight Office did not conduct a follow-up inspection of this issue to confirm corrective action.

But more importantly, the Director added that the extent to which original classification decisions have been made by contractor employees, such decisions are void unless or until ratified by a DOE official. To meet the requirements of the order, an independent DOE assessment of each original classification determination made by contractors would be needed.

DOE officials could not tell us the extent to which such determinations have been reviewed and approved. They acknowledged, however, that DOE's current classification policies and procedures do not provide for a systematic review and approval of original classification determinations. According to these officials, they periodically assess, through biennial appraisals, the original classification determinations made by both DOE employees and contractors to ensure the appropriateness and quality of the determinations. However, they agree that the sampling methodology used does not allow an overall assessment of the quality and appropriateness of all classification determinations since the results of the sample are not projectable to the universe of all such determinations. These officials also told us that similar appraisals are conducted by the local classification offices. And like the headquarters Office of Classification appraisals, the sampling methodology used—due to the lack of projectability—does not allow for an overall assessment of the quality and appropriateness of all original classification determinations.

Conclusions

Despite the Executive order provisions limiting the authority to make original classification decisions to government officials, DOE has delegated this authority to a number of contractor employees. Although the number of original classification decisions made by these contractors is small, this fact does not negate or diminish the significance of the

improper delegation of authority. If misclassification were to occur, particularly at the Top Secret level, U.S. national security interests could potentially be seriously impacted and threatened.

Furthermore, DOE's argument that the delegation of such authority is a long-standing policy and done on a selective basis does not legitimize the practice nor does it relieve DOE of its responsibility to ensure that the requirements of Executive Order 12356 are met. To meet the requirements of the order, an independent DOE assessment of all original classification determinations made by contractors would be needed. In the absence of such an assessment, which heretofore has not been made, DOE cannot provide assurance that U.S. national security interests have been or are being adequately protected.

Recommendations

To comply with the requirements of Executive Order 12356, we recommend that the Secretary of Energy immediately revoke the original classification authority for national security information that has been delegated to contractor employees.

In addition, to better ensure that the nation's security interests are being adequately protected, we recommend that the Secretary of Energy identify all original classification decisions that have been made by contractors and independently determine and implement the appropriate classification action(s) needed in those instances.

We performed our work at DOE headquarters in May 1991. This work was done in accordance with generally accepted government auditing standards.

To conduct our work, we reviewed, among other things, Executive Order 12356, its implementing directives, and congressional hearings pertaining to the order's implementation. We also interviewed DOE Office of Classification officials and National Security Council Information Security Oversight Office officials.

To determine if contractors were classifying national security information, we obtained a list of DOE's authorized original classifiers from DOE Office of Classification officials and had them identify the contractor employees on that list.

To determine the extent to which contractor employees were originally classifying national security information, we obtained DOE data on the original classification determinations made between October 1, 1985, and September 30, 1990, from DOE Office of Classification officials. We then identified the number of classifications made by contractor employees.

As agreed with your office, we did not obtain official agency comments on a draft of this report. We did, however, discuss the facts with responsible DOE and National Security Council Information Security Oversight Office officials and incorporated their suggestions where appropriate. In general, they agreed with the facts presented.

As arranged with your office, we plan no further distribution of this report until 30 days after the date of this letter. At that time, we will send copies to the Secretary of Energy; the Director, National Security Council; the Director, Office of Management and Budget; and other interested parties. This work was performed under the direction of Victor S. Rezendes, Director, Energy Issues, who may be reached at (202) 275-1441. Other major contributors to this report are listed in appendix I.

Sincerely yours,



J. Dexter Peach
Assistant Comptroller General

Major Contributors to This Report

**Resources,
Community, and
Economic
Development Division,
Washington, D.C.**

Judy A. England-Joseph, Associate Director, Energy Issues
Carl J. Bannerman, Assistant Director
Doris E. Cannon, Assignment Manager
Judith L. Leonhardt, Evaluator-in-Charge

**Office of General
Counsel, Washington,
D.C.**

Michael G. Burros, Attorney

--	--

Related GAO Products

Energy: Bibliography of GAO Documents January 1986-December 1989
(GAO/RCED-90-179, July 1990).

Energy Reports and Testimony: 1990 (GAO/RCED-91-84, Jan. 1991).

Nuclear Security: Accountability for Livermore's Secret Classified Documents Is Inadequate (GAO/RCED-91-65, Feb. 8, 1991).

Ordering Information

The first five copies of each GAO report are free. Additional copies are \$2 each. Orders should be sent to the following address, accompanied by a check or money order made out to the Superintendent of Documents, when necessary. Orders for 100 or more copies to be mailed to a single address are discounted 25 percent.

U.S. General Accounting Office
P. O. Box 6015
Gaithersburg, MD 20877

Orders may also be placed by calling (202) 275-6211.

United States
General Accounting Office
Washington, D.C. 20548

Official Business
Penalty for Private Use \$300

First Class Mail
Postage & Fees Paid
GAO
Permit No. G100