

Roles and Responsibilities of NESDIS Facility Points of Accountability for Export-Controlled Technology

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I. Purpose

This policy document describes the roles and responsibilities of the designated NESDIS Export Control Point of Accountability (POA) for a NESDIS-occupied facility, the process for NESDIS review of potential export cases, and the NESDIS policy for foreign national guest processing timeliness.

II. Background

Federal law defines the legal requirements for all U.S. citizens to control of the export of technology to foreign persons both within and outside the United States. The primary federal regulations for exports are contained in the Export Administration Regulations (EAR, 15 Code of Federal Regulations CFR Parts 300-799) and the International Traffic in Arms Regulations (ITAR, 22 CFR Chapter I, Subchapter M Parts 120-130). The EAR (http://www.access.gpo.gov/bis/ear/ear_data.html) is administered by the Department of Commerce's (DOC) Bureau of Industry and Security (BIS), and the ITAR (http://www.pmddtc.state.gov/regulations_laws/itar_official.html) is administered by the Department of State Directorate of Defense Trade Controls (DDTC) in coordination with the Department of Defense Defense Technology Security Administration (DTSA).

Since weather satellites and space technology in general are currently covered under the ITAR, NESDIS is predominantly subject to ITAR. However NESDIS can be affected by both the EAR and the ITAR, and in fact, both EAR and ITAR controlled technology exist in NESDIS's current facility inventory.

NOAA's Administrative Order (NAO) 207-12 "Technology Controls and Foreign National Access" (http://www.corporateservices.noaa.gov/ames/administrative_orders/chapter_207/207-12.html) defines the NOAA policy and processes for controlling technology exports to foreign nationals and is derived from and supports these existing federal regulations (EAR, ITAR) as well as the corresponding DOC Administrative Order (DAO) 207-12 "Foreign National Visitor and Guest Access Program." The NAO is administered by NOAA's Office of the Chief Administrative Officer (OCAO). The roles and responsibilities defined here are derived from and support the NAO and DAO and NESDIS's compliance with them. More information on the NOAA export compliance program can be found at <http://deemedexports.noaa.gov/>.

III. Export Control Points of Accountability

The director of each NESDIS office/center/program designates an Export Control Point of Accountability (POA) for their offices that have office space at a facility for NESDIS employees. To effectively perform this export compliance job, the POA must have a technical background, for example in engineering or science. Typically, the POA is a federal employee. The POA may also be a NESDIS contractor who is a U.S. person in extenuating circumstances per the decision of the NESDIS office/center director as long as there is direct federal employee oversight of the POA activities.

Normally the covered facilities are NOAA-owned/leased and operated; however, they may include external facilities owned and operated by other federal or private organizations if NESDIS employees routinely conduct business and occupy the facility. A single facility may have multiple POAs if that facility contains multiple offices or data centers. In order to permit effective monitoring, the facility POA should physically reside in the facility for which he/she is designated, except in extenuating circumstances per the decision of the NESDIS office/center director.

Currently there are 14 NESDIS-occupied facilities and 16 POAs. The NESDIS Facility POA List documents the names of the POAs and the facility they are responsible for and is maintained by the NESDIS Controlled Technology Coordinator.

IV. Controlled Technology Coordinator

The NESDIS Assistant Administrator (AA) and other NOAA Line Office AAs each designate a Controlled Technology Coordinator (CTC). This person, normally a physical scientist or engineer from within the Office of Systems Development, has responsibility to coordinate the activities across NESDIS related to compliance with NOAA policy and federal regulations and to serve as the NESDIS focal point for export control. The CTC serves as the bidirectional interface between NESDIS POAs and NESDIS headquarters and the NOAA OCAO on export compliance issues. The CTC designates a Deputy CTC (DCTC) to assist in these tasks, and this DCTC in NESDIS normally comes from the Interagency and International Affairs Office. The CTC assembles and provides the NOAA OCAO with quarterly reports on NESDIS export compliance for the past quarter.

V. POA Responsibilities

Each designated POA shall:

-Serve as the expert focal point for the designated office/facility and be responsible for compliance with federal export regulations (ITAR, EAR) and related NOAA policy NAO 207-12

-Maintain knowledge of ITAR and EAR export control regulations, what is controlled in their area of responsibility, and how to effectively apply the regulations to the business activities in his/her office/center, including when and how to apply for an export license or Technical Assistance Agreement (TAA), if necessary

-Maintain knowledge of NOAA's export control policy and procedures for foreign national access and technology control and how to apply them in his/her office/center to assure continued compliance

-Maintain knowledge of any existing NOAA international Memorandums of Agreement, program-level Technical Transfer Control Plans or Export Control Plans, contractor TAAs, or any other related export-related documents within the office or center that may define status, processes, and restrictions on NESDIS controlled technology transfer to foreign entities

-Respond to and resolve export-related or foreign-national-related questions and issues that arise in his/her office, including performing assessments of technical information or services that office colleagues wish to export to a foreign country and providing recommendations to them on how to proceed

-Provide education outreach and guidance to project managers and others in the office who may deal with technology export issues with foreign countries or foreign nationals on-site in the facility to assure on-going compliance with NOAA policy and export regulations

-Provide education outreach and guidance to federal sponsors of foreign visitors and guests (Departmental Sponsors/NOAA- DSNs) in the office, including the process and paperwork requirements for pre-approval and annual renewal, to assure on-going compliance with NOAA policy and export regulations

-Maintain up-to-date electronic records of controlled technology and foreign nationals at the designated facility and provide those records to the CTC at the end of each quarter for consolidation into the NESDIS-wide report and forwarding to NOAA OCAO, including:

- Certification of POA Compliance
- Controlled Technology Inventory
- Foreign National Guest List
- Access Control Plan
- Access Control Information Sheets

-Respond to and resolve quarterly or annual actions that may result from random audits of these records by the NESDIS CTC or NOAA OCAO

-Take formal continuing education training at least once every other year to maintain proficiency in export control regulations and NOAA policy and report it to the CTC when completed

VI. Process for Review of Requests to Export ITAR- or EAR-controlled Technology, Technical Documentation, and Defense Services

As described above, the facility export control POA has been designated by their NESDIS office or center director and is responsible for reviewing any requests to export technology in whatever form or defense services from NESDIS federal employees within their office to foreign nationals in the U.S. or foreign countries and for providing them guidance on how to proceed. This may also include the following:

- 1) review of technical presentations to be made at public meetings or internal NOAA meetings with foreign partners, or
- 2) review of publications of technical information to be published in professional journals, or
- 3) public release of export controlled documents containing certain technical information needed by the public to satisfy NESDIS program or NOAA mission requirements or international agreements (e.g., through use of ITAR's exemption 22 CFR 125.4(b)(13) or EAR's 15 CFR 734.3(b)(3)).

The POA is uniquely qualified to perform these reviews given their direct knowledge of their office business activities and processes. The general NESDIS process for completing that assessment is described below. This process is intended to be general in nature, and may be tailored depending on the complexity of the case. Simple cases can follow a more simplified informal process, while more complicated cases may require a more robust and formal process at the discretion of the POA and the CTC.

If there are other specific approved processes in place within the POA's office, center, or program, for example, as defined in a technology transfer control plan or export control plan (both the GOES-R and JPSS programs have these), the POA should review them and make sure that they are also being followed.

The assessment should be done within the context of and with full understanding of any existing formal NOAA and international partner agreements, contractor TAAs, and/or export licenses that may relate to that program and technology. If a NESDIS satellite program has their own separate designated and trained export control focal point, then the POA should work with that person on any technology export assessments, but that designated person will generally take the lead in performing the assessment and providing guidance for their program staff.

What is being assessed for potential export could include technology in such forms as tangible hardware, software, electronic or hard copy technical documents or presentations, defense services, or anything else that may fall under control of the U.S. Munitions List for ITAR and the Commerce Control List for EAR. The federal regulations define the scope of this controlled technology and should always be the first source of information in assessing potential export of that technology to foreign nationals, along with technical assistance from the NESDIS engineers and scientists who have a greater understanding of the NESDIS technology that may be exported.

Written records should be maintained primarily by the exporter regarding the facts and POA and CTC recommendations for each export case for potential future audit purposes in NOAA or DOS or DOC, regardless of whether the export ultimately occurred or not. This is true even in cases when it was determined that the technology to be exported was not actually export controlled by ITAR or EAR, and it was ultimately exported based on that written assessment. The exporter, i.e., the individual who actually executes an export to a foreign national in this country or a foreign country, is ultimately responsible for complying with all federal export regulations and related NOAA policies and should take this responsibility seriously. Failure to follow regulations could result in large monetary fines or jail time for the exporter.

Note that NESDIS contract employees should coordinate with the relevant POA if they wish to export NOAA-related technical information or services, but any formal assessments of a contract employee's potential export of controlled technology and follow-on actions resulting from that assessment (e.g., obtaining licenses or exemptions) must generally be executed by the contractor and not NESDIS.

The general NESDIS assessment process steps are as follows:

- 1) The person wishing to export technology (the "export requester") submits in writing to the responsible POA in their office or center the following information:
 - a. a detailed description of the technology or defense services they wish to export, including the specific ITAR Munitions List category or EAR Export Control Classification Number (ECCN) if known,
 - b. a statement indicating that NOAA owns the technology and therefore has legal authority to release that technology to foreign nationals or the public,
 - c. nature of the export (permanent, temporary, third-party),
 - d. a statement validating that this technology that they wish to export or release to the public does not offer specific insight into the design, development, production, manufacturing or operation of an ITAR or EAR controlled item that might allow potential adversaries to replicate the item or exploit or defeat U.S. controlled technologies,
 - e. the foreign national(s) to whom they want to export the items or data, the Home Country of the foreign national(s), and their current residence,
 - f. what the foreign national or entity plans to do with the technical information or services once received,
 - g. a clear justification why the foreign person needs to know this information ("they asked for it" is an inadequate rationale),
 - h. the reason why this export action supports NOAA's mission and provides NOAA a clear benefit (e.g., it supports an existing formal NOAA international agreement with that foreign entity)
 - i. confirmation that the foreign national(s) or entity is not listed on the "Lists to Check." This is a multi-agency database containing individuals or companies for whom export privileges have been denied and is consolidated on the following link

- 2) The POA collects all the relevant facts and reviews this information in coordination with the requester and other knowledgeable engineers or scientists. The POA reviews the ITAR or EAR regulations, as appropriate, and other relevant supporting background information, including the existence of any formal NOAA intergovernmental agreements or contractor Technical Assistance Agreements with the foreign entity they wish to export to that might discuss technical data exchange authorities or restrictions. The POA and requester may want to determine if any of the information to export is already available in the public domain such as open literature or on the internet. In order to do this assessment, it may be necessary to contact the DOS/DDTC and/or DOC/BIS for additional guidance on the regulations and licensing processes or for a commodity jurisdiction request or a commodity classification request (see their web sites for contact information).
- 3) The POA assembles a brief written assessment report that summarizes the key facts and includes a recommendation about whether the information is believed to be controlled by federal regulations, which one and why, whether the technical data can be legitimately released to the public, or if a license to export to the foreign person is required. The POA forwards the draft assessment report to the NESDIS CTC and Deputy CTC for review and concurrence unless the case is straightforward and the assessment recommendation is clear to the POA.
- 4) The CTC and DCTC will review the draft report and provide the POA their concurrence or non-concurrence and any suggested follow-on actions or revisions. If the conclusions and recommendations are questionable or open to debate, they may forward the draft report to others in NESDIS, NOAA General Counsel, or in NOAA's Office of the CAO for additional internal review, or they may consult with DOS/DDTC or DOC/BIS for additional guidance.
- 5) Once the POA implements any requested revisions to the assessment report, and the CTC, DCTC, and other internal NOAA reviewers reach consensus on the assessment and recommendations, the vetted report is provided to the export requester by the POA.
- 6) The export requester decides, based on the NOAA recommendations in the report, if they will proceed with the export and any necessary follow-on actions (obtaining licenses, etc.). The requester makes the ultimate decision on how to proceed and is legally responsible for that action. The requester should maintain all relevant records for this case in the event that any future audit actions occur.

After following the above process, if there is a potential export case where NOAA technical data in either electronic or hard copy form is approved to be released to the public, it is a necessary pre-condition that all ITAR or EAR markings must be removed

from the entire document and the cover page must explicitly state that it has been reviewed and released by NOAA for unlimited public distribution, citing whatever exemptions or exceptions are being utilized. The government should inform the originating contractor who wrote the document, if applicable, that they have made a determination to export the technical data.

VII. Policy for Foreign National Guest Pre-approval Processing Timeliness

A NESDIS policy addressing foreign national guest pre-approval processing timeliness is necessary since the associated DOC and NOAA policies (DAO/NAO 207-12) have been frequently violated by NESDIS DSNs over the years. This refers to the existing DOC and NOAA policy whereby DSNs must submit to the NESDIS CTC all request forms (i.e., Endorsement Supplement Forms, ESFs, and Appendix B, required visit data to the Office of Security) for pre-approval of new FN guests or annual renewal of long-term FN guests at least 30 days in advance. Many forms are received by the CTC for processing and approval with start dates that are less than the required 30 days in advance, some even with start dates as short as a few days in advance, that then results in rush processing and inconvenience up the NESDIS, NOAA, and DOC approval chain.

It is understood that there are legitimate unusual or extenuating circumstances when the submission of late forms is necessary. These circumstances should be rare. In cases when there is a need for late submission of less than 30 days in advance, the DSN's forms will be processed and sent forward for signature approval by the CTC only in the following case:

- 1) the start or renewal date on the ESF is 15 or more days in advance of the date submitted to the CTC, AND
- 2) the forms are accompanied in the email with the DSN's explanation (not the POA's explanation) of why it is being submitted late, AND
- 3) the explanation is determined by the CTC to be satisfactory and justified (this does not include excuses such as "I forgot" or "I didn't plan ahead").

If the above three requirements are not satisfied, the submission will be rejected by the CTC and returned to the POA and DSN. In the case when no explanation was provided, the DSN may resubmit the forms with the explanation. If all three requirements are ultimately not met, the forms will be rejected, and the DSN may then resubmit the request with a new start date that meets NOAA policy, i.e., is submitted at least 30 days in advance of the start or renewal date.

If a DSN does not submit the renewal forms for a current FN guest the required number of days in advance and, as a result, that FN's previous approved annual period expires, the FN shall not be granted access by the DSN back into the NESDIS facility after the previously approved end date until the new renewal approvals are obtained AND after the new specified start date....whichever comes later. The way to avoid this unfortunate event is for the DSN to always submit the forms on time per defined policy.

Although it is the primary responsibility of the DSN, not the POA, to abide by the policy requirements for sponsoring foreign national guests, it is the responsibility of the POA to communicate any policy requirements derived from DAO/NAO 207-12, such as described herein, to the DSNs and to sensitize them to their responsibilities. The POAs must communicate this NESDIS policy to all the DSNs in their offices/centers/programs so that NESDIS can return to full compliance. It is always recommended that the DSN first submit the FN pre-approval forms to the POA for review before submitting them to the CTC so that the POA can assure that the forms are properly and completely filled out and to alleviate any additional delays when forms must be returned for revision by the CTC or NOAA OCAO.

VIII. Impacts of On-going Export Control Reform

As the U.S. government moves forward with EAR and ITAR export control reform across both the Commerce and State Departments, it is expected that there may be major changes in the classification and federal agency jurisdiction of weather satellites in particular. Although this should not alter the fundamental review and approval processes described above, these changes likely will impact the export controls placed on satellite technology and should be monitored over the coming months. Any such changes may require portions of this document be revised accordingly when the changes are formally implemented by the U.S. government.