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DEPARTMENT OF ENERGY

10 CFR Parts 710, 711, and 712

[Docket No. SO–RM–00–HRP]

RIN 1992–AA29

Human Reliability Program

AGENCY: Office of Security, Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE or Department) today is publishing a final rule to establish the Human Reliability Program. This rule consolidates the Personnel Security Assurance Program (PSAP) and Personnel Assurance Program (PAP) into a single program, which incorporates all the important facets of each into a coherent, comprehensive, and concise regulation. The PSAP was an access authorization program for individuals who applied for or occupied certain positions critical to the national security. The PSAP required an initial and annual supervisory review, medical assessment, management evaluation, and DOE personnel security review of all applicants or incumbents. The PAP was a nuclear explosive safety program for individuals who occupied positions that involved hands-on work with, or access to, nuclear explosives. The PAP used many of the same evaluations as the PSAP to ensure that employees assigned to nuclear explosive duties did not have a mental/personality disorder or physical condition that could result in an accidental or unauthorized detonation of nuclear explosives.

EFFECTIVE DATE: This rule is effective April 22, 2004.

FOR FURTHER INFORMATION CONTACT: Ms. Lynn Gebrowsky, Security Policy Staff, Office of Security, Department of Energy, 1000 Independence Avenue, SW., Washington, D.C., 20585, (301) 903–3200, or Mr. Charles Westfall, Office of Nuclear Weapons Surety, Department of Energy, 1000 Independence Avenue, SW., Washington, D.C. 20585, (301) 903–4051.

For information concerning Subpart B, Medical Standards, contact: Mr. Kenneth O. Matthews, Office of Health, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (301) 903–6398.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to the Atomic Energy Act of 1954 (the AEA), the DOE owns, leases, operates or supervises activities at facilities in various locations in the United States. Many of these facilities are involved in researching, testing, producing, disassembling, or transporting nuclear explosives, which, when combined with Department of Defense delivery systems, become nuclear weapons systems. These facilities are often involved in other activities that affect the national security. Compromise of these and other DOE facilities would severely damage national security. To guard against such compromise, DOE has implemented security and safety reliability programs designed to ensure that individuals who occupy positions affording unescorted access to certain materials, facilities, and programs meet the highest standards of reliability as well as physical and mental suitability.

In 1989, as part of its ongoing efforts to protect national security, DOE established regulations at 10 CFR part 710, subpart B, ''Criteria and Procedures for Establishment of the Personnel Security Assurance Program and Determinations of an Individual's Eligibility for Access to a Personnel Security Assurance Program Position.'' These Personnel Security Assurance Program (PSAP) regulations apply to individuals who occupy positions throughout the DOE complex that involve access to, or responsibility for, special nuclear material or who otherwise have the potential to cause unacceptable damage to national security. In 1998, DOE established regulations at 10 CFR part 711, ''Personnel Assurance Program (PAP).'' The PAP codified longstanding certification procedures for individuals who occupy positions that involve hands-on work with, or access to, nuclear explosives.

As the PSAP and PAP evolved, significant similarities developed in the objectives, requirements, and administration of the two programs. DOE has concluded that the monetary and time requirements of administering two very similar programs with similar goals, the protection of special nuclear material and nuclear explosives, could not be justified as consistent with good management practices when compared to the benefits of consolidation.

On July 17, 2002, DOE published a notice of proposed rulemaking (NOPR) to establish a Human Reliability Program (HRP) (67 FR 46912). Subpart A of the proposed rule contained the provisions that established the HRP and the HRP certification requirements, while Subpart B contained the medical standards provisions required for HRP certification. The NOPR proposed to establish a single unified HRP management structure that incorporated all of the important elements of the PSAP and PAP into one comprehensive regulation. By adopting a uniform set of requirements applicable to both PSAP and PAP employees, DOE has developed a stronger, more efficient, and more effective human reliability program for personnel who occupy these positions.

The HRP, published today as 10 CFR part 712, is designed to protect the national security through a system of continuous evaluation of individuals working in positions affording unescorted access to certain materials, facilities, and programs. The purpose of this continuous evaluation is to identify, in a timely manner, individuals whose judgment may be impaired by physical,

mental/personality disorders; the use of illegal drugs or the abuse of legal drugs or other substances; the abuse of alcohol; or any other condition or circumstance that may represent a reliability, safety, or security concern.

The HRP requires that all individuals who work in positions affording unescorted access to certain materials, facilities, and programs be certified as meeting the highest standards of reliability and physical, mental/personality suitability before such access may be granted. An individual's certification is subject to immediate review in the event that the individual's behavior indicates a reliability or security risk to nuclear explosive operations or national security. During the review the individual will be removed from assigned duties. This immediate removal is an interim, precautionary action and does not constitute a final determination of reliability or access authorization status. Individuals who are removed from HRP duties for reasons that are not related to security are entitled to resolve these issues through a formal procedure outlined in § 712.19 through § 712.23 of today's final rule. If the removal is based on a security concern, 10 CFR part 710, subpart A, provides procedures for resolving issues concerning eligibility for an access authorization. These regulations require that the individual be given a written statement of the issues, an opportunity to respond, including an opportunity for a hearing before a DOE Hearing Officer, and an opportunity to have the opinion of the hearing officer reviewed at a higher level before a final determination is made.

Most of the provisions of the HRP rule are taken directly from the PSAP and PAP regulations. However, the HRP rule has several new requirements applicable to all HRP positions and some new requirements for certain HRP positions. These include:

1. *Random alcohol testing for all individuals in HRP positions.* The decision by DOE to require random alcohol testing for all individuals in HRP positions is supported by scientific research that shows that cognitive and physical task performance decreases as a result of alcohol abuse (Hartwell *et al.*, ''Workplace alcohol testing programs: Prevalence and trends,'' *Monthly Labor Review,* V121, 1998; Mangione *et al.*, ''Employee drinking practices and work performance,'' *Journal of Studies on Alcohol,* V60, 1999; Ames *et al.*, ''The relationship of drinking and hangovers to workplace problems: An empirical study,'' *Journal of Studies on Alcohol* V58, 1997; Yesavage and Leirer, ''Hangover effects on aircraft pilots 14 hours after alcohol ingestion: A preliminary report,'' *American Journal of Psychiatry,* V143, 1986).

DOE believes that the misuse or abuse of alcohol represents a risk that is incompatible with the nature of work performed by individuals in HRP positions. DOE has a compelling interest in ensuring that individuals who hold HRP positions are functioning at the highest level of reliability because they have unescorted access to certain materials, facilities, and programs. This interest outweighs the diminished privacy expectations resulting from intrusions caused by a carefully tailored alcohol testing program. The government must ensure the unimpaired judgment of persons who perform hands-on work with, or have access to, nuclear explosives or have access to, or responsibility for, special nuclear material. It also must ensure that the persons charged with the security of these research and production facilities do not pose a risk to the life of the citizenry by the use of deadly force resulting from impaired perception or judgment.

The part of the HRP regulation pertaining to random alcohol testing is consistent with regulations of other Federal agencies charged with overseeing critical activities, and specifically the regulations of the Department of Transportation. On February 15, 1994, the Department of Transportation (DOT) operating agencies promulgated alcohol testing regulations for the aviation, motor carrier, rail, transit, and pipeline transportation industries. In the common preamble to those regulations, the operating agencies discussed the research regarding the effects of blood alcohol and recommendations of expert bodies, including the National Highway Traffic Safety Administration (NHTSA), the National Transportation Safety Board, the National Academy of Sciences, and the Transportation Research Board (59 FR 7302, 7318–19). DOT concluded, based on this body of research, that while impairment of performance of safety-sensitive functions clearly was increased above 0.04 percent blood alcohol concentration, there was evidence of some impairment at levels as low as 0.02, the lowest level that can be reliably measured. Alcohol affects individuals differently; indeed, even a minimal level of blood alcohol impairs some individuals. Based on this evidence, DOT adopted a standard that requires removal from a safety-sensitive position of an employee with an alcohol concentration of 0.02 percent or greater. The DOT regulations requiring random alcohol testing already apply to some DOE and contractor employees at certain sites.

The Nuclear Regulatory Commission (NRC) also considers the misuse of alcohol to be a serious and pervasive workplace problem (Barnes *et al.,* ''Fitness for Duty in the Nuclear Power Industry: A Review of Technical Issues,'' 1988, NUREG/CR–5227, U.S. Nuclear Regulatory Commission, Washington, D.C.; Moore *et al.*, ''Fitness for Duty in the Nuclear Power Industry: A Review of Technical Issues,'' 1989, NUREG/CR–5227, Supplement 1, U.S. Nuclear Regulatory Commission, Washington, DC). The NRC requires random alcohol testing in its fitness-for-duty program contained in 10 CFR part 26.

The job tasks performed by individuals in the HRP are equally or more sensitive than those performed by workers in the transportation and the nuclear power industries, and the HRP tasks have added security-sensitive elements. An individual in the HRP who misuses or abuses alcohol has the potential capability to (1) cause an accidental or unauthorized detonation of a nuclear explosive; (2) misuse deadly force in guarding or transporting special nuclear materials or nuclear weapons; (3) cause a criticality incident involving special nuclear material; or (4) misuse classified information. DOE believes that random alcohol testing will enhance the safety and reliability aspects of the HRP and deter the use of alcohol on the job, as well as during a period prior to reporting for work. Individuals in HRP positions also will be subject to testing if they are involved in an incident, unsafe practice, or occurrence as defined in § 712.3 of the regulation, or if there is reasonable suspicion that their judgment may be impaired.

2. *Eight-hour abstinence rule for alcohol.* In the past, individuals reporting for nuclear explosive duties under PAP have been prohibited from drinking alcohol during the eight hours before their work assignments. This eight-hour abstinence requirement is retained in the HRP for those employees and is now applicable to employees in specific positions to be designated by the National Nuclear Security Administration (NNSA) Administrator or his or her designee, or the appropriate Lead Program Secretarial Officer, or his or her designee or the Manager of the Chicago, Idaho, Oak Ridge, Richland, and Savannah River Operations Offices; Manager of the Rocky Flats Office; Manager of the Pittsburgh Naval Reactors Office and the

Schenectady Naval Reactors Office; Site Office Managers for Livermore, Los Alamos, Sandia, Y–12, Nevada, Pantex, Kansas City, and Savannah River; Director of the Service Center, Albuquerque; Assistant Deputy Administrator for the Office of Secure Transportation, Albuquerque; and for the Washington, DC area, the Director, Office of Security (hereinafter collectively referred to as the ''Manager'' in accordance with § 712.3 of the regulation). This abstinence requirement is in addition to the random alcohol testing requirement.

3. *Annual Submission of Questionnaire for National Security Positions (QNSP), Part 2.* Submission of this Questionnaire previously had been required only for participants in the PSAP DOE now has made this a requirement for all individuals in the HRP, thereby underscoring DOE's commitment to evaluating personnel security concerns. This annual requirement will assist in ensuring that HRP-certified individuals are reliable and trustworthy.

4. *Psychological evaluations.* This requirement previously was in effect only for PAP individuals and now is required for all HRP candidates and HRP-certified individuals. The psychological evaluation, as part of the overall medical assessment, addresses an individual's mental or behavioral state as it relates to security and safety concerns. This evaluation includes the completion of a psychological assessment (test) and a semi-structured interview with the Designated Psychologist, or a psychologist under his or her supervision. The psychologist conducting the semi-structured interview has the latitude to vary the focus and content of questions based on the results of the psychological test and/or the interviewee's response to certain questions. Through this evaluation process, an assessment is made of whether the individual shows at-risk behavior or conditions that raise a security concern or may impact the ability to perform his or her duties in a safe and reliable manner. Individuals will be subject to an initial psychological evaluation and annual evaluations thereafter. Every third year individuals in an HRP position will be required to take another psychological assessment (test). This process will assist medical personnel in their efforts to monitor participants and ensure that individuals in HRP positions are reliable and trustworthy.

5. *Counterintelligence polygraph examinations.* A counterintelligence-scope polygraph examination in accordance with DOE's Polygraph Examination Regulation, 10 CFR part 709, was required for individuals who occupied or applied for PAP and PSAP positions. HRP positions will continue to be subject to the requirements of 10 CFR part 709 and any subsequent revisions to that regulation. Refusal to submit to a polygraph examination will result in rejection of the initial application for, or removal from, an HRP position, consistent with procedures in 10 CFR part 709.

II. Discussion of Public Comments

DOE received a total of two hundred and twelve written comments and forty-one oral comments during public hearings held in Albuquerque, New Mexico, Livermore, California, Amarillo, Texas, and Oak Ridge, Tennessee. DOE has carefully considered all of these comments in preparing this final rule.

A. Section-by-Section Review and Discussion of Public Comments

Comments Regarding § 712.1 Purpose

A commenter questioned the use of ''facilities'' and ''programs'' without specific definitions of these terms. The Department disagrees that definitions are needed because these terms are commonly used throughout DOE.

The Department disagrees with a commenter's suggestion to replace the phrase ''or any other condition or circumstance that may be of a security or safety concern'' with ''* * * or by their personality or behavioral tendencies.'' As written, the text clearly conveys the intent of the rule and allows a broader assessment of individuals.

One commenter suggested adding the term ''quality'' when using the terms ''safety and security.'' The Department disagrees with this suggestion because it adds no clarity to the sentence.

Comments Regarding § 712.3 Definitions

A number of commenters raised issues pertaining to the definitions section. All definitions were reviewed and several were modified for clarification.

One commenter raised a question regarding the use of the Accelerated Access Authorization Program (AAAP) for HRP certification since it does not require a random alcohol test. The AAAP is a program for granting an interim access authorization and is not used for HRP certification purposes. Once individuals have successfully completed the AAAP, they are required to meet all of the HRP certification requirements including initial and random alcohol testing.

Several commenters suggested including the term ''special assembly'' in the phrase ''nuclear explosive and/or Category I SNM'' in paragraph (2) in the definition of *access* and throughout the text. The Department disagrees that adding this term would enhance the definition of *access*; the definition as proposed covers access to ''special assembly.''

A commenter indicated that the definition of *alcohol abuse* is overly broad. The Department disagrees with the commenter. The definition of alcohol abuse is derived from the scientific literature dealing with alcohol-related disorders.

Several commenters suggested changing the definition of *blood alcohol concentration* to indicate that it is measured as a percentage. The text has been modified to parallel the DOT definition of *alcohol concentration* set forth at 49 CFR 40.3.

Several other commenters noted that the definition of the *certifying official* was not consistent with the NNSA organizational structure. The Department concurs and the text has been changed to reflect the organizational structure.

One commenter suggested that as written, the definition of *Designated Psychologist* could include a licensed person with a master's or bachelor's degree. The Department concurs and has changed the text to better define the term.

Commenters suggested changing *HRP individual* to *HRP candidate.* The Department agrees this would clarify the meaning. The text has been changed.

One commenter proposed a less vague definition of *HRP management official.* The Department is not making this change because the current definition allows sites the flexibility to identify the most appropriate person to be responsible for the HRP.

Another commenter suggested revising the definition of *job task analysis* because the recommended process would be burdensome and require frequent updates. The Department has modified the text to better reflect the intent of the rule.

One commenter suggested adding additional examples for the definition of *occurrence.* The Department believes that the definition is appropriate as written and does not need additional examples.

Another commenter criticized the definition of *occurrence* claiming that it ''conflicts with itself.'' The Department believes that the definition is correct and covers the various aspects of an occurrence at its sites.

A commenter questioned the term ''national security protection significance'' in the definition of *occurrence* and asked for examples of this term as well as the definition of ''immediate'' under occurrence testing in § 712.15(d)(1). ''National security protection significance,'' also referred to as ''National Security Assets'' (*Safeguards and Security Glossary of Terms,* December 18, 1995), refers to nuclear weapons and their design, Category I quantities of special nuclear material, classified information, sensitive information, critical facilities, and valuable government property. The immediate reporting requirement is based on the criteria set forth in DOE M 232.1–1A, ''Occurrence Reporting and Processing of Operations Information.''

A commenter suggested adding a definition for *psychological assessment* or *test.* The Department concurs and has added new text to reflect this suggestion.

One commenter suggested, in addition to defining *random alcohol testing,* the regulations should include a definition for *annual unannounced testing.* The Department does not believe that a definition is needed. However, after reviewing the definition for *random alcohol testing* the Department has changed the text of the definition to better define the term and its requirements.

A commenter stated that the definition of *safety concern* is difficult to follow. The Department concurs and the text has been changed.

Another commenter suggested adding text to the *supervisor* definition to better define matrix management situations. The Department concurs with this suggestion and has modified the definition of *supervisor* to reflect the suggestion.

Several commenters suggested adding the word ''inclination'' to the definition for *reliability.* The Department disagrees with this suggestion because it does not enhance the current definition.

Comments Regarding § 712.10 Designation of HRP Positions

Several commenters contended the proposed provision on designation of HRP positions was ''broad and vague.'' The Department disagrees and believes that the description clearly identifies the HRP population.

Several commenters questioned why individuals having ''access to information/material regarding'' weapons of mass destruction were not included in the HRP. While the Department recognizes the importance of programs pertaining to weapons of mass destruction, it believes that it is not appropriate to expand the HRP beyond the current PAP and PSAP populations, because the purpose of this rulemaking is to combine two programs with similar administrative requirements into one stronger, more efficient and more effective program.

One commenter suggested designating positions with specific sigma levels as HRP positions. The Department disagrees with this suggestion and believes that the current position descriptions are appropriate as listed.

Several commenters suggested that, since the HRP is a fitness for duty program, the application of procedures and requirements should be graded based on the job task analysis. The Department disagrees with this suggestion. The HRP is not a fitness for duty program. It is a security/safety program which includes some aspects of fitness for duty.

One commenter suggested changes in the NNSA organizational structure make the job titles in the proposed rule incorrect. The text has been modified to address these changes.

Comments Regarding § 712.11 General Requirements of HRP Certification

One commenter asked why only security police officers could obtain a ''Q'' access authorization through the AAAP. The AAAP provision was incorporated into the PSAP to allow security police officers to assume their duties as soon as possible to enhance the physical security of the various DOE sites. The Department adopted the provision because of the urgent need for additional security police officers in the aftermath of the terrorist acts of September 11, 2001.

A number of commenters questioned the requirement for a counterintelligence polygraph examination in proposed § 712.11(a)(10). This requirement was mandated by Congress in the National Defense Authorization Act of 2000. In response to that legislation, DOE issued a Polygraph Examination Regulation (10 CFR part 709); DOE's Office of Counterintelligence is responsible for administering this requirement of the HRP.

A commenter questioned the need for the requirement in proposed § 712.11(a)(2) for providing selective service registration information within Part 2 of the Questionnaire for National Security Positions. This is a standard form used throughout the government. The Department cannot modify the form.

Other commenters questioned the omission of the flashback issue in proposed § 712.37 on evaluation for hallucinogen use. A new paragraph (b) has been added to § 712.37 to reflect this issue.

Several commenters questioned whether the proposed § 712.11(a)(9) random alcohol testing element of the HRP is necessary for security-related jobs. The Department recognizes that the consumption of alcohol is legal; however, the misuse and abuse of alcohol represent a risk that is incompatible with the nature of work performed by individuals in HRP positions. The Department believes that random alcohol testing will enhance the safety and reliability aspects of the HRP and deter the use of alcohol on the job as well as during the period immediately prior to reporting to work.

Other commenters questioned the appropriateness of adopting specific components of the DOT alcohol test regulation, 49 CFR part 40, including: breath alcohol technician training requirements, the NHTSA Conforming Products List of Evidential Breath Measurement Devices, the specifications for alcohol used to calibrate the testing equipment, and the EBT manufacturer quality assurance plan. Early in the process of developing proposed 10 CFR part 712 for the HRP, the Department made the decision to use the DOT Procedures for Transportation Workplace Drug and Alcohol Testing Program set forth at 49 CFR part 40 because this regulation has established proven procedures and is cost-effective for DOE to utilize since most facilities already have the trained technicians and equipment to perform the tests. After considering the public comments, the DOE affirms its decision to follow the DOT regulations for the reasons given above.

Several commenters suggested the use of alternative alcohol screening devices for initial screening, such as a saliva test strip. The Department does not agree with this suggestion and believes that the use of an evidential-grade breath alcohol device is the appropriate and industry accepted standard for evaluating alcohol concentrations.

One commenter suggested making the proposed random alcohol testing discretionary and using a ''for cause'' or ''reasonable suspicion'' standard. The Department disagrees with the suggestion and believes the procedure outlined in the proposed rule adequately addresses the concerns regarding alcohol testing. DOE believes that job tasks performed by individuals in the HRP are equally, or more safety-sensitive than those performed by workers in the transportation industry and the nuclear power industry. Therefore, it is appropriate that the DOE

regulations for alcohol testing be at least as stringent as the DOT and NRC regulations.

A commenter suggested adding the words ''safety'' and ''quality-reliability and assessing continuous suitability to the activity at hand'' to the general requirements for HRP certification. The Department agrees in part and has added ''safety'' to the certification text (§ 712.11(b)(1)). DOE does not believe the remaining suggested text is necessary programmatically or to improve upon the clarity of the proposed language, which is retained in today's rule.

Another commenter raised a question concerning the use of over-the-counter medications that contain alcohol. The proposed rule, § 712.11(d), did not differentiate between alcohol purchased for consumption and alcohol contained in over-the-counter medications for purposes of testing for alcohol use by individuals reporting for unscheduled nuclear explosive duties. Both can impair an individual's judgment and reliability while performing HRP duties. For this reason, DOE has not revised the final rule to differentiate over-the-counter medications containing alcohol.

A commenter suggested changing the text in proposed § 712.11(d) for the eight-hour abstinence requirement to include text that identifies individuals who may perform nuclear explosive duties on an irregular basis. The Department disagrees with this suggestion and believes the text as written provides appropriate guidance for all individuals performing nuclear explosive duties and is sufficient in describing this requirement.

Several commenters questioned the need for the eight-hour abstinence requirement. As explained in item 2 of the Background section, this requirement has always been a part of the PAP for individuals performing nuclear explosive duties. The requirement has been expanded to also include specific positions designated by the NNSA Administrator, the appropriate Lead Program Secretarial Office, or the Manager of the Chicago, Idaho, Oak Ridge, Richland, and Savannah River Operations Offices; Manager of the Rocky Flats Office; Manager of the Pittsburgh Naval Reactors Office and the Schenectady Naval Reactors Office; Site Office Managers for Livermore, Los Alamos, Sandia, Y–12, Nevada, Pantex, Kansas City, and Savannah River; Director of the Service Center, Albuquerque; Assistant Deputy Administrator for the Office of Secure Transportation, Albuquerque; and for the Washington, DC area, the Director, Office of Security. The Department believes the requirement (§ 712.11(d)), which affects only a small portion of the HRP population, is necessary to ensure the reliability of personnel in HRP position.

One commenter, who questioned the need for the eight-hour abstinence requirement, also objected to the proposed 0.02 blood alcohol levels (§ 712.11(c)). The commenter suggested DOE adopt the less stringent NRC Fitness for Duty Policy. The Department believes the HRP requirement is appropriate because HRP job requirements differ from those covered under the NRC rule.

One commenter questioned why the proposed unscheduled work and alcohol consumption provision, § 712.11(c), should apply to exempt workers attending to work responsibilities outside of normal work hours. This requirement, which was a requirement under PAP, applies to all workers performing nuclear explosive safety duties or those designated by the Manager, the NNSA Administrator, or Lead Program Secretarial Office. The sensitive nature of the work performed by individuals in these positions requires that exempt employees also be subject to the eight-hour abstinence provision.

Several commenters suggested removing the proposed unscheduled work reporting requirement in § 712.11(d). They claimed the requirement is ''unenforceable, impractical to implement, and only serves to agitate interpersonal relationships.'' The Department disagrees with this suggestion. This is a longstanding requirement for individuals performing nuclear explosive duties, and the Department believes that it is a valuable and essential component of the HRP.

One commenter, concerned about the 12-hour abstinence requirement, suggested it should be replaced by the former eight-hour standard. The proposed HRP regulations do not have a 12-hour abstinence requirement but rather an eight-hour abstinence requirement (§ 712.11(c)) as recommended by the commenter.

Another commenter suggested that an individual be allowed to obtain a confirming blood alcohol test in addition to the current testing procedure. The Department disagrees and believes the procedures in § 712.11(e), which conform to 49 CFR part 40, are appropriate.

A number of commenters questioned the lack of guidance in proposed §§ 712.11(e) and 712.15(c) concerning an individual who has a breath alcohol concentration of 0.02 percent or greater. The Department concurs and has added specific language in § 712.15(c)(3) to address these concerns.

A number of commenters questioned the 0.02 percent blood alcohol concentration limit in proposed §§ 712.11(e) and 712.15(c), and suggested that the level be increased to at least 0.04. The Department disagrees with this change and, as discussed in the Background section, this follows the DOT regulations. The Department believes that the 0.02 level of blood alcohol is appropriate. The rule has not been changed to adopt the commenters' suggestion.

One commenter contended that § 712.11(e) and § 712.15(d)(1) pertaining to ''occurrence testing,'' are redundant regarding testing for alcohol and/or drugs. The Department disagrees with this comment and points out that these two sections support each other regarding the procedures which would be followed and potential actions taken in occurrence testing situations.

Another commenter questioned the ''must'' requirement in proposed § 712.11(f) for alcohol/drug testing for any type of incident or unsafe practice. The Department concurs and has changed the text (replacing ''must'' with ''may'' in § 712.11(e)) to give greater flexibility to the sites.

A commenter asked whether individuals could be tested under the eight-hour requirement after stating they had not consumed alcohol. As § 712.11(d) makes clear, ''If they answer 'no,' they may perform their assigned duties but still may be tested.''

Comments Regarding § 712.12 HRP Implementation

A commenter criticized the extensive discussions of roles of numerous individuals, the lack of information for the HRP management official, and the incorrectness of the role of the Operations Office Managers. The Department has changed the text regarding Operations Office Managers to reflect the new NNSA organizational structure. In addition, the commenter noted that even if an organization performs all the tasks specified in the HRP it could still fail to identify potential security and safety risks. The commenter is correct. Even if all the HRP tasks are performed as required, the process still could fail. This is true for any program, and for this reason the Department has established specific objectives and requirements to help reduce the possibility of a failure. The key elements in the process are the individuals who work in HRP positions and their commitment to its success.

Another commenter stated that the role of the supervisor in the Supervisory Review section, proposed § 712.13, is unclear. The Department disagrees but has revised the text to describe the process more clearly.

One commenter questioned the omission of the role of the Deputy Administrator for Defense Programs, NNSA, regarding responsibility for nuclear materials at NNSA sites. The Deputy Administrator for Defense Programs has many responsibilities, which include the safety and security of nuclear materials at NNSA sites. The responsibilities identified in § 712.12, HRP Implementation, deal specifically with nuclear explosive duties and their requirements. The Department believes that text as written clearly identifies this specific requirement and does not need to be expanded.

A commenter suggested adding the term ''following temporary removal'' to clarify the HRP certifying official's responsibilities in § 712.12(g)(1). The Department concurs and the text has been changed.

Several comments were received regarding the requirement in proposed § 712.12(h)(2) for reporting prescription drugs and over-the-counter medication to only the Site Occupational Medical Director (SOMD). The text has been changed to allow this reporting requirement to include the Designated Physician and the Designated Psychologist. One commenter supported the proposed requirement that over-the-counter medications be reported; several others questioned the need for such a requirement. In addition, several commenters proposed that the individual's private physician provide such information. The Department does not believe that a person's private physician adequately knows and understands the individual's work requirements. Since the Designated Physician, the Designated Psychologist, or the SOMD can refer to the individual's job task analysis, a decision can be made based on a clear understanding of job requirements. Both prescription drugs and over-the-counter medications can affect an individual's judgment and reliability, and thus the Department believes this reporting is an important part of the HRP. It is not the intent of this rule to list categories or names of drugs that should be reported to the Designated Physician, the Designated Psychologist, or the SOMD. Common sense should be applied. Taking medications that can impact an individual's physical or mental capabilities (for example, those with instructions not to drive or operate motorized machinery) should be reported to the Designated Physician, the Designated Psychologist, or the SOMD. If an individual is unsure of possible side effects, he or she should consult with the Designated Physician, the Designated Psychologist, or the SOMD. Medications that do not have physical and/or mental side effects, such as medicated shampoos or dermatological ointments, would not be reportable.

One commenter objected to the proposed requirement in § 712.12(h)(4) to report another HRP-certified individual, specifically if they observe the individual purchasing, possessing, or using alcohol at any time. DOE believes that the text as written clearly indicates that this reporting requirement is based on the judgment of the individual observing the behavior. The purchase, possession, or use of alcohol is not a reportable issue. If, however, it is believed that the observed use is chronic and excessive, thereby indicating a reliability concern, then it should be reported to a supervisor and/or the Designated Physician, the Designated Psychologist, or the SOMD.

A commenter read the preamble to the notice of proposed rulemaking as not authorizing the HRP certifying official to temporarily remove an individual from an HRP position. The HRP certifying official does have this authority as stated in proposed § 712.12(g)(1). The commenter also suggested that the HRP certifying official temporarily remove individuals who have missed their recertification date. This is already addressed in proposed § 712.12(g)(4). If an individual fails to meet the 12-month recertification requirements, he or she is removed from the HRP. An exception is made if the personnel security element cannot resolve an issue within the 12-month requirement. New text has been added in § 712.11(a)(5)(i) to address this issue.

Another commenter suggested adding language that would require an individual to do a self-assessment of his or her ability to perform HRP duties. The Department agrees and has added text in § 712.12(h)(5) of this rule.

Comments Regarding § 712.13 Supervisory Review

A commenter stated that the supervisory review requirements in proposed § 712.13(b) and (c) should identify the types of security concerns the supervisor is expected to evaluate. The Department disagrees and believes the training requirement for supervisors will provide the necessary knowledge to address the security and safety issues outlined under the supervisory reviews.

One commenter suggested adding ''domestic violence'' and ''workplace incident leading to disciplinary action'' to the proposed list of reportable behaviors and conditions supervisors are required to report. The Department believes that these behaviors are covered in the existing examples listed in § 712.13(c). The list is not intended to be exhaustive or comprehensive.

Several commenters contended there was a need for greater clarity in proposed § 712.13(d)(2), authorizing ''temporary removal'' by the SOMD and the HRP-certifying official. The Department agrees and has added text allowing the Designated Physician and Designated Psychologist to recommend temporary removal of individuals from HRP positions. The HRP Certifying Official already has this authority so no new text was added.

A commenter questioned why § 712.13(e) applies only to Federal employees. Federal employees have a different set of rules relating to their removal or transfer. This section addresses this issue. The Department has added additional text to describe this requirement more accurately.

Another commenter stated that alcohol should be included in the list of concerns to be recognized and reported. The Department concurs and has added this language to the rule in § 712.13(f).

Comments Regarding § 712.14 Medical Assessment

A commenter noted that a Physician's Assistant (PA) and a Nurse Practitioner (NP) currently perform some medical evaluations and asked if they could conduct an HRP medical assessment. This is allowed in the HRP as long as the Designated Physician oversees the process and is responsible for signing the certification or recertification form.

One commenter questioned the utility of the job task analysis requirement in proposed § 712.14(e). The Department believes that this detailed information regarding an employee's job tasks is vital to the physician who is conducting the medical assessment, because it may have bearing on both physical and mental health status. The job task analysis also is a requirement in DOE Order 440.1A, ''Worker Protection Management for DOE Federal and Contractor Employees.''

One commenter raised the concern that the job task analysis does not take into consideration psychological factors such as mental stress, fatigue, or boredom. The Department disagrees and believes that the job task analysis as part of the medical assessment addresses this concern. Another commenter suggested replacing the term ''condition'' in

proposed § 712.14(a)(2) with ''demonstrates problems with reliability or judgment.'' The Department disagrees with this suggestion because the term ''condition'' in this context refers to a factor that restricts or modifies physical health, which includes one's psychological status. In addition, the term suggested already is part of the supervisory review process.

Another commenter asked what criteria the medical staff would use in applying proposed § 712.14(c) to determine if an individual represents a security concern. The criteria in 10 CFR 710.8 identify the following: An illness or mental condition, alcohol abuse or dependency, use or experimentation with drugs or other illegal substances, or unusual conduct which raises a question about an individual's judgment, reliability, and trustworthiness. These criteria and those listed in § 712.13(c) are the basis for a medical security concern.

One commenter suggested adding the phrase ''and other examiners working under the direction of the Designated Physician'' in proposed § 712.14(b)(2). The Department has incorporated the language in this section even though Subpart B, § 712.32(c) specifically provides that a portion of the assessment may be performed by another physician, a physician's assistant (PA), or nurse practitioner (NP).

A commenter suggested adding revealed substance abuse problems to the list of reasons in proposed § 712.14(b)(2) to conduct an intermediate medical evaluation. The Department believes the referral by management under § 712.14(b)(2)(ii) for a medical evaluation adequately covers this situation.

One commenter questioned the use of the term ''intermediate'' in proposed § 712.14(b)(2). The Department concurs and has omitted this term.

A commenter objected to the evaluation requirement in proposed § 712.14(d) of the medical assessment requirement, stating that such a requirement was in essence a ''fishing expedition.'' The Department disagrees with this characterization of the evaluation. The medical examination requirements clearly identify the areas that require assessment. The job task analysis provided to the Designated Physician/Designated Psychologist provides the framework for determining what conditions are significant to an individual's ability to perform work in a safe and secure manner. If a medical/psychological condition is believed to be clinically insignificant, then it is not an issue and would not be identified.

Several commenters requested guidance on what specific medical tests are required for the HRP medical assessment and for a clearance. In considering this comment, the Department referred to DOE Order 440.1A, ''Worker Protection Management for DOE Federal and Contractor Employees,'' which states under Employee Health Examinations: ''Health examinations shall be conducted * * * in accordance with current sound and acceptable medical practices.'' The minimum elements of a comprehensive medical evaluation are further described in DOE Guide 440.1–4 as a medical/occupational history, physical examination, laboratory studies, and review and evaluation of findings. The Department reviewed what current medical tests were routinely performed at the various DOE sites. The tests that are routinely performed are: complete blood count, blood chemistry, electrocardiogram, pulmonary function tests, urinalysis, vision, and hearing acuity. These should be the minimum for an HRP medical assessment. Additional tests such as a graded stress test may be performed at the physician's discretion. The tests listed above also may indicate a problem that is or may become a security concern as described in 10 CFR 710.8, *e.g.*, alcohol abuse or dependency and illegal substance use. DOE believes that it is inappropriate to specify in the regulation which medical tests should be performed because these are decisions best left to the physician's discretion.

A commenter suggested including text in proposed § 712.14(e) that would require the Designated Physician/Designated Psychologist to use the job task analysis when performing assessments. The Department believes that no change is needed because it is implicit in § 712.14(e) that the Designated Physician and Designated Psychologist must use the job task analysis in conducting the medical assessment and psychological evaluation.

A commenter suggested that language be incorporated in proposed § 712.14(f)(3) that would allow the testing portion of the psychological evaluation to be phased in within a three-year period. The Department agrees and has added appropriate text to the rule.

Another commenter questioned whether proposed § 712.14(h) would permit another health care provider, *i.e.*, Designated Physician, PA, or NP, to temporarily remove or restrict an individual. Section 712.14(h) has been modified to allow the Designated Physician and Designated Psychologist to recommend temporary removal or restrictions on an HRP-certified individual.

One commenter suggested changing the psychological assessment test requirement in proposed § 712.14(f)(3) from every three years to every five years. The Department disagrees with this suggestion. This three-year requirement was a PAP requirement and will be continued in the HRP.

A commenter questioned the use of the term ''certain circumstances'' in proposed § 712.14(g) pertaining to return to work after sick leave. The Department agrees those words are unnecessary and has removed them from the text.

A commenter requested proposed § 712.14(g) be clarified to specify which official could approve ''return to work.'' Text has been added that allows the Designated Physician, the Designated Psychologist, or the SOMD to perform this function.

Another commenter asked what other evaluations are the sole responsibility of the SOMD. The responsibilities of the SOMD are listed in subpart B, Medical Standards, § 712.34.

A commenter suggested changing the language in proposed § 712.14(j) regarding the medications and treatment section within the medical assessment to include changes in an existing medication regimen. The Department has not included the suggested language because the text as written clearly identifies the requirements.

Comments Regarding § 712.15 Management Evaluation

A commenter questioned whether the 0.02 percent or greater alcohol concentration requirement in proposed § 712.15(c) must be maintained at all times, such as ''midnight on Friday.'' The 0.02 percent alcohol concentration requirement is for any HRP-certified individual who is performing HRP duties during any work cycle.

One commenter raised a concern regarding requirements appearing in multiple sections. The Department does not believe this is a problem since each section defines the specific requirement for that section. The Department feels that combining all the requirements under just one section would increase the possibility of error and inconsistency.

Another commenter suggested deleting the terms ''incident'' and ''unsafe practice,'' in § 712.15(b), because the testing protocol in 10 CFR part 707 is referenced and those terms are not used in that part. The Department utilizes the testing protocol

set forth in 10 CFR part 707 but in proposed § 712.15(c) also requires testing when an HRP-certified individual is involved in an incident, unsafe practice, or occurrence, as defined in the regulation, or if there is a reasonable suspicion they may be impaired.

A commenter suggested adding text to proposed § 712.15(c) to indicate that the random unannounced testing would be conducted if necessary to achieve the requirement at least once in a 12-month period. The Department disagrees and believes the text as written clearly conveys the intent of the requirement.

One commenter raised a question regarding dual compliance issues between the HRP and DOT requirements. The Department does not believe a problem exists regarding dual compliance. The HRP requirements in proposed § 712.15(c)(2) regarding alcohol testing parallel the DOT requirements. In the event of a conflict between the two sets of requirements, the DOT regulation will take precedence.

A commenter questioned when the initial alcohol test is to be conducted (*e.g.*, prehire, during posthire processing, or prework). As clarified in § 712.15(c), the initial alcohol test for an individual coming into the HRP will be conducted during the individual's orientation into the HRP and prior to performing HRP duties.

Another commenter suggested requiring a preshift alcohol breath test. The Department does not agree and believes that the proposed testing requirement in § 712.15(c) allows ample latitude to address the circumstances under which testing should be conducted.

One commenter suggested that the word ''annual'' be included in the proposed alcohol testing requirement in § 712.15(c). The Department disagrees and notes that the requirement is once every 12 months.

A commenter suggested removing the text ''if involved in an incident, unsafe practice or occurrence, or based on reasonable suspicion'' from proposed § 712.15(c) and referencing sections (d) and (e) of this section. The Department disagrees with the proposed suggestion because it only identifies occurrence and reasonable suspicion and omits incident and unsafe practice, which also are reasons to test.

Several commenters questioned the two-hour time period allowed between notification and reporting for alcohol testing in proposed § 712.15(c)(3)(i) and provided information that showed if such an allowance was made, a person's blood alcohol level could fall below 0.02 percent in the interval. The commenters suggested that, for alcohol testing, the person should be required to report immediately to the testing facility. The Department is sensitive to the commenters' concern and notes that nothing prohibits a facility from having more stringent requirements. Text has been added to § 712.15(c)(3)(i) to allow facilities to establish a shorter time period from notification to testing. Such a requirement should be described in detail in the facility implementation plan.

Another commenter suggested removing the phrase ''or the individual's behavior creates the basis for reasonable suspicion'' from the occurrence testing provision in § 712.15(d) because this language appears in § 712.15(e) (Testing for reasonable suspicion). The Department concurs and the text has been changed.

A commenter questioned why proposed § 712.15(e)(1) required two or more supervisory or management officials for reasonable suspicion testing for alcohol when the DOT regulation requires only a single supervisor/manager. The Department is not bound to incorporate all aspects of the DOT regulation and believes that two or more supervisors/managers provide a greater degree of protection to management and even more importantly, to the individual. If an individual is subject to the DOT alcohol testing regulation, then DOT test procedures take precedence over the HRP regulation with respect to that individual.

One commenter questioned why the term ''in possession of'' was included in the proposed § 712.15(e)(2) reasonable suspicion text and again in the observable phenomena provision in § 712.15(e)(2)(i). The Department believes that the first part of the text identifies articulable belief, whereas the later reference identifies direct observation, which differs from beliefs that can be articulated.

Comments Regarding § 712.16 DOE Security Review

A commenter suggested adding text that would allow information from the personnel security file to be the basis for immediate removal if the information indicated a life-threatening risk. The Department believes that the proposed text in § 712.16(c) would allow the SOMD, the Designated Physician, or the Designated Psychologist to recommend removal of an individual who may pose a life-threatening risk to themselves or others as determined either through the medical assessment or on the basis of information received from DOE personnel security.

Comments Regarding § 712.17 Instructional Requirements

A commenter suggested that non-HRP-certified supervisors and managers also be required to receive appropriate training in the HRP. The Department concurs and has added appropriate text to the proposed § 712.17(a)(1).

One commenter asked if a reasonable suspicion component would be a part of the proposed behavioral training requirement in § 712.17(b)(1) as it relates to alcohol and controlled substance use. These elements will be part of the overall training requirement.

Another commenter suggested changing the text ''HRP medical personnel'' in proposed § 712.17(a)(2) to allow more flexibility. The Department disagrees and believes the text clearly identifies the appropriate personnel and allows flexibility in accomplishing the objective.

A commenter suggested adding additional text to the program training elements in proposed § 712.17(b) to allow for more flexibility. The Department concurs and has added text to reflect this change.

Comments Regarding § 712.18 Transferring HRP Certification

A commenter suggested changing the requirement in proposed § 712.18(b)(3) pertaining to transferring an HRP certificate requirement to allow the new site flexibility regarding the initial approval date. The Department concurs and the text has been modified.

Another commenter questioned language in proposed § 712.18(a) regarding the transfer of an HRP certification, indicating that as written it implied an individual could initiate a transfer request. The Department concurs and has modified the text.

One commenter questioned why proposed § 712.18(b) did not mention the personnel security process in connection with transferring an HRP certification. The Department did not include this in the HRP rule because transferring an HRP certification is a separate process from transferring an access authorization.

Comments Regarding § 712.19 Removal From HRP

A commenter suggested adding a new section that addresses immediate removal from HRP duties at the request of the HRP certifying official. The Department agrees that a supervisor must remove an HRP-certified individual immediately when requested by the HRP certifying official, and language has been added to § 712.19(a) to make this clear.

One commenter suggested changing the proposed text in § 712.19(a)(3) to delay the 24-hour written notification to an individual to be removed from HRP duties if the notification could have a negative impact on a psychiatric or medical condition. The Department is confident responsible officials will implement the requirements with appropriate sensitivity to the individual while simultaneously meeting DOE requirements.

Another commenter contended that the proposed provisions, §§ 712.19(a) and (c), respectively, prescribing supervisory and HRP management responsibilities in removal situations did not clearly provide for an evaluation and determination of the individual's reliability. The Department disagrees, and declines to adopt the alternative text proposed by the commenter.

Comments Regarding § 712.32 Designated Physician

Several commenters stated that it was not clear which other qualified personnel could perform parts of the medical assessment and that no clear guidelines existed for a PA and NP. The Department believes the proposed text in § 712.32(c) clearly allows the Designated Physician to utilize both PAs and NPs to conduct parts of the medical assessment. It is the responsibility of the Designated Physician to supervise the evaluation process, interpret the medical test results, and indicate if the individual is medically qualified to perform his or her HRP duties.

One commenter requested clarification of the requirement in proposed § 712.32(b)(4) regarding the Designated Physician's eligibility for a DOE access authorization. The Department does not require the Designated Physician to have an access authorization, but only to be eligible for an access authorization if one is required.

Comments Regarding § 712.34 Site Occupational Medical Director

Several commenters questioned the utility of the proposed requirement in § 712.34(b) for the SOMD to submit a renomination report biennially through the Manager to the Deputy Assistant Secretary for Health evaluating the performance of Designated Physician and Designated Psychologist and asked for more information regarding the proposed report's content. The Department believes these reports will be an important aspect of the medical assessment process and will provide needed information regarding the effectiveness of the various components of the medical assessment. The Office of Health will be responsible for detailing the specific content of these reports.

Comments Regarding § 712.35 Deputy Assistant Secretary for Health

One commenter suggested that greater detail regarding the responsibilities of the Deputy Assistant Secretary for Health be incorporated into the rule. The Department disagrees and believes the proposed rule allows the latitude needed to develop appropriate policies and standards for the medical assessment.

Comments Regarding § 712.36 Medical Assessment Process

A commenter recommended modifying proposed § 712.36(d)(4) to reference the types of behavior or conditions enumerated in proposed § 712.13(c), which a supervisor must report following the annual evaluation of an HRP-certified individual, as reasons for conducting additional psychological or psychiatric evaluations. The Department concurs and the text has been modified to reflect this change.

One commenter asked whether proposed § 712.36(e) would permit a PA or NP to recommend a return-to-work and work accommodations. The rule does not give a PA or NP this responsibility.

Several commenters requested the disqualifying conditions, including criteria necessary for judgment determinations, be listed and defined. The Department disagrees and notes that under § 712.36(h) disqualifying conditions are based on the job task, fitness-for-duty requirements, and the Designated Physician's medical judgment relating to the physical and mental capabilities necessary to successfully perform required work.

A commenter asked if the HRP certification process would be suspended under proposed § 712.36(h) if the required documentation is not provided. The Department affirms that if the required medical documentation is not provided, the HRP process will be suspended until the documentation is provided.

B. Other Public Comments

DOE also received several general comments that did not address any specific sections of the NOPR. These are discussed below.

One commenter raised a question regarding the costs involved in the additional testing requirements. The Department recognizes that these new requirements have additional costs; however these costs are minimal because many of the requirements already are in place or in some cases are currently required for other programs.

We agree with the comment expressing concerns regarding the use of the ''term emotional and mental disorders'' and have substituted the term ''mental/personality disorder'' in the final rule.

Another commenter suggested that the regulation should contain procedures similar to the PAP regulation permitting an HRP-certified individual to request a medical assessment (i.e., self-referral). Text has been added at § 712.12(h)(5) to include this requirement.

A commenter asked whether being under the influence of alcohol would be treated differently than being under the influence of an illegal drug. Being under the influence of alcohol will be treated differently than being under the influence of an illegal drug or other substance. The consequences are described in the applicable subject sections.

A commenter asked if individuals who currently are in a PAP or PSAP position will be grandfathered into the HRP. Appropriate text has been added in § 712.2 to reflect that individuals who currently are in a PAP or PSAP position will be grandfathered into the HRP.

A commenter raised the question of how to measure the effectiveness of the HRP. DOE will measure the effectiveness of the HRP through site evaluations and continuous monitoring of the program elements.

One commenter questioned the use of the term ''impairment'' in relation to alcohol testing. The Department believes the term ''impairment,'' defined in § 712.3 as a decrease in functional capacity of a person, is an appropriate term.

A commenter asked what psychological and physiological indicators the medical staff would monitor. These indicators include, but are not limited to, the behaviors and conditions listed in § 712.13(c), and the psychological test and interview and the medical evaluation criteria in § 712.14(d) for determining overall health.

III. Regulatory Review

A. Executive Order 12866

Executive Order 12866, 58 FR 51735 (October 4, 1993) provides for a review by the Office of Information and Regulatory Affairs in the Office of Management and Budget of a ''significant regulatory action.'' This rule (10 CFR part 712) has been determined not to be a significant regulatory action. Accordingly, this rule

has not been reviewed by the Office of Information and Regulatory Affairs.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires preparation of an initial regulatory flexibility analysis for every rule that must be proposed for public comment, unless the agency certifies that the rule 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. This rule does not directly regulate small businesses or small governmental entities. It applies principally to individuals who are employees of, or applicants for employment by, some of DOE's prime contractors, which are large businesses. There may be some affected small businesses that are subcontractors, but the rule will not impose unallowable costs. Accordingly, DOE certifies that the rule will not have a significant economic impact on a substantial number of small entities.

C. National Environmental Policy Act

The rule, which consolidates the PAP and PSAP, relates to personnel qualifications that have no impact on the environment. DOE has determined that this rule is covered under the Categorical Exclusion in DOE's National Environmental Policy Act regulations in paragraph A.6 of Appendix A to subpart D, 10 CFR part 1021, which applies to rulemakings that are strictly procedural. Accordingly, neither an environmental assessment nor an environmental impact statement has been prepared.

D. Paperwork Reduction Act

DOE has determined that the rule does not contain any new or amended record keeping, reporting or application requirements, or any other type of information collection requirements that require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* The OMB has defined the term ''information'' to exclude certifications, consents, and acknowledgments that entail only minimal burden [5 CFR 1320.3 (h)(1)].

E. Executive Order 13132

Executive Order 13132, 64 FR 43255 (August 10, 1999), requires agencies to develop an accountable process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have ''federalism implications.'' Policies that have federalism implications are defined in the Executive Order to include regulations that have ''substantial direct effects 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.'' 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 this rule and determined that it 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.

F. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531 *et seq.*, requires a Federal agency to perform a detailed assessment of the costs and benefits of any rule imposing a Federal mandate with costs to state, local, or tribal governments, or to the private sector of $100 million or more. The rule does not impose a Federal mandate requiring preparation of an assessment under the Unfunded Mandates Reform Act of 1995.

G. Executive Order 12988

Section 3(a) of Executive Order 12988, 61 FR 4729 (February 7, 1996) imposes on executive 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 Executive Order 12988 specifically requires that executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

H. Executive Order 13084

Under Executive Order 13084, 63 FR 27655 (May 19, 1998), DOE may not issue a discretionary rule that significantly or uniquely affects Indian tribal governments and imposes substantial direct compliance costs. This rule does not have such effects. Accordingly, Executive Order 13084 does not apply.

I. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act of 1999, (Pub. L. No. 105–277), requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. This rule will have no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has not prepared a Family Policymaking Assessment.

J. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) requires Federal agencies to prepare and submit to the Office of

Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

L. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this notice. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 801(2).

List of Subjects

10 CFR Part 710

Administrative practice and procedures, Classified information, Government contracts, Government employees, and Nuclear materials.

10 CFR Part 711

Administrative practice and procedure, Alcohol abuse, Drug abuse, Government contracts, Government employees, Nuclear safety, Occupational safety and health.

10 CFR Part 712

Administrative practice and procedure, Alcohol abuse, Drug abuse, Government contracts, Government employees, Health, National security, Nuclear safety, Occupational safety and health, Personnel security, and Security concerns.

Issued in Washington, DC, on January 13, 2004.

Spencer Abraham,

Secretary of Energy.

■ For the reasons stated in the preamble, the DOE hereby amends Chapter III of Title 10 of the Code of Federal Regulations as set forth below:

PART 710—CRITERIA AND PROCEDURES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED MATTER OR SPECIAL NUCLEAR MATERIAL

■ 1. The authority citation for part 710 is revised to read as follows:

Authority: 42 U.S.C. 7101, *et seq.*; 50 U.S.C. 2401, *et seq.*; Pub. L. 83–703, sec. 141, 68 Stat 940, as amended (42 U.S.C. 2161); Pub. L. 83–703, sec. 145, 68 Stat 942, as amended (42 U.S.C. 2165); Pub. L. 83–703, sec. 161, 68 Stat 948, as amended (42 U.S.C. 2201); E.O. 10450, 3 CFR 1949–1953 comp., p. 936, as amended; E.O. 10865, 3 CFR 1959–1963 comp., p. 398, as amended, 3 CFR Chap. IV; E.O. 12958, 3 CFR 1995, comp., p. 333; E.O. 12968, 3 CFR 1995, comp., p. 391.

Subpart B—[Removed]

■ 2. Subpart B of 10 CFR part 710, is removed.

PART 711—PERSONNEL ASSURANCE PROGRAM

■ 3. The authority citation for part 711 continues to read as follows:

Authority: 42 U.S.C. 2201(p), 7191.

■ 4. Part 711 is removed.

■ 5. Part 712, Human Reliability Program is added to read as follows:

PART 712—HUMAN RELIABILITY PROGRAM

Subpart A—Establishment of and Procedures for the Human Reliability Program

General Provisions

Sec.

Procedures

Subpart B—Medical Standards

Authority: 42 U.S.C. 2165; 42 U.S.C. 2201; 42 U.S.C. 5814–5815; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*; E.O. 10450, 3 CFR 1949–1953 Comp., p. 936, as amended; E.O. 10865, 3 CFR 1959–1963 Comp., p. 398, as amended; 3 CFR Chap. IV.

Subpart A—Establishment of and Procedures for the Human Reliability Program

General Provisions

§ 712.1 Purpose.

This part establishes the policies and procedures for a Human Reliability Program (HRP) in the Department of Energy (DOE), including the National Nuclear Security Administration (NNSA). The HRP is a security and safety reliability program designed to ensure that individuals who occupy positions affording access to certain materials, nuclear explosive devices, facilities, and programs meet the highest standards of reliability and physical and mental suitability. This objective is accomplished under this part through a system of continuous evaluation that identifies individuals whose judgment and reliability may be impaired by physical or mental/personality disorders, alcohol abuse, use of illegal drugs or the abuse of legal drugs or other substances, or any other condition or circumstance that may be of a security or safety concern.

§ 712.2 Applicability.

The HRP applies to all applicants for, or current employees of DOE or a DOE contractor or subcontractor in a position defined or designated under § 712.10 of this subpart as an HRP position. Individuals currently in a Personnel Assurance Program or Personnel Security Assurance Program position will be grandfathered into the HRP.

§ 712.3 Definitions.

The following definitions are used in this part:

Accelerated Access Authorization Program means the DOE program for granting interim access to classified matter and special nuclear material based on a drug test, a National Agency Check, a psychological assessment, a counterintelligence-scope polygraph examination in accordance with 10 CFR part 709, and a review of the applicant's completed ''Questionnaire for National Security Positions'' (Standard Form 86).

Access means:

(1) A situation that may provide an individual proximity to or control over

Category I special nuclear material (SNM); or

(2) The proximity to a nuclear explosive and/or Category I SNM that allows the opportunity to divert, steal, tamper with, and/or damage the nuclear explosive or material in spite of any controls that have been established to prevent such unauthorized actions.

Alcohol means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohol.

Alcohol abuse means consumption of any beverage, mixture, or preparation, including any medication containing alcohol that results in impaired social or occupational functioning.

Alcohol concentration means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test.

Alcohol use disorder means a maladaptive pattern in which a person's intake of alcohol is great enough to damage or adversely affect physical or mental health or personal, social, or occupational function; or when alcohol has become a prerequisite to normal function.

Certification means the formal action the HRP certifying official takes that permits an individual to perform HRP duties after it is determined that the individual meets the requirements for certification under this part.

Contractor means subcontractors at all tiers and any industrial, educational, commercial, or other entity, grantee, or licensee, including an employee that has executed an agreement with the Federal government for the purpose of performing under a contract, license, or other arrangement.

Deputy Assistant Secretary for Health means the DOE individual with responsibility for policy and quality assurance for DOE occupational medical programs.

Designated Physician means a licensed doctor of medicine or osteopathy who has been nominated by the Site Occupational Medical Director (SOMD) and approved by the Manager or designee, with the concurrence of the Deputy Assistant Secretary for Health, to provide professional expertise in occupational medicine for the HRP.

Designated Psychologist means a licensed Ph.D., or Psy.D., in clinical psychology who has been nominated by the SOMD and approved by the Manager or designee, with the concurrence of the Deputy Assistant Secretary for Health, to provide professional expertise in the area of psychological assessment for the HRP.

Diagnostic and Statistical Manual of Mental Disorders means the current version of the American Psychiatric Association's manual containing definitions of psychiatric terms and diagnostic criteria of mental disorders.

Drug abuse means use of an illegal drug or misuse of legal drugs.

Evidential-grade breath alcohol device means a device that conforms to the model standards for an evidential breath-testing device as listed on the Conforming Products List of Evidential Breath Measurement Devices published by the National Highway Traffic Safety Administration (NHTSA).

Flashback means an involuntary, spontaneous recurrence of some aspect of a hallucinatory experience or perceptual distortion that occurs long after taking the hallucinogen that produced the original effect; also referred to as hallucinogen persisting perception disorder.

Hallucinogen means a drug or substance that produces hallucinations, distortions in perception of sights and sounds, and disturbances in emotion, judgment, and memory.

HRP candidate means an individual being considered for assignment to an HRP position.

HRP-certified individual means an individual who has successfully completed the HRP requirements.

HRP certifying official means the Manager or the Manager's designee who certifies, recertifies, temporarily removes, reviews the circumstances of an individual's removal from an HRP position, and directs reinstatement.

HRP management official means an individual designated by the DOE or a DOE contractor, as appropriate, who has programmatic responsibility for HRP positions.

Illegal drug means a controlled substance, as specified in Schedules I through V of the Controlled Substances Act, 21 U.S.C. 811 and 812; the term does not apply to the use of a controlled substance in accordance with the terms of a valid prescription, or other uses authorized by Federal law.

Impaired or impairment means a decrease in functional capacity of a person that is caused by a physical, mental, emotional, substance abuse, or behavioral disorder.

Incident means an unplanned, undesired event that interrupts the completion of an activity and that may include property damage or injury.

Job task analysis means the formal process of defining the requirements of a position and identifying the knowledge, skills, and abilities necessary to effectively perform the duties of the position.

Manager means the Manager of the Chicago, Idaho, Oak Ridge, Richland, and Savannah River Operations Offices; Manager of the Rocky Flats Office; Manager of the Pittsburgh Naval Reactors Office and the Schenectady Naval Reactors Office; Site Office Managers for Livermore, Los Alamos, Sandia, Y–12, Nevada, Pantex, Kansas City, and Savannah River; Director of the Service Center, Albuquerque; Assistant Deputy Administrator for the Office of Secure Transportation, Albuquerque; and for the Washington, DC area, the Director, Office of Security.

Material access area means a type of Security Area that is authorized to contain a Category I quantity of special nuclear material and that has specifically defined physical barriers, is located within a Protected Area, and is subject to specific access controls.

Medical assessment means an evaluation of an HRP candidate and HRP-certified individual's present health status and health risk factors by means of:

(1) Medical history review;

(2) Job task analysis;

(3) Physical examination;

(4) Appropriate laboratory tests and measurements; and

(5) Appropriate psychological and psychiatric evaluations.

Nuclear explosive means an assembly of fissionable and/or fusionable materials and main charge high explosive parts or propellants that is capable of producing a nuclear detonation.

Nuclear explosive duties means work assignments that allow custody of a nuclear explosive or access to a nuclear explosive device or area.

Occurrence means any event or incident that is a deviation from the planned or expected behavior or course of events in connection with any DOE or DOE-controlled operation if the deviation has environmental, public health and safety, or national security protection significance, including (but not limited to) incidents involving:

(1) Injury or fatality to any person involving actions of a DOE employee or contractor employee;

(2) An explosion, fire, spread of radioactive material, personal injury or death, or damage to property that involves nuclear explosives under DOE jurisdiction;

(3) Accidental release of pollutants that results from, or could result in, a significant effect on the public or environment; or

(4) Accidental release of radioactive material above regulatory limits.

Psychological assessment or test means a scientifically validated instrument designed to detect psychiatric, personality, and behavioral

tendencies that would indicate problems with reliability and judgment.

Random alcohol testing means the unscheduled, unannounced alcohol testing of randomly selected employees by a process designed to ensure that selections are made in a nondiscriminatory manner.

Random drug testing means the unscheduled, unannounced drug testing of randomly selected employees by a process designed to ensure that selections are made in a nondiscriminatory manner.

Reasonable suspicion means a suspicion based on an articulable belief that an individual uses illegal drugs or is under the influence of alcohol, drawn from reasonable inferences from particular facts, as detailed further in part 707 of this title.

Recertification means the formal action the HRP certifying official takes annually, not to exceed 12 months, that permits an employee to remain in the HRP and perform HRP duties.

Reinstatement means the action the HRP certifying official takes after it has been determined that an employee who has been temporarily removed from the HRP meets the certification requirements of this part and can be returned to HRP duties.

Reliability means an individual's ability to adhere to security and safety rules and regulations.

Safety concern means any condition, practice, or violation that causes a substantial probability of physical harm, property loss, and/or environmental impact.

Security concern means the presence of information regarding an individual applying for or holding an HRP position that may be considered derogatory under the criteria listed in 10 CFR part 710, subpart A.

Semi-structured interview means an interview by a Designated Psychologist, or a psychologist under his or her supervision, who has the latitude to vary the focus and content of the questions depending on the interviewee's responses.

Site Occupational Medical Director (SOMD) means the physician responsible for the overall direction and operation of the occupational medical program at a particular site.

Supervisor means the individual who has oversight and organizational responsibility for a person holding an HRP position, and whose duties include evaluating the behavior and performance of the HRP-certified individual.

Transfer means an HRP-certified individual moving from one site to another site.

Unacceptable damage means an incident that could result in a nuclear detonation; high-explosive detonation or deflagration from a nuclear explosive; the diversion, misuse, or removal of Category I special nuclear material; or an interruption of nuclear explosive operations with a significant impact on national security.

Unsafe practice means either a human action departing from prescribed hazard controls or job procedures or practices, or an action causing a person unnecessary exposure to a hazard.

Procedures

§ 712.10 Designation of HRP positions.

(a) HRP certification is required for each individual assigned to, or applying for, a position that:

(1) Affords access to Category I SNM or has responsibility for transportation or protection of Category I quantities of SNM;

(2) Involves nuclear explosive duties or has responsibility for working with, protecting, or transporting nuclear explosives, nuclear devices, or selected components;

(3) Affords access to information concerning vulnerabilities in protective systems when transporting nuclear explosives, nuclear devices, selected components, or Category I quantities of SNM; or

(4) Is not included in paragraphs (a)(1) through (3) of this section but affords the potential to significantly impact national security or cause unacceptable damage and is approved pursuant to paragraph (b) of this section.

(b) The Manager or the HRP management official may nominate positions for the HRP that are not specified in paragraphs (a)(1) through (3) of this section or that have not previously been designated HRP positions. All such nominations must be submitted to and approved by either the NNSA Administrator, his or her designee, the Director, Office of Security, or the appropriate Lead Program Secretarial Officer, or his or her designee.

(c) Before nominating a position for designation as an HRP position, the Manager or the HRP management official must analyze the risks the position poses for the particular operational program. If the analysis shows that more restrictive physical, administrative, or other controls could be implemented that would prevent the position from being designated an HRP position, those controls will be implemented, if practicable.

(d) Nothing in this part prohibits contractors from establishing stricter employment standards for individuals who are nominated to DOE for certification or recertification in the HRP.

§ 712.11 General requirements for HRP certification.

(a) The following certification requirements apply to each individual applying for or in an HRP position:

(1) A DOE ''Q'' access authorization based on a background investigation, except for security police officers who have been granted an interim ''Q'' through the Accelerated Access Authorization Program;

(2) The annual submission of SF–86, OMB Control No. 3206–0007, Questionnaire for National Security Positions, Part 2, and an annual review of the personnel security file;

(3) Signed releases, acknowledgments, and waivers to participate in the HRP on forms provided by DOE;

(4) Completion of initial and annual HRP instruction as provided in § 712.17;

(5) Successful completion of an initial and annual supervisory review, medical assessment, management evaluation, and a DOE personnel security review for certification and recertification in accordance with this part. With respect to the DOE personnel security review:

(i) If the DOE personnel security review is not completed within the 12-month time period and the individual's access authorization is not suspended, the HRP certification form shall be forwarded to the HRP certifying official for recertification or temporary removal, contingent upon a favorable security review;

(ii) If a final determination has been made by DOE personnel security that is favorable, this information shall be forwarded to the HRP certifying official and so noted on the certification form; or

(iii) If the final determination has been made by DOE personnel security that the access authorization has been suspended, the individual shall be immediately removed from the HRP position, the HRP certifying official notified, the information noted on the certification form, and the procedures outlined in 10 CFR part 710, subpart A, shall be followed.

(6) No use of any hallucinogen in the preceding five years and no experience of flashback resulting from the use of any hallucinogen more than five years before applying for certification or recertification;

(7) A psychological evaluation consisting of a generally accepted psychological assessment (test) and a semi-structured interview;

(8) An initial drug test and random drug tests for the use of illegal drugs at

least once each 12 months in accordance with DOE policies implementing Executive Order 12564 or the relevant provisions of 10 CFR part 707 for DOE contractors, and DOE Order 3792.3, ''Drug-Free Federal Workplace Testing Implementation Program,'' for DOE employees;

(9) An initial alcohol test and random alcohol tests at least once each 12 months using an evidential-grade breath alcohol device, as listed without asterisks on the Conforming Products List of Evidential Breath Measurement Devices published by the NHTSA (49 CFR part 40); and

(10) Successful completion of a counterintelligence evaluation, which includes a counterintelligence-scope polygraph examination in accordance with DOE's Polygraph Examination Regulation, 10 CFR part 709, and any subsequent revisions to that regulation.

(b) Each HRP candidate must be certified in the HRP before being assigned to HRP duties and must be recertified annually, not to exceed 12 months between recertifications. For certification:

(1) Individuals in newly identified HRP positions must immediately sign the releases, acknowledgments, and waivers to participate in the HRP and complete initial instruction on the importance of security, safety, reliability, and suitability. If these requirements are not met, the individual must be removed from the HRP position.

(2) All remaining HRP requirements listed in paragraph (a) of this section must be completed in an expedited manner.

(c) Alcohol consumption is prohibited within an eight-hour period preceding scheduled work for individuals performing nuclear explosive duties and for individuals in specific positions designated by either the Manager, the NNSA Administrator, his or her designee, or the appropriate Lead Program Secretarial Officer, or his or her designee.

(d) Individuals reporting for unscheduled nuclear explosive duties and those specific positions designated by either the Manager, the NNSA Administrator or his or her designee, or the appropriate Lead Program Secretarial Officer, or his or her designee, will be asked prior to performing any type of work if they have consumed alcohol within the preceding eight-hour period. If they answer ''no,'' they may perform their assigned duties but still may be tested.

(e) HRP-certified individuals may be tested for alcohol and/or drugs in accordance with § 712.15(b), (c), (d) and (e) if they are involved in an incident, unsafe practice, or an occurrence, or if there is reasonable suspicion that they may be impaired.

§ 712.12 HRP implementation.

(a) The implementation of the HRP is the responsibility of the appropriate Manager or his or her designee. The Manager or designee must fully implement the HRP by April 22, 2004.

(b) The HRP Management Official must:

(1) Prepare an initial HRP implementation plan and submit it by March 23, 2004, to the applicable Manager for review and site approval. The implementation plan must:

(i) Be reviewed and updated every two years;

(ii) Include the four annual components of the HRP process: supervisory review, medical assessment, management evaluation (which includes random drug and alcohol testing), and a DOE personnel security determination; and

(iii) Include the HRP instruction and education component described in § 712.17 of this part.

(2) Approve the temporary removal and the reinstatement after temporary removal of an HRP-certified individual if the removal was based on a nonsecurity concern and the HRP-certified individual continues to meet the certification requirements and notify the HRP certifying official of these actions.

(c) The Deputy Administrator for Defense Programs, NNSA must:

(1) Provide advice and assistance to the Director, Office of Security, regarding policies, standards, and guidance for all nuclear explosive duty requirements; and

(2) Be responsible for implementation of all nuclear explosive duty safety requirements.

(d) The DOE Deputy Secretary, based on a recommendation of the Director, Office of Security, makes the final decision for any appeal of denial or revocation of certification or recertification from HRP.

(e) The Director, Security Policy Staff, within the Office of Security, is responsible for HRP policy and must:

(1) Ensure consistency of the HRP throughout the DOE and NNSA;

(2) Review and comment on all HRP implementation plans to ensure consistency with policy; and

(3) Provide policies and guidance, including instructional materials, to NNSA and non-NNSA field elements concerning the HRP, as appropriate.

(f) The Manager must:

(1) Review and approve the HRP implementation plan for sites/facilities under their cognizance and forward the plan to the Director, Security Policy Staff; and

(2) Ensure that the HRP is implemented at the sites/facilities under their cognizance.

(g) The HRP certifying official must:

(1) Approve placement, certification, reinstatement, and recertification of individuals into HRP positions; for unresolved temporary removals, follow the process in § 712.19(c)(5);

(2) Ensure that instructional requirements are implemented;

(3) Immediately notify (for the purpose of limiting access) the appropriate HRP management official of a personnel security action that results in the suspension of access authorization; and

(4) Ensure that the supervisory review, medical assessment, and management evaluation, including drug and alcohol testing, are conducted on an annual basis (not to exceed 12 months).

(h) Individuals assigned to HRP duties must:

(1) Execute HRP releases, acknowledgments, and waivers to facilitate the collection and dissemination of information, the performance of drug and alcohol testing, and medical examinations;

(2) Notify the Designated Physician, the Designated Psychologist, or the SOMD immediately of a physical or mental condition requiring medication or treatment;

(3) Provide full, frank, and truthful answers to relevant and material questions, and when requested, furnish, or authorize others to furnish, information that DOE deems pertinent to reach a decision regarding HRP certification or recertification;

(4) Report any observed or reported behavior or condition of another HRP-certified individual that could indicate a reliability concern, including those behaviors and conditions listed in § 712.13(c), to a supervisor, the Designated Physician, the Designated Psychologist, the SOMD, or the HRP management official; and

(5) Report to a supervisor, the Designated Physician, the Designated Psychologist, the SOMD, or the HRP management official, any behavior or condition, including those listed in § 712.13(c), that may affect his or her ability to perform HRP duties.

§ 712.13 Supervisory review.

(a) The supervisor must ensure that each HRP candidate and each individual occupying an HRP position but not yet HRP certified, executes the appropriate HRP releases, acknowledgments, and waivers. If these documents are not executed:

(1) The request for HRP certification may not be further processed until these requirements are completed; and

(2) The individual is immediately removed from the position.

(b) Each supervisor of HRP-certified personnel must conduct an annual review of each HRP-certified individual during which the supervisor must evaluate information (including security concerns) relevant to the individual's suitability to perform HRP tasks in a reliable and safe manner.

(c) The supervisor must report any concerns resulting from his or her review to the appropriate HRP management official. Types of behavior and conditions that would indicate a concern include, but are not limited to:

(1) Psychological or physical disorders that impair performance of assigned duties;

(2) Conduct that warrants referral for a criminal investigation or results in arrest or conviction;

(3) Indications of deceitful or delinquent behavior;

(4) Attempted or threatened destruction of property or life;

(5) Suicidal tendencies or attempted suicide;

(6) Use of illegal drugs or the abuse of legal drugs or other substances;

(7) Alcohol use disorders;

(8) Recurring financial irresponsibility;

(9) Irresponsibility in performing assigned duties;

(10) Inability to deal with stress, or the appearance of being under unusual stress;

(11) Failure to comply with work directives, hostility or aggression toward fellow workers or authority, uncontrolled anger, violation of safety or security procedures, or repeated absenteeism; and

(12) Significant behavioral changes, moodiness, depression, or other evidence of loss of emotional control.

(d) The supervisor must immediately remove an HRP-certified individual from HRP duties, pursuant to § 712.19, and temporarily reassign the individual to a non-HRP position if the supervisor believes the individual has demonstrated a security or safety concern that warrants such removal. If temporary removal is based on a security concern, the HRP management official must immediately notify the applicable DOE personnel security office and the HRP certifying official.

(1) Based on the DOE personnel security office recommendation, the HRP certifying official will make the final decision about whether to reinstate an individual into an HRP position.

(2) If temporary removal is based on a medical concern, the Designated Physician, the Designated Psychologist, or the SOMD must immediately recommend the medical removal or medical restriction in writing to the appropriate HRP management official, who will make the final determination in temporary removal actions and immediately notify the appropriate HRP certifying official.

(e) The supervisor must immediately remove from HRP duties any Federal employee who does not obtain HRP recertification. The supervisor may reassign the individual or realign the individual's current duties. If these actions are not feasible, the supervisor must contact the appropriate personnel office for guidance.

(f) The supervisor who has been informed by the breath alcohol technician that an HRP-certified individual's confirmatory breath alcohol test result is at or above an alcohol concentration of 0.02 percent shall send the individual home and not allow that individual to perform HRP duties for 24 hours, and inform the HRP management official of this action.

§ 712.14 Medical assessment.

(a) *Purpose.* The HRP medical assessment is performed to evaluate whether an HRP candidate or an HRP-certified individual:

(1) Represents a security concern; or

(2) Has a condition that may prevent the individual from performing HRP duties in a reliable and safe manner.

(b) When performed. (1) The medical assessment is performed initially on HRP candidates and individuals occupying HRP positions who have not yet received HRP certification. The medical assessment is performed annually for HRP-certified individuals, or more often as required by the SOMD.

(2) The Designated Physician and other examiners working under the direction of the Designated Physician also will conduct an evaluation:

(i) If an HRP-certified individual requests an evaluation (*i.e.*, self-referral); or

(ii) If an HRP-certified individual is referred by management for an evaluation.

(c) *Process.* The Designated Physician, under the supervision of the SOMD, is responsible for the medical assessment of HRP candidates and HRP-certified individuals. In performing this responsibility, the Designated Physician or the SOMD must integrate the medical evaluations, available testing results, psychological evaluations, any psychiatric evaluations, a review of current legal drug use, and any other relevant information. This information is used to determine if a reliability, safety, or security concern exists and if the individual is medically qualified for his or her assigned duties. If a security concern is identified, the Designated Physician or SOMD must immediately notify the HRP management official, who notifies the applicable DOE personnel security office and appropriate HRP certifying official.

(d) *Evaluation.* The Designated Physician, with the assistance of the Designated Psychologist, must determine the existence or nature of any of the following:

(1) Physical or medical disabilities, such as a lack of visual acuity, defective color vision, impaired hearing, musculoskeletal deformities, and neuromuscular impairment;

(2) Mental/personality disorders or behavioral problems, including alcohol and other substance use disorders, as described in the *Diagnostic and Statistical Manual of Mental Disorders;*

(3) Use of illegal drugs or the abuse of legal drugs or other substances, as identified by self-reporting or by medical or psychological evaluation or testing;

(4) Threat of suicide, homicide, or physical harm; or

(5) Medical conditions such as cardiovascular disease, endocrine disease, cerebrovascular or other neurologic disease, or the use of drugs for the treatment of conditions that may adversely affect the judgment or ability of an individual to perform assigned duties in a reliable and safe manner.

(e) *Job task analysis.* Before the initial or annual medical assessment and psychological evaluation, employers must provide, to both the Designated Physician and Designated Psychologist, a job task analysis for each HRP candidate or HRP-certified individual. Medical assessments and psychological evaluations may not be performed if a job task analysis has not been provided.

(f) *Psychological evaluations.* Psychological evaluations must be conducted:

(1) For initial HRP certification. This psychological evaluation consists of a psychological assessment (test), approved by the Deputy Assistant Secretary for Health or his or her designee, and a semi-structured interview.

(2) For recertification. This psychological evaluation consists of a semi-structured interview. A psychological assessment (test) may also be conducted as warranted.

(3) Every third year. The medical assessment for recertification must include a psychological assessment (test) approved by the Deputy Assistant Secretary for Health or his or her

designee. This requirement can be implemented over a three-year period for individuals who are currently in an HRP position.

(4) When additional psychological or psychiatric evaluations are required by the SOMD to resolve any concerns.

(g) *Return to work after sick leave.* HRP-certified individuals who have been on sick leave for five or more consecutive days, or an equivalent time period for those individuals on an alternative work schedule, must report in person to the Designated Physician, the Designated Psychologist, or the SOMD before being allowed to return to normal duties. The Designated Physician, the Designated Psychologist, or the SOMD must provide a written recommendation to the appropriate HRP supervisor regarding the individual's return to work. An HRP-certified individual also may be required to report to the Designated Physician, the Designated Psychologist, or the SOMD for written recommendation to return to normal duties after any period of sick leave.

(h) *Temporary removal or restrictions.* The Designated Physician, the Designated Psychologist, or the SOMD may recommend temporary removal of an individual from an HRP position or restrictions on an individual's work in an HRP position if a medical condition or circumstance develops that affects the individual's ability to perform assigned job duties. The Designated Physician, the Designated Psychologist, or the SOMD must immediately recommend medical removal or medical restrictions in writing to the appropriate HRP management official. If the HRP management official concurs, he or she will then notify the appropriate HRP certifying official. To reinstate or remove such restrictions, the Designated Physician, the Designated Psychologist, or the SOMD must make written recommendation to the HRP management official for concurrence. The HRP management official will then notify the appropriate HRP certifying official.

(i) *Medical evaluation after rehabilitation.* (1) Individuals who request reinstatement in the HRP following rehabilitative treatment for alcohol use disorder, use of illegal drugs, or the abuse of legal drugs or other substances, must undergo an evaluation, as prescribed by the SOMD, to ensure continued rehabilitation and adequate capability to perform their job duties.

(2) The HRP certifying official may reinstate HRP certification of an individual who successfully completes an SOMD-approved drug or alcohol rehabilitation program. Recertification is based on the SOMD's follow-up evaluation and recommendation. The individual is also subject to unannounced follow-up tests for illegal drugs or alcohol and relevant counseling for three years.

(j) *Medication and treatment.* HRP-certified individuals are required to immediately report to the Designated Physician, the Designated Psychologist, or the SOMD any physical or mental condition requiring medication or treatment. The Designated Physician, the Designated Psychologist, or the SOMD determines if temporary removal of the individual from HRP duties is required and follows the procedures pursuant to § 712.14(h).

§ 712.15 Management evaluation.

(a) *Evaluation components.* An evaluation by the HRP management official is required before an individual can be considered for initial certification or recertification in the HRP. This evaluation must be based on a careful review of the results of the supervisory review, medical assessment, and drug and alcohol testing. If a safety concern is identified, the HRP management official must require the supervisor to temporarily reassign the individual to non-HRP duties and forward this information to the HRP certifying official. If the management evaluation reveals a security concern, the HRP management official must notify the applicable DOE personnel security office.

(b) *Drug testing.* All HRP candidates and HRP-certified individuals are subject to testing for the use of illegal drugs, as required by this part. Testing must be conducted in accordance with 10 CFR part 707, the workplace substance abuse program for DOE contractor employees, and DOE Order 3792.3, ''Drug-Free Federal Workplace Testing Implementation Program,'' for DOE employees. The program must include an initial drug test, random drug tests at least once every 12 months from the previous test, and tests of HRP-certified individuals if they are involved in an incident, unsafe practice, occurrence, or based on reasonable suspicion. Failure to appear for unannounced testing within two hours of notification constitutes a refusal to submit to a test. Sites may establish a shorter time period between notification and testing but may not exceed the two-hour requirement. An HRP-certified individual who, based on a drug test, has been determined to use illegal drugs must immediately be removed from HRP duties, and DOE personnel security must be notified immediately.

(c) *Alcohol testing.* All HRP candidates and HRP-certified individuals are subject to testing for the use of alcohol, as required by this part. The alcohol testing program must include, as a minimum, an initial alcohol test prior to performing HRP duties and random alcohol tests at least once every 12 months from the previous test, and tests of HRP-certified individuals if they are involved in an incident, unsafe practice, occurrence, or based on reasonable suspicion. An HRP-certified individual who has been determined to have an alcohol concentration of 0.02 percent or greater shall be sent home and not allowed to perform HRP duties for 24 hours.

(1) Breath alcohol testing must be conducted by a certified breath alcohol technician and conform to the DOT procedures (49 CFR part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs, subparts J through N) for use of an evidential-grade breath analysis device approved for 0.02/0.04 cutoff levels, which conforms to the DOT model specifications and the most recent ''Conforming Products List'' issued by NHTSA.

(2) An individual required to undergo DOT alcohol testing is subject to the regulations of the DOT. If such an individual's blood alcohol level exceeds DOT standards, the individual's employer may take appropriate disciplinary action.

(3) The following constitutes a refusal to submit to a test and shall be considered as a positive alcohol concentration test of 0.02 percent, which requires the individual be sent home and not allowed to perform HRP duties for 24 hours:

(i) Failure to appear for unannounced testing within two hours of notification (or established shorter time for the specific site);

(ii) Failure to provide an adequate volume of breath in two attempts without a valid medical excuse; and

(iii) Engaging in conduct that clearly obstructs the testing process, including failure to cooperate with reasonable instructions provided by the testing technician.

(d) *Occurrence testing.* (1) When an HRP-certified individual is involved in, or associated with, an occurrence requiring immediate reporting to the DOE, the following procedures must be implemented:

(i) Testing for the use of illegal drugs in accordance with the provisions of the DOE policies implementing Executive Order 12564, and 10 CFR part 707 or DOE Order 3792.3, which establish workplace substance abuse programs for

contractor and DOE employees, respectively.

(ii) Testing for use of alcohol in accordance with this section.

(2) Testing must be performed as soon as possible after an occurrence that requires immediate notification or reporting.

(3) The supervisor must remove an HRP-certified individual from HRP duties if the individual refuses to undergo the testing required by this section.

(e) *Testing for reasonable suspicion.* (1) If the behavior of an individual in an HRP position creates the basis for reasonable suspicion of the use of an illegal drug or alcohol, that individual must be tested if two or more supervisory or management officials, at least one of whom is in the direct chain of supervision of the individual or is the Designated Physician, the Designated Psychologist, or the SOMD, agree that such testing is appropriate.

(2) Reasonable suspicion must be based on an articulable belief, drawn from facts and reasonable inferences from those particular facts, that an HRP-certified individual is in possession of, or under the influence of, an illegal drug or alcohol. Such a belief may be based on, among other things:

(i) Observable phenomena, such as direct observation of the use or possession of illegal drugs or alcohol, or the physical symptoms of being under the influence of drugs or alcohol;

(ii) A pattern of abnormal conduct or erratic behavior;

(iii) Information provided by a reliable and credible source that is independently corroborated; or

(iv) Detection of alcohol odor on the breath.

(f) Counterintelligence Evaluation. HRP candidates and, when selected, HRP-certified individuals, must submit to and successfully complete a counterintelligence evaluation, which includes a polygraph examination in accordance with 10 CFR part 709, Polygraph Examination Regulations and any subsequent revisions to that regulation.

§ 712.16 DOE security review.

(a) A personnel security specialist will perform a personnel security file review of an HRP candidate and HRP-certified individual upon receiving the supervisory review, medical assessment, and management evaluation and recommendation.

(b) If the personnel security file review is favorable, this information must be forwarded to the HRP certifying official. If the review reveals a security concern, or if a security concern is identified during another component of the HRP process, the HRP certifying official must be notified and the security concern evaluated in accordance with the criteria in 10 CFR part 710, subpart A. All security concerns must be resolved according to procedures outlined in 10 CFR part 710, subpart A, rather than through the procedures in this part.

(c) Any mental/personality disorder or behavioral issues found in a personnel security file, which could impact an HRP candidate or HRP-certified individual's ability to perform HRP duties, may be provided in writing to the SOMD, Designated Physician, and Designated Psychologist previously identified for receipt of this information. Medical personnel may not share any information obtained from the personnel security file with anyone who is not an HRP certifying official.

§ 712.17 Instructional requirements.

(a) HRP management officials at each DOE site or facility with HRP positions must establish an initial and annual HRP instruction and education program. The program must provide:

(1) HRP candidates, HRP-certified individuals, supervisors, and managers, and supervisors and managers responsible for HRP positions with the knowledge described in paragraph (b)(1) of this section; and

(2) For all HRP medical personnel, a detailed explanation of HRP duties and responsibilities.

(b) The following program elements must be included in initial and annual instruction. The elements may be tailored to accommodate group differences and refresher training needs:

(1) The objectives of the HRP and the role and responsibilities of each individual in the HRP to include recognizing and responding to behavioral change and aberrant or unusual behavior that may result in a risk to national security or nuclear explosive safety; recognizing and reporting security concerns and prescription drug use; and an explanation of return-to-work requirements and continuous evaluation of HRP participants; and

(2) For those who have nuclear explosive responsibilities, a detailed explanation of duties and safety requirements.

§ 712.18 Transferring HRP certification.

(a) For HRP certification to be transferred, the individual must currently be certified in the HRP.

(b) Transferring the HRP certification from one site to another requires the following before the individual is allowed to perform HRP duties at the new site:

(1) Verify that the individual is currently certified in the HRP and is transferring into a designated HRP position;

(2) Incorporate the individual into the new site's alcohol and drug-testing program;

(3) Ensure that the 12-month time period for HRP requirements that was established at the prior site is not exceeded; and

(4) Provide site-specific instruction.

(c) Temporary assignment to HRP positions at other sites requires verification that the individual is currently enrolled in the HRP and has completed all site-specific instruction. The individual is required to return to the site that maintains his or her HRP certification for recertification.

§ 712.19 Removal from HRP.

(a) *Immediate removal.* A supervisor who has a reasonable belief that an HRP-certified individual is not reliable, based on either a safety or security concern, must immediately remove that individual from HRP duties pending a determination of the individual's reliability. A supervisor also must immediately remove an individual from HRP duties when requested to do so by the HRP certifying official. The supervisor must, at a minimum:

(1) Require the individual to stop performing HRP duties;

(2) Take action to ensure the individual is denied both escorted and unescorted access to the material access areas; and

(3) Provide, within 24 hours, to the individual and the HRP management official, a written reason for these actions.

(b) The temporary removal of an HRP-certified individual from HRP duties pending a determination of the individual's reliability is an interim, precautionary action and does not constitute a determination that the individual is not fit to perform his or her required duties. Removal is not, in itself, cause for loss of pay, benefits, or other changes in employment status.

(c) *Temporary removal.* (1) If an HRP management official receives a supervisor's written notice of the immediate removal of an HRP-certified individual, that official must direct the temporary removal of the individual pending an evaluation and determination of the individual's reliability.

(2) If removal is based on a security concern, the HRP management official must notify the HRP certifying official and the applicable DOE personnel

security office. The security concern will be resolved under the criteria and procedures in 10 CFR part 710, subpart A.

(3) If removal is based on a concern that is not security related, the HRP management official must conduct an evaluation of the circumstances or information that led the supervisor to remove the individual from HRP duties. The HRP management official must prepare a written report of the evaluation that includes a determination of the individual's reliability for continuing HRP certification.

(4) If the HRP management official determines that an individual who has been temporarily removed continues to meet the requirements for certification, the HRP management official must:

(i) Notify the individual's supervisor of the determination and direct that the individual be allowed to return to HRP duties;

(ii) Notify the individual; and

(iii) Notify the HRP certifying official.

(5) If the HRP management official determines that an individual who has been temporarily removed does not meet the HRP requirements for certification, the HRP management official must forward the written report to the HRP certifying official. If the HRP certifying official is not the Manager, the HRP certifying official must review the written report and take one of the following actions:

(i) Direct that the individual be reinstated and provide written explanation of the reasons and factual bases for the action;

(ii) Direct continuation of the temporary removal pending completion of specified actions (*e.g.*, medical assessment, treatment) to resolve the concerns about the individual's reliability; or

(iii) Recommend to the Manager the revocation of the individual's certification and provide written explanation of the reasons and factual bases for the decision.

(d) The Manager, on receiving the HRP management official's written report and the HRP certifying official's recommendation (if any), must take one of the following actions:

(1) Direct reinstatement of the individual and provide written explanation of the reasons and factual bases for the action;

(2) Direct revocation of the individual's HRP certification; or

(3) Direct continuation of the temporary removal pending completion of specified actions (*e.g.*, medical assessment, treatment) to resolve the concerns about the individual's reliability.

(e) If the action is revocation, the Manager must provide the individual a copy of the HRP management official's report. The Manager may withhold such a report, or portions thereof, to the extent that he or she determines that the report, or portions thereof, may be exempt from access by the employee under the Privacy Act or the Freedom of Information Act.

(f) If an individual is directed by the Manager to take specified actions to resolve HRP concerns, he or she must be reevaluated by the HRP management official and HRP certifying official after those actions have been completed. After considering the HRP management and HRP certifying officials' report and recommendation, the Manager must direct either:

(1) Reinstatement of the individual; or

(2) Revocation of the individual's HRP certification.

(g) *Notification of Manager's initial decision.* The Manager must send by certified mail (return receipt requested) a written decision, including rationale, to the HRP-certified individual whose certification is revoked. The Manager's decision must be accompanied by notification to the individual, in writing, of the procedures pertaining to reconsideration or a hearing on the Manager's decision.

§ 712.20 Request for reconsideration or certification review hearing.

(a) An HRP-certified individual who receives notification of the Manager's decision to revoke his or her HRP certification may choose one of the following options:

(1) Take no action;

(2) Submit a written request to the Manager for reconsideration of the decision to revoke certification. The request must include the individual's response to the information that gave rise to the concern. The request must be sent by certified mail to the Manager within 20 working days after the individual received notice of the Manager's decision; or

(3) Submit a written request to the Manager for a certification review hearing. The request for a hearing must be sent by certified mail to the Manager within 20 working days after the individual receives notice of the Manager's decision.

(b) If an individual requests reconsideration by the Manager but not a certification review hearing, the Manager must, within 20 working days after receipt of the individual's request, send by certified mail (return receipt requested) a final decision to the individual. This final decision about certification is based on the individual's response and other relevant information available to the Manager.

(c) If an individual requests a certification review hearing, the Manager must forward the request to the Office of Hearings and Appeals.

§ 712.21 Office of Hearings and Appeals.

(a) The certification review hearing is conducted by the Office of Hearings and Appeals.

(b) The hearing officer must have a DOE ''Q'' access authorization when hearing cases involving HRP duties.

(c) An individual who requests a certification review hearing has the right to appear personally before the hearing officer; to present evidence in his or her own behalf, through witnesses or by documents, or by both; and to be accompanied and represented at the hearing by counsel or any other person of the individual's choosing and at the individual's own expense.

(d) In conducting the proceedings, the hearing officer must:

(1) Receive all relevant and material information relating to the individual's fitness for HRP duties through witnesses or documentation;

(2) Ensure that the individual is permitted to offer information in his or her behalf; to call, examine, and cross-examine witnesses and other persons who have made written or oral statements, and to present and examine documentary evidence;

(3) Require the testimony of the individual and all witnesses be given under oath or affirmation; and

(4) Ensure that a transcript of the certification review proceedings is made.

§ 712.22 Hearing officer's report and recommendation.

Within 30 calendar days of the receipt of the hearing transcript by the hearing officer or the closing of the record, whichever is later, the hearing officer must forward written findings, a supporting statement of reasons, and recommendation regarding the individual's eligibility for recertification in the HRP position to the Director, Office of Security. The hearing officer's report and recommendation must be accompanied by a copy of the record of the proceedings. The Director, Office of Security shall forward to the DOE Deputy Secretary a recommendation to either recertify or revoke the certification of an individual in the HRP.

§ 712.23 Final decision by DOE Deputy Secretary.

Within 20 working days of the receipt of the Director, Office of Security's

recommendation, the Deputy Secretary should issue a final written decision. A copy of this decision must be sent by certified mail (return receipt requested) to the Manager and to the individual accompanied by a copy of the hearing officer's report and the transcript of the certification review proceedings.

Subpart B—Medical Standards

§ 712.30 Applicability.

This subpart establishes standards and procedures for conducting medical assessments of DOE and DOE contractor individuals in HRP positions.

§ 712.31 Purpose.

The standards and procedures set forth in this subpart are necessary for DOE to:

(a) Identify the presence of any mental/personality disorders, physical, or behavioral characteristics or conditions that present or are likely to present an unacceptable impairment in reliability;

(b) Facilitate the early diagnosis and treatment of disease or impairment and foster accommodation and rehabilitation;

(c) Determine what functions an HRP-certified individual may be able to perform and to facilitate the proper placement of individuals; and

(d) Provide for continuing monitoring of the health status of individuals to facilitate early detection and correction of adverse health effects, trends, or patterns.

§ 712.32 Designated Physician.

(a) The Designated Physician must be qualified to provide professional expertise in the area of occupational medicine as it relates to the HRP.

(b) The Designated Physician must:

(1) Be a graduate of an accredited school of medicine or osteopathy;

(2) Have a valid, unrestricted state license to practice medicine in the state where HRP medical assessments occur;

(3) Have met the applicable HRP instruction requirements; and

(4) Be eligible for the appropriate DOE access authorization.

(c) The Designated Physician is responsible for the medical assessments of HRP candidates and HRP-certified individuals, including determining which components of the medical assessments may be performed by other qualified personnel. Although a portion of the assessment may be performed by another physician, physician's assistant, or nurse practitioner, the Designated Physician remains responsible for:

(1) Supervising the evaluation process;

(2) Interpreting the results of evaluations;

(3) Documenting medical conditions or issues that may disqualify an individual from the HRP;

(4) Providing medical assessment information to the Designated Psychologist to assist in determining psychological fitness;

(5) Determining, in conjunction with DOE if appropriate, the location and date of the next required medical assessment; and

(6) Signing a recommendation about the medical fitness of an individual for certification or recertification.

(d) The Designated Physician must immediately report to the SOMD any of the following about himself or herself:

(1) Initiation of an adverse action by any state medical licensing board or any other professional licensing board;

(2) Initiation of an adverse action by any Federal regulatory board since the last designation;

(3) The withdrawal of the privilege to practice by any institution;

(4) Being named a defendant in any criminal proceedings (felony or misdemeanor) since the last designation;

(5) Being evaluated or treated for alcohol use disorder or drug dependency or abuse since the last designation; or

(6) Occurrence, since the last designation, of a physical, mental/personality disorder, or health condition that might affect his or her ability to perform professional duties.

§ 712.33 Designated Psychologist.

(a) The Designated Psychologist reports to the SOMD and determines the psychological fitness of an individual to participate in the HRP. The results of this evaluation may be provided only to the Designated Physician or the SOMD.

(b) The Designated Psychologist must:

(1) Hold a doctoral degree from a clinical psychology program that includes a one-year clinical internship approved by the American Psychological Association or an equivalent program;

(2) Have accumulated a minimum of three years postdoctoral clinical experience with a major emphasis in psychological assessment and testing;

(3) Have a valid, unrestricted state license to practice clinical psychology in the state where HRP medical assessments occur;

(4) Have met the applicable HRP instruction requirements; and

(5) Be eligible for the appropriate DOE access authorization.

(c) The Designated Psychologist is responsible for all psychological evaluations of HRP candidates, HRP-certified individuals, and others as directed by the SOMD. Although a portion of the psychological evaluation may be performed by another psychologist, the Designated Psychologist must:

(1) Supervise the psychological evaluation process and designate which components may be performed by other qualified personnel;

(2) Upon request of management, assess the psychological fitness of HRP candidates and HRP-certified individuals for HRP duties, including specific work settings, and recommend referrals as indicated; and

(3) Make referrals for psychiatric, psychological, substance abuse, or personal or family problems, and monitor the progress of individuals so referred.

(d) The Designated Psychologist must immediately report to the SOMD any of the following about himself or herself:

(1) Initiation of an adverse action by any state medical licensing board or any other professional licensing board;

(2) Initiation of an adverse action by any Federal regulatory board since the last designation;

(3) The withdrawal of the privilege to practice by any institution;

(4) Being named a defendant in any criminal proceeding (felony or misdemeanor) since the last designation;

(5) Being evaluated or treated for alcohol use disorder or drug dependency or abuse since the last designation; or

(6) Occurrence since the last designation of a physical, mental/personality disorder, or health condition that might affect his or her ability to perform professional duties.

§ 712.34 Site Occupational Medical Director.

(a) The SOMD must nominate a physician to serve as the Designated Physician and a clinical psychologist to serve as the Designated Psychologist. The nominations must be sent through the Manager to the Deputy Assistant Secretary for Health or his or her designee. Each nomination must describe the nominee's relevant training, experience, and licensure, and include a curriculum vitae and a copy of the nominee's current state or district license.

(b) The SOMD must submit a renomination report biennially through the Manager to the Deputy Assistant Secretary for Health or his or her designee. This report must be submitted at least 60 days before the second anniversary of the initial designation or

of the last redesignation, whichever applies. The report must include:

(1) A statement evaluating the performance of the Designated Physician and Designated Psychologist during the previous designation period; and

(2) A copy of the valid, unrestricted state or district license of the Designated Physician and Designated Psychologist.

(c) The SOMD must submit, annually, to the Deputy Assistant Secretary for Health or his or her designee through the Manager, a written report summarizing HRP medical activity during the previous year. The SOMD must comply with any DOE directives specifying the form or contents of the annual report.

(d) The SOMD must investigate any reports of performance issues regarding a Designated Physician or Designated Psychologist, and the SOMD may suspend either official from HRP-related duties. If the SOMD suspends either official, the SOMD must notify the Deputy Assistant Secretary for Health or his or her designee and provide supporting documentation and reasons for the action.

§ 712.35 Deputy Assistant Secretary for Health.

The Deputy Assistant Secretary for Health or his or her designee must:

(a) Develop policies, standards, and guidance for the medical aspects of the HRP, including the psychological testing inventory to be used;

(b) Review the qualifications of Designated Physicians and Designated Psychologists, and concur or nonconcur with their designations by sending a statement to the Manager and an informational copy to the SOMD; and

(c) Provide technical assistance on medical aspects of the HRP to all DOE elements and DOE contractors.

§ 712.36 Medical assessment process.

(a) The Designated Physician, under the supervision of the SOMD, is responsible for the medical assessment of HRP candidates and HRP-certified individuals. In carrying out this responsibility, the Designated Physician or the SOMD must integrate the medical evaluations, psychological evaluations, psychiatric evaluations, and any other relevant information to determine an individual's overall medical qualification for assigned duties.

(b) Employers must provide a job task analysis for those individuals involved in HRP duties to both the Designated Physician and the Designated Psychologist before each medical assessment and psychological evaluation. HRP medical assessments and psychological evaluations may not be performed if a job task analysis has not been provided.

(c) The medical process by the Designated Physician includes:

(1) Medical assessments for initial certification, annual recertification, and evaluations for reinstatement following temporary removal from the HRP;

(2) Evaluations resulting from self-referrals and referrals by management;

(3) Routine medical contacts and occupational and nonoccupational health counseling sessions; and

(4) Review of current legal drug use.

(d) Psychological evaluations must be conducted:

(1) For initial certification. This psychological evaluation consists of a generally accepted psychological assessment (test) approved by the Deputy Assistant Secretary for Health or his or her designee and a semi-structured interview.

(2) For recertification. This psychological evaluation consists of a semi-structured interview, which is conducted annually at the time of the medical examination.

(3) Every third year. The medical assessment for recertification must include a generally accepted psychological assessment (test) approved by the Deputy Assistant Secretary for Health or his or her designee.

(4) When the SOMD determines that additional psychological or psychiatric evaluations are required to resolve HRP concerns as listed in § 712.13(c).

(e) Following absences requiring return-to-work evaluations under applicable DOE directives, the Designated Physician, the Designated Psychologist, or the SOMD must determine whether a psychological evaluation is necessary.

(f) Except as provided in paragraph (g) of this section, the Designated Physician must forward the completed medical assessment of an HRP candidate and HRP-certified individual to the SOMD, who must make a recommendation, based on the assessment, to the individual's HRP management official. If the Designated Physician determines that a currently certified individual no longer meets the HRP requirements, the Designated Physician must immediately, orally, inform the HRP management official. A written explanation must follow within 24 hours.

(g) The Designated Physician, the Designated Psychologist, or the SOMD may make a medical recommendation for return to work and work accommodations for HRP-certified individuals.

(h) The following documentation is required after treatment of an individual for any disqualifying condition:

(1) A summary of the diagnosis, treatment, current status, and prognosis to be furnished by the treatment provider to the Designated Physician;

(2) The medical opinion of the Designated Physician advising the individual's supervisor whether the individual is able to return to work in either an HRP or non-HRP capacity; and

(3) Any periodic monitoring plan, approved by the Designated Physician or the Designated Psychologist and the SOMD, used to evaluate the reliability of the individual.

(i) If the disqualifying condition was of a security concern, the appropriate procedure described in 10 CFR part 710, subpart A, applies.

§ 712.37 Evaluation for hallucinogen use.

If DOE determines that an HRP candidate or HRP-certified individual has used any hallucinogen, the individual is not eligible for certification or recertification unless:

(a) Five years have passed since the last use of the hallucinogen;

(b) There is no evidence of any flashback within the last five years from the previous hallucinogen use; and

(c) The individual has a record of acceptable job performance and observed behavior.

§ 712.38 Maintenance of medical records.

(a) The medical records of HRP candidates and HRP-certified individuals must be maintained in accordance with the Privacy Act, 5 U.S.C. 552a, and DOE implementing regulations in 10 CFR part 1008; the Department of Labor's regulations on access to individual exposure and medical records, 29 CFR 1910.1020; and applicable DOE directives. DOE contractors also may be subject to section 503 of the Rehabilitation Act, 29 U.S.C. 793, and its implementing rules, including confidentiality provisions in 41 CFR 60–741.23 (d).

(b) The psychological record of HRP candidates and HRP-certified individuals is a component of the medical record. The psychological record must:

(1) Contain any clinical reports, test protocols and data, notes of individual contacts and correspondence, and other information pertaining to an individual's contact with a psychologist;

(2) Be stored in a secure location in the custody of the Designated Psychologist; and

(3) Be kept separate from other medical record documents, with access

limited to the SOMD and the Designated Physician.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NE–13–AD; Amendment 39–13435; AD 2004–01–21]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc (RR) RB211–22B, RB211–524, and RB211–535 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for Rolls-Royce plc (RR) RB211–22B, RB211–524, and RB211–535 series turbofan engines. This AD requires the installation of a front engine mount housing and link support assembly that has a serialized, life limited, spherical bearing installed. This AD results from reports of corrosion and fatigue cracks in the mount pins, the spherical bearings, and the support links and their respective spherical bearings. We are issuing this AD to prevent failure of the front engine mount housing and link support assembly due to cracks that could result in loss of the engine.

DATES: This AD becomes effective February 27, 2004. The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of February 27, 2004.

ADDRESSES: You can get the service information identified in this AD from Rolls-Royce plc, P.O. Box 31 Derby, DE24 8BJ, United Kingdom; telephone 011–44–1332–242424; fax 011–44–1332–249936. You may examine the AD docket, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA. You may examine the service information, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: John Frost, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7756; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that is applicable to RR RB211–22B, RB211–524, and RB211–535 series turbofan engines was published in the **Federal Register** on February 26, 2002 (67 FR 8739). That action proposed to require disassembling and inspecting all engine mounts for cracks, refurbishing the engine mounts, and replacing the front mount thrust link spherical bearing in accordance with RR Service Bulletin (SB) No. RB.211–71–5291, Revision 14, dated March 13, 2001.

After we issued that NPRM, we became aware that the Civil Aviation Authority (CAA), which is the aviation authority for the U.K., cancelled AD 004–08–2000. CAA AD 004–08–2000 addressed disassembling and inspecting all engine mounts for cracks, refurbishing the engine mounts, and replacing the front mount thrust link spherical bearing. We were also informed that RR downgraded the category of SB No. RB.211–71–5291, Revision 14, dated March 13, 2001, which required those actions, to recommend the actions instead of requiring them. RR has since issued a mandatory SB No. RB.211–71–D437, Revision 1, dated February 28, 2003, which introduces a serialized, life-limited, spherical bearing for the engine front mount housing and link support assembly. Since RR has also introduced requirements to inspect the engine front and rear mounts into the Time Limit Manual, compliance with the requirements of SB No. RB.211–71–5291 is no longer required.The CAA has issued AD 005–04–2002, dated April 2002, to mandate compliance with the new requirements included in RR Mandatory Service Bulletin (MSB) No. RB.211–71–D437, Revision 1, dated February 28, 2003.

Since this change expands the scope of the originally proposed rule, we determined that it was necessary to reopen the comment period to provide additional opportunity for public comment. As a result, we published a supplemental proposed AD that applies to RR RB211–22B, RB211–524, and RB211–535 series turbofan engines in the **Federal Register** on July 31, 2003 (68 FR 44902). That action proposed to require the installation of a front engine mount housing and link support assembly that has a serialized, life limited spherical bearing installed in accordance with RR MSB No. RB.211–71–D437, Revision 1, dated February 28, 2003.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Update Title of Table 2

One commenter requests that the FAA update the title of Table 2 from ''Table 2. Module 04 Reworked part numbers (P/Ns)'' to ''Table 2. Module 07 Reworked P/Ns''. The commenter also requests that the list of Module 07 P/Ns in Table 2 be completed. The FAA agrees. Table 2 was incomplete and has been changed.

P/Ns Not Applicable to RB211–535 Series Engines

One commenter notes that RB211–535 operators need to be informed that the ''existing'' and ''reworked'' module 07 P/Ns in Table 2 are not included in the RB211–535 Engine Manual. The FAA agrees and paragraph (b) has been changed to indicate this.

Credit for Previous Compliance

One commenter requests that the final rule allow credit for previous compliance with the initial issuance of RR No. SB RB.211–71–D437. We do not agree. Revision 1 expands the Accomplishment Instructions to include the requirement to control the spherical bush life by recording the part serial numbers as specified in the Time Limits Manual, and defines a repetitive inspection of the front mounts as specified in the Time Limits Manual.

Editorial Comment

We have corrected a minor mathematical error in the Supplemental NPRM Cost of Compliance section in the final rule.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes described previously. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Economic Analysis

There are about 2,214 RR RB211–22B, RB211–524, and RB211–535 series turbofan engines of the affected design in the worldwide fleet. We estimate that about 620 RB211–535 engines, and about 45 RB211–524 and RB211–22B engines installed on airplanes of U.S.