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Part III

Department of Energy

10 CFR Parts 709, 710, and 711
Polygraph Examination Regulation; Proposed Rule

DEPARTMENT OF ENERGY

10 CFR Parts 709, 710, and 711

[Docket No. CN–RM–99–POLY]

RIN 1992–AA24

Polygraph Examination Regulation

AGENCY: Department of Energy.

ACTION: Notice of proposed rulemaking and public hearings.

SUMMARY: The Department of Energy (DOE or the Department) proposes regulations for the use of polygraph examinations for certain DOE and contractor employees, applicants for employment, and other individuals assigned or detailed to Federal positions at DOE. The proposed regulations describe the categories of individuals who would be eligible for polygraph testing and controls for the use of such testing and for prevention of unwarranted intrusion into the privacy of individuals. These regulations are being proposed to comply with various Executive Orders which require the Department to protect classified information. These regulations for the use of polygraph examinations for certain DOE and contractor employees are intended to protect highly sensitive and classified information and materials to which such employees have access. This rulemaking also proposes conforming changes to regulations governing the Department's Personnel Security Assurance Program and Personnel Assurance Program.

DATES: The comment period for this proposed rule will end on October 4, 1999. Public hearings will be held on: September 14, 1999 in Livermore, CA from 9 a.m. to 1 p.m. and 3 p.m. to 7 p.m.; September 16, 1999, in Albuquerque, NM from 9 a.m. to 1 p.m. and 3 p.m. to 7 p.m.; September 17, 1999, in Los Alamos, NM from 9 a.m. to 1 p.m. and 3 p.m. to 6 p.m.; and September 22, 1999, in Washington D.C. from 9 a.m. to 1 p.m.

Requests to speak at any of the hearings should be phoned in to Andi Kasarsky, (202) 586–3012, by September 10, for the Livermore, CA hearing; September 14, for the Albuquerque, NM hearing; September 15, for the Los Alamos, NM hearing; and September 20, for the Washington, DC hearing. Each presentation is limited to 5 minutes to ensure that all persons have an opportunity to speak.

ADDRESSES: Written comments (10 copies) should be addressed to Douglas J. Hinckley, Office of Counterintelligence, CN–1, Docket No. CN–RM–99–POLY, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585. Alternatively, comments may be e-mailed to the following address: poly@hq.doe.gov. Where possible, commentors should identify the specific section of the proposed rule to which they are responding.

Copies of the public hearing transcripts, written comments received, technical reference material referred to in this notice, and any other docket material may be reviewed and copied at the DOE Freedom of Information Reading Room, Room 1E–190, 1000 Independence Avenue, SW, Washington, DC 20585, between the hours of 9 a.m. and 4 p.m. Monday through Friday, except Federal holidays. The docket material for this rulemaking will be filed under ''CN–RM–99–POLY.'' The **Federal Register** notice and supporting documentation can be located on DOE's Internet home page at the following address: http://home.doe.gov/news/fedreg.htm.

The public hearings for this rulemaking will be held at the following addresses:

Livermore, CA: Lawrence Livermore National Laboratory, Building 123 Auditorium (use South West Gate entrance, East Avenue).

Albuquerque, NM: Sandia National Laboratories, Steve Schiff Auditorium, Building 825.

Los Alamos, NM: Los Alamos National Laboratory, Administration Building, Main Auditorium (1st floor).

Washington, DC: U.S. Department of Energy, Auditorium (ground floor, E corridor), 1000 Independence Avenue, SW, Washington, DC.

For more information concerning public participation in this rulemaking proceeding, see Section V of this notice (Opportunity for Public Comment).

FOR FURTHER INFORMATION CONTACT:

Douglas Hinckley, U.S. Department of Energy, Office of Counterintelligence, CN–1, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586–5901

Lise Howe, U.S. Department of Energy, Office of General Counsel, GC–73, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586–2906

For information concerning the public hearings, requests to speak at the hearings, submission of written comments or docket file information contact: Andi Kasarsky at (202) 586–3012.

SUPPLEMENTARY INFORMATION:

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I. Introduction

The Atomic Energy Act of 1954 (AEA or Atomic Energy Act) assigns to DOE certain atomic energy defense production and clean-up obligations that are discharged at various DOE-owned, contractor-operated installations around the United States. Section 161 of the AEA authorizes DOE to adopt rules necessary to carry out those functions, 42 U.S.C. 2201. Under that authority, DOE today proposes regulations for using counterintelligence-scope polygraph examinations for national security purposes, and exculpatory polygraph examinations at the request of an individual, while protecting the rights of individuals. All such polygraph examinations will be voluntary. However, if an individual refuses to submit to an examination that is for national security purposes, DOE and its contractors may decline to select the individual for the sensitive positions specified in this rule, and DOE may deny the individual access to the information that justified conducting the examination.

II. Background

DOE, as the successor agency to the Atomic Energy Commission, has broad responsibilities under the AEA to direct the development, use, and control of atomic energy. These responsibilities include a specific mandate to protect sensitive and classified information and materials involved in the design, production, and maintenance of nuclear weapons, as well as a general obligation to ensure that permitting an individual to have access to information classified under the AEA will not endanger the nation's common defense and security.

In addition, various Executive Orders of government-wide applicability require DOE to take steps to protect classified information. Executive Order No. 12958, Classified National Security Information (April 17, 1995), requires the Secretary to establish controls to ensure that classified information is used only under conditions that provide adequate protection and prevent access

by unauthorized persons. Executive Order 12968, Access to Classified Information (August 2, 1995), requires the Secretary to establish and maintain an effective program to ensure that employee access to classified information is clearly consistent with the interests of national security. In addition, in February 1998, President Clinton issued Presidential Decision Directive–61, ''U.S. Department of Energy Counterintelligence Program,'' a classified document containing the President's determination that DOE must do more to protect the highly sensitive and classified information at its facilities. The President instructed DOE to develop and implement specific measures to reduce the threat to such information, including implementation of a polygraph program. An unclassified version of the Presidential Decision Directive is available in the DOE Freedom of Information Reading Room.

As an element of carrying out its national security mission, DOE has instituted a counterintelligence program to strengthen its protection of information and technologies in connection with DOE's atomic energy defense activities. DOE believes that requiring counterintelligence-scope polygraph examinations for individuals in positions with access to the most sensitive information in connection with DOE's atomic energy defense activities is a necessary, prudent measure to fulfill DOE's national security responsibilities. A counterintelligence-scope polygraph examination both serves as a means to deter unauthorized disclosures of classified information and provides a means for possible early detection of disclosures to enable DOE to take steps promptly to prevent further harm to the national security.

A counterintelligence-scope polygraph examination also is an integral element of the DOE Accelerated Access Authorization Program (AAAP), a program that DOE utilizes to grant interim security clearances on an expedited basis. In addition, use of a polygraph examination when an individual requests one as a means of exculpation in order to resolve a counterintelligence investigation or personnel security issue hastens the DOE's prompt resolution of such issues.

The Employee Polygraph Protection Act (Pub. L. 100–347) (EPPA) generally prohibits the use of polygraph examinations in private employment settings, but that law does not apply to the Federal government or its employees. In addition, the EPPA specifically exempts from its prohibitions polygraph examinations administered by DOE in the performance of its counterintelligence function to any expert, consultant or contractor employee of DOE in connection with atomic energy defense activities, 29 U.S.C. 2006(b)(1)(B). The statute also specifically exempts polygraph examinations administered by a Federal agency, in the performance of an intelligence or counterintelligence function, to an individual whose duties involve access to top secret classified information or information designated as being within a Special Access Program (SAP), 29 U.S.C. 2006(b)(2). In DOE's view, polygraph examinations are a useful investigatory tool for counterintelligence purposes because they assist in eliciting comprehensive information, and in distinguishing between deception and non-deception. Congress left to DOE the discretion to develop rational procedures for evaluating and processing the results of polygraph examinations and for protecting individuals from misuse of such an examination.

Along with the strong need for protection of classified and sensitive information in its possession, DOE recognizes the importance of protecting individuals' rights. In the 1960s, President Lyndon B. Johnson issued a memorandum entitled ''Use of Polygraph in the Executive Branch'' which is intended to ''prevent unwarranted intrusion into the privacy of individuals.'' The memorandum prohibits subjecting Federal employees to polygraph examinations except in limited situations. One of the exceptions permits an executive department or agency that has an intelligence or counterintelligence mission directly affecting national security to use polygraph examinations for employment screening and personnel investigations, and in intelligence and counterintelligence operations. In such cases, the agency must complete a review process with the Office of Personnel Management (OPM).

As an initial step toward developing and implementing a polygraph requirement for sensitive positions, DOE issued an internal DOE directive, DOE Notice 472.2, Use of Polygraph Examinations, that establishes a polygraph requirement for Federal employees who occupy or seek to occupy certain sensitive positions. The DOE Notice also provides for polygraph examinations to be administered to Federal employees as part of the AAAP and, upon request, as a means of exculpation. The DOE Notice has been submitted to OPM for its review. The Notice is publicly available at http://www.explorer.doe.gov:1776/htmls/regs/doe/newserieslist.html on the DOE Directives website.

As a second step, DOE is proposing today to expand the polygraph examination program to cover all employees at its facilities, contractor employees as well as Federal employees, in positions with access to the most sensitive categories of classified information and materials, as well as applicants for such positions. When final, this rule will establish polygraph examination regulations that apply to both Federal and contractor employees. DOE also has submitted a copy of this proposed rule to OPM.

DOE acknowledges that some individuals consider polygraph examination results to be generally unreliable and believe that they should not be used as the basis for any action with regard to an employee. However, DOE is aware of no scientific studies that establish that polygraph examination results are unreliable for use as an investigative tool, as DOE today has proposed to use them. As an investigative tool, polygraph examinations results are superior to random interviews relying on purely subjective evaluations. DOE also is aware that some individuals think today's proposed rule could have an effect on the recruitment and retention of qualified personnel. Nevertheless, DOE believes that established procedures for polygraph testing, limitations on the scope of questions, qualifications standards for polygraph examiners, and limitations on the use of polygraph examination results with regard to final adverse actions, will be perceived as fair by most potential employees and will protect the legitimate interests of existing employees. DOE invites members of the public to comment on the balance it has struck in today's proposal between legitimate national security interests and regulatory limitations to protect employees from inappropriate or imprudent use of polygraph examinations and the results of such examinations.

Today's action continues DOE's efforts to carry out its statutory responsibilities and Presidential direction to provide strong programs to protect against the disclosure of information and materials that could harm national defense and security.

III. Description of Proposal

PART 709, Subpart A—General Provisions

Section 709.3 What Are the Definitions of the Terms Used in This Part?

This section proposes definitions for terms used in the rule. The definition for the phrase ''adverse personnel action'' for Federal employees is derived from 5 U.S.C. Chapter 75, and for contractor employees from correlative principles under the National Labor Relations Act. The terms ''counterintelligence'' and ''intelligence'' are based on definitions in the National Security Act of 1947. 50 U.S.C. 401a. The definition for ''polygraph'' is the same as that used by the Department of Labor in its regulations implementing the EPPA. 29 CFR part 801. The definition for ''Special Access Program or SAP'' is based on the definition of that term in Executive Order 12958, Classified National Security Information (April 17, 1995).

Section 709.4 To Whom Does the Polygraph Examination Requirement Under This Part Apply?

This section proposes the programs whose employees would be eligible for polygraph examination. The programs include employees and applicants for employment with DOE and its contractors (including subcontractors at all tiers), and also individuals who may be assigned or detailed to Federal positions at DOE. There are eight program categories whose employees are eligible for polygraph examination. These include counterintelligence and intelligence positions; positions requiring access to special access programs; positions subject to the Personnel Assurance Program (PAP) or Personnel Security Assurance Program (PSAP); positions with a need-to-know or access to information specifically designated by the Secretary or his delegatee regarding the design and operation of nuclear weapons and associated use and control features; positions within the Office of Independent Oversight and Performance Assurance, or any successor thereto, involved in inspection and assessment of safeguards and security functions, including cyber security, of the Department; and positions within the Office of Security and Emergency Operations, or any successor thereto. DOE will establish an internal process to review these programs in order to develop the criteria for identifying the specific positions in the eight program categories that warrant polygraph examination and the order of priority for conducting polygraph examinations of the DOE and contractor employees in the eligible positions.

In addition to the programs whose employees would be eligible for a polygraph examination, there are two other circumstances under which DOE would administer polygraph examinations. First, a counterintelligence-scope polygraph examination is an element of the AAAP, which is a voluntary program under which an individual's DOE access authorization (security clearance) may be expedited. Second, individuals would be permitted, at their own option, to request a polygraph examination in order to resolve questions that have arisen in either the personnel security or counterintelligence areas; these examinations are referred to as exculpatory polygraph examinations.

Section 709.5 How Will an Individual Know If His or Her Position Will Be Eligible for Polygraph Examination?

As proposed, all employees of the programs described in § 709.4(a)(1)–(8) are eligible for polygraph examinations. If there is a vacant position within one of these programs, DOE or its contractors must indicate in the job or vacancy announcement that the employee selected would be eligible for a polygraph examination.

Subpart B—Polygraph Examination Protocols and Protection of National Security

Section 709.11 What Types of Topics Are Within the Scope of a Polygraph Examination?

Polygraph examinations would be counterintelligence-scope, designed to address the narrow topics of whether the individual has engaged, or is engaging, in espionage, sabotage, terrorism, unauthorized disclosures of classified information, unauthorized foreign contacts, or deliberate damage to or malicious misuse of a U.S. government information or defense system. The only time topics other than these would be within the scope of a polygraph examination is when an individual has requested an exculpatory examination. In the case of exculpatory examinations, the topics are limited to the personnel security or counterintelligence matter at issue.

Section 709.14 What Are the Consequences of a Refusal To Take a Polygraph Examination?

All polygraph examinations administered by DOE are voluntary. There may, however, be consequences resulting from a refusal to take, or failure to complete, a polygraph examination. This section describes the possible consequences of an individual's refusing to take, or failing to complete, a required polygraph examination.

Failure to complete the polygraph examination is treated the same as a refusal to take a polygraph examination. If an individual refuses to take, or terminates at any time prior to completion, a polygraph examination, that individual may be denied access to the information and denied involvement in the activities that justified conducting the examination, consistent with proposed § 709.15. In some circumstances, for example individuals with counterintelligence or intelligence responsibilities, the information or activities may be essential to the individual's ability to do his or her job. In such a case, the employer (whether it is DOE or a contractor) must make every effort to find a new position for which the individual would be suitable, consistent with that denial of access. If the individual is on assignment or detail to DOE from another agency, the individual may simply be returned to the employing agency.

If a DOE employee refuses to take a required polygraph examination, DOE cannot record the fact of that refusal in the individual's personnel file. Nevertheless, DOE may record the refusal in a personnel security file. The prohibition on recording a DOE employee's refusal to take a polygraph examination in an individual's personnel file is contained in President Lyndon B. Johnson's Memorandum on ''Use of the Polygraph in the Executive Branch.'' Because that memorandum is not explicitly applicable to contractor employees and because DOE does not maintain personnel files for contractor employees, DOE has limited the prohibition in the rule to Federal employees. However, the Department recommends that its contractors adopt a similar policy with respect to contractor employees.

Exculpatory polygraph examinations are administered only at the request of the individual, and an individual is under no obligation to request an exculpatory polygraph examination. To ensure there are no inappropriate consequences if an individual does not request an exculpatory polygraph

examination, DOE or its contractors may not take an adverse personnel action against an individual solely on the basis of refusing to take or complete such an exculpatory polygraph examination. Similarly, the fact that an individual has not requested an exculpatory examination may not be recorded in an individual's personnel security or investigative file or the personnel file of a Federal employee. Because DOE does not maintain personnel files for contractor employees, DOE has limited the prohibition in the rule to Federal employees. However, the Department recommends that its contractors adopt a similar policy with respect to contractor employees.

Section 709.15 How Does DOE Use Polygraph Examination Results?

If following the completion of the polygraph test there are any unresolved issues, the polygraph examiner must conduct an in-depth interview of the individual to address those unresolved issues. After the in-depth interview, if there are remaining unresolved issues that raise significant questions relevant to the individual's access to the information or involvement in the activities that justified the polygraph examination, DOE will so advise the individual and provide an opportunity for the individual to undergo an additional polygraph examination. If the additional polygraph examination is not sufficient to resolve the matter, DOE must undertake a comprehensive investigation of the individual, using the polygraph examination as an investigative lead.

After completion of the polygraph examination(s), the Department will conduct an eligibility evaluation that considers polygraph examination results, the individual's personnel security file, and other pertinent information. DOE may conduct a personal interview as an element of the eligibility evaluation. Based upon the eligibility evaluation, the individual may be denied access to the information and denied involvement in the activities that justified the polygraph examination. If the eligibility evaluation results raise questions of loyalty to the United States, DOE must refer the matter to the Federal Bureau of Investigation for investigation under section 145d of the Atomic Energy Act (42 U.S.C. 2165d). If the eligibility evaluation results reflect derogatory information and the individual already holds an access authorization, DOE may initiate an administrative review of the individual's access authorization eligibility under the DOE regulations governing eligibility for access authorization (security clearance) at 10 CFR part 710.

Subpart C—Safeguarding Privacy and Employee Rights

Section 709.21 When Is an Individual Notified That a Polygraph Examination Is Scheduled?

DOE has elected to establish a minimum of forty-eight hours advance notification of scheduled polygraph examinations. DOE believes that the forty-eight hours should provide an individual sufficient time to secure any desired legal counsel or another representative. DOE has provided two exceptions to the rule, a good cause exception and an exception when the individual waives the advance notice. Under the good cause exception, DOE may provide an individual less than forty-eight hours advance notification of a polygraph examination when the Secretary of Energy or the Secretary's designee determines that the information to which the individual has access is of such extreme sensitivity that waiting forty eight hours poses an unacceptable risk to national security or defense. The waiver provision would favor an individual who wishes a polygraph examination as quickly as possible either for exculpatory reasons or to expedite his or her access to information or involvement in activities that justify the polygraph examination.

Section 709.22 What Rights to Counsel or Other Representation Does an Individual Have?

An individual has a right to consult with anyone before any polygraph examination. The individual may obtain legal counsel, professional assistance, or union representation. However, these representatives may not be present during any phase of the polygraph examination.

Section 709.25 Are There Limits on Use of Polygraph Examination Results That Reflect ''Deception Indicated'' or ''No Opinion''?

DOE believes that, while polygraph examinations are a useful tool, they should not constitute the sole basis for taking any action against an individual, except when the Secretary or the Secretary's designee determines that permitting the individual continued access to protected information would pose an unacceptable risk to national defense and security. While an individual's access may be suspended pursuant to such a Secretarial determination, DOE will in all such cases investigate further under § 709.15 in order to resolve the issue.

Section 709.26 How Does DOE Protect the Confidentiality of Polygraph Examination Records?

All polygraph examination records will be maintained in systems of records established under the Privacy Act of 1974 with appropriate protections on confidentiality. In accordance with the Privacy Act, the records cannot be disclosed, except in response to a written request by, or with the prior written consent of, the individual to whom the record pertains unless disclosure would be permitted by the Privacy Act.

Parts 710 and 711

DOE proposes conforming changes to regulations established for the Personnel Security Assurance Program (PSAP), 10 CFR part 710, subpart B, and the Personnel Assurance Program (PAP), 10 CFR part 711. All positions subject to these programs would be eligible for the polygraph examination provisions of proposed part 709.

IV. Regulatory Review

A. National Environmental Policy Act

This proposed rule would establish regulations for use of polygraph examinations. DOE has determined that this rule is covered under the Categorical Exclusion found in the Department's National Environmental Policy Act regulations at 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 is required.

B. Regulatory Flexibility Act

Consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, DOE must prepare an initial regulatory flexibility analysis for a proposed rule unless DOE certifies that the rule would not have a substantial impact on a significant number of small entities. This rulemaking would not directly regulate small businesses or small governmental entities. It would apply principally to individuals who are existing employees of, or applicants for employment by, some of the DOE's prime contractors who are all large businesses. There may be some affected small businesses that are subcontractors, but the rule would not impose unallowable costs. Accordingly, DOE certifies that the rule will not have a substantial impact on a significant number of small entities.

C. Review Under the Paperwork Reduction Act

DOE has determined that this rule, as proposed, does not contain any new or amended record keeping, reporting, or application requirements, or any other type of information collection requirements subject to the Paperwork Reduction Act (Pub. L. 96–511).

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires Federal agencies to closely examine the impacts of regulatory actions on State, local, and tribal governments. Subsection 101(5) of title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose an enforceable duty upon State, local, or tribal governments, except, among other things, a condition of Federal assistance or a duty arising from participating in a voluntary federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or to the private sector, of $100 million or more. Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments.

This rule, as proposed, is not likely to result in any Federal mandate that may result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

E. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. Today's proposal would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

F. Executive Order 12866

Section 6 of Executive Order 12866 provides for a review by the Office of Information and Regulatory Affairs (OIRA) of a significant regulatory action, which is defined to include an action that may have an effect on the economy of $100 million or more, or adversely affect, in a material way, the economy, competition, jobs, productivity, the environment, public health or safety, or State, local, or tribal governments. DOE has concluded that this proposed rule is not a significant regulatory action.

G. Executive Order 12612

Executive Order 12612, 52 FR 41685, requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effect on States, on the relationship between the Federal government and the States, or in the distribution of power and responsibilities among various levels of government. If there are substantial effects, then the Executive Order requires a preparation of a Federalism assessment to be used in all decisions involved in promulgating and implementing policy action. The rule, as proposed in this notice, will not have a substantial direct effect on the institutional interests or traditional functions of the States. Accordingly, no assessment or analysis is required under Executive Order 12612.

H. Executive Order 12875

Executive Order 12875 (Enhancing Intergovernmental Partnership), provides for reduction or mitigation, to the extent allowed by law, of the burden on State, local and tribal governments of unfunded Federal mandates not required by statute. The analysis under the Unfunded Mandates Reform Act of 1995 above, satisfies the requirements of Executive Order 12875. Accordingly, no further analysis is required under Executive Order 12875.

I. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, Civil Justice Reform, 61 FR 4729 (February 7, 1996), imposes on 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. With regard to the review required by section 3(a), 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, the rule, as proposed, meets the relevant standards of Executive Order 12988.

J. Review Under Executive Order 13084

Under Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments), DOE may not issue a discretionary rule that significantly or uniquely affects Indian tribal governments and imposes substantial direct compliance costs. This proposed rulemaking would not have such effects. Accordingly, Executive Order 13084 does not apply to this rulemaking.

V. Opportunity for Public Comment

A. Written Comments

Interested individuals are invited to participate in this proceeding by submitting data, views or comments with respect to this proposed rule. To help the Department review the submitted comments, commentors are requested to reference the paragraph(s) (e.g., 850.3(a)) to which they refer when possible.

Ten copies of written comments should be submitted to the address indicated in the **ADDRESSES** section of this NOPR. Comments should be identified on the outside of the envelope and on the comments themselves with the designation, ''Polygraph Rule, Docket No. CN–RM–99–POLY.'' Should anyone wishing to provide written comments be unable to provide ten copies, alternative arrangements can be made in advance with the Department.

DOE will consider all comments received on or before the date specified at the beginning of this NOPR and other relevant information before final action is taken on the proposed rule.

All submitted comments will be available for public inspection as part of the administrative record on file for this rulemaking, which is in the DOE Freedom of Information Reading Room at the address indicated in the **ADDRESSES** section of this NOPR.

Pursuant to the provisions of 10 CFR 1004.11, anyone submitting information or data which he or she believes to be confidential and exempt by law from public disclosure should submit one complete copy of the document, as well as two copies, if possible, from which the information has been deleted. The Department will make its own determination as to the confidentiality of the information and treat it accordingly.

B. Public Hearings

Public hearings will be held at the times, dates and locations indicated in the **DATES** and **ADDRESSES** section of this NOPR. Any person who is interested in making an oral presentation should make a phone request to the number in the **DATES** section of this NOPR. The person should provide a daytime phone number where he or she may be reached. Persons requesting an opportunity to speak will be notified of the approximate time they will be speaking. To ensure that as many persons as possible have the opportunity to present comments, a maximum of five minutes may be allotted to each speaker. However, if there is time at the end of the hearing, DOE may allot additional time to the speakers present. Persons making oral statements should bring 6 copies of their statement to the hearing and submit them at the registration desk.

In the event that requests exceed the time allowed, DOE reserves the right to schedule speakers, presentations and to establish the procedures for conducting the hearing. A DOE official will be designated to preside at each hearing, which will not be judicial or evidentiary. Only those persons conducting the hearing may ask questions. Any further procedural rules needed to conduct the hearing properly will be announced by the DOE presiding official.

A transcript of each hearing will be made available to the public. DOE will retain the record of the full hearing, including the transcript, and make it available for inspection and copying in the DOE Freedom of Information Reading Room at the address provided in the **ADDRESSES** section of this NOPR. Transcripts may also be purchased from the court reporter.

If DOE must cancel the hearings, it will make every effort to give advance notice.

List of Subjects

10 CFR Part 709

Polygraph tests.

10 CFR Part 710

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

10 CFR Part 711

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

Issued in Washington, DC, on August 11, 1999.

Edward J. Curran,

Director, Office of Counterintelligence.

For the reasons stated in the preamble, DOE hereby proposes to amend Chapter III of title 10 of the Code of Federal Regulations as set forth below:

1. New Part 709 is added to read as follows:

PART 709—POLYGRAPH EXAMINATION REGULATIONS

Subpart A—General Provisions

709.1 What is the purpose of this part?
709.2 What is the scope of this part?
709.3 What are the definitions of the terms used in this part?
709.4 To whom does the polygraph examination requirement under this part apply?
709.5 How will an individual know if his or her position will be eligible for a polygraph examination?

Subpart B—Polygraph Examination Protocols and Protection of National Security

709.11 What types of topics are within the scope of a polygraph examination?
709.12 How does DOE determine the wording of questions?
709.13 May an individual refuse to take a polygraph examination?
709.14 What are the consequences of a refusal to take a polygraph examination?
709.15 How does DOE use polygraph examination results?

Subpart C—Safeguarding Privacy and Employee Rights

709.21 When is an individual notified that a polygraph examination is scheduled?
709.22 What rights to counsel or other representation does an individual have?
709.23 How does DOE obtain an individual's consent to a polygraph examination?
709.24 What other information is provided to the individual prior to a polygraph examination?
709.25 Are there limits on use of polygraph examination results that reflect ''deception indicated'' or ''no opinion''?
709.26 How does DOE protect the confidentiality of polygraph examination records?

Subpart D—Polygraph Examination and Examiner Standards

709.31 What are the DOE standards for polygraph examinations and polygraph examiners?
709.32 What are the training requirements for polygraph examiners?

Authority: 42 U.S.C. 2011, *et seq.*, 42 U.S.C. 7101, *et seq.*

Subpart A—General Provisions

§ 709.1 What is the purpose of this part?

(a) The purpose of this part is to provide guidelines for:

(1) The use of counterintelligence-scope polygraph examinations in connection with the atomic energy defense activities of the Department;

(2) The use of counterintelligence-scope polygraph examinations for individuals whose duties involve access to top secret classified information or information designated as being within a special access program (SAP); and

(3) The use of exculpatory polygraph examinations, upon the request of an individual, in order to resolve counterintelligence investigations and personnel security issues.

(b) This part also provides guidelines for protecting the rights of individual DOE and DOE contractor employees subject to this rule.

§ 709.2 What is the scope of this part?

This part includes:

(a) A description of the conditions under which DOE may administer and use polygraph examinations;

(b) A description of the positions which DOE may subject to polygraph examination;

(c) Controls on the use of polygraph examinations; and

(d) Safeguards to prevent unwarranted intrusion into the privacy of individuals.

§ 709.3 What are the definitions of the terms used in this part?

For purposes of this part:

Accelerated Access Authorization Program or AAAP means the program for granting interim access to classified matter and special nuclear material based on a drug test, a National Agency Check, a psychological assessment, and a counterintelligence-scope polygraph examination consistent with this part.

Adverse personnel action means:

(1) With regard to a DOE employee, any of the applicable personnel actions described in chapter 75 of title 5, United States Code; or

(2) With regard to a contractor employee, the discharge, discipline, or denial of employment or promotion, or any other discrimination in regard to hire or tenure of employment or any term or condition of employment.

Contractor means DOE contractors and subcontractors at all tiers.

Counterintelligence means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities.

DOE means the Department of Energy.

Intelligence means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations or foreign persons.

Personnel Assurance Program or PAP means the human reliability program set forth under 10 CFR part 711 designed to ensure that individuals assigned to nuclear explosive duties do not have emotional, mental or physical incapacities that could result in a threat to nuclear explosive safety.

Personnel Security Assurance Program or PSAP means the program set forth under subpart B of 10 CFR part 710 for assuring the highest standards of reliability for individuals with access to certain material or facilities.

Polygraph means an instrument that:

(1) Records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electro dermal patterns as minimum instrumentation standards; and

(2) Is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

Polygraph examination means a process that encompasses all activities that take place between a polygraph examiner and examinee during a specific series of interactions. These interactions may include the pretest interview, the use of the polygraph instrument to collect physiological data from the examinee while the polygraph examiner is presenting a series of tests, the test data analysis phase, and the post-test phase.

Polygraph test means that portion of the polygraph examination during which the polygraph instrument collects physiological data based upon the examinee's responses to test questions from the examiner.

Presidential appointee means an individual appointed by the President and confirmed by the Senate.

Special Access Program or SAP means a program established under Executive Order 12958 for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level.

§ 709.4 To whom does the polygraph examination requirement under this part apply?

(a) Except as provided in paragraph (b) of this section, this part applies to DOE and contractor employees and applicants for employment, and other individuals assigned or detailed to Federal positions at DOE, who are in:

(1) Positions that DOE has determined include counterintelligence activities or access to counterintelligence sources and methods;

(2) Positions that DOE has determined include intelligence activities or access to intelligence sources and methods;

(3) Positions requiring access to information that is protected within a non-intelligence special access program (SAP) designated by the Secretary of Energy;

(4) Positions that are subject to the Personnel Security Assurance Program (PSAP);

(5) Positions that are subject to the Personnel Assurance Program (PAP);

(6) Positions that DOE has determined have a need-to-know or access to information specifically designated by the Secretary or his delegatee regarding the design and operation of nuclear weapons and associated use and control features;

(7) Positions within the Office of Independent Oversight and Performance Assurance, or any successor thereto, involved in inspection and assessment of safeguards and security functions, including cyber security, of the Department;

(8) Positions within the Office of Security and Emergency Operations, or any successor thereto;

(9) The Accelerated Access Authorization Program (AAAP); and

(10) Positions where the applicant or incumbent has requested a polygraph examination in order to respond to questions that have arisen in the context of counterintelligence investigations or personnel security issues. These examinations are referred to in this part as exculpatory polygraph examinations.

(b) This part does not apply to:

(1) A Presidential appointee, if such an appointee has received a favorably adjudicated, full-field Federal Bureau of Investigation background investigation;

(2) A position requiring access to SAP's that are intelligence-related and therefore subject to requirements promulgated by the Director of Central Intelligence;

(3) Any individual for whom the Secretary of Energy gives a written waiver in the interest of national security; or

(4) Any individual for whom the Director, Office of Counterintelligence, gives a waiver, based upon certification from another Federal agency that the individual has successfully completed a full scope or counterintelligence-scope polygraph examination administered within the last five years.

(c) The Director, Office of Counterintelligence, in consultation with the appropriate Program Manager, will establish the criteria for identifying the specific positions described in § 709.4(a)(1)–(8) that warrant polygraph examination and the order of priority for conducting polygraph examinations of the DOE and contractor employees in the eligible positions.

§ 709.5 How will an individual know if his or her position will be eligible for a polygraph examination?

All positions in the programs described in § 709.4(a)(1)–(8) are eligible for polygraph examination. Any job announcement or posting with respect to any position in those programs must indicate that the individual selected for the position is eligible for a polygraph examination.

Subpart B—Polygraph Examination Protocols and Protection of National Security

§ 709.11 What types of topics are within the scope of a polygraph examination?

(a) DOE may ask questions that are appropriate to a counterintelligence-scope examination or that are relevant to the matter at issue in an exculpatory examination.

(b) A counterintelligence-scope polygraph examination is limited to topics concerning the examinee's involvement in espionage, sabotage, terrorism, unauthorized disclosure of classified information, unauthorized foreign contacts, or deliberate damage to or malicious misuse of a U.S.

government information or defense system.

(c) DOE may not ask questions that:

(1) Probe a person's thoughts or beliefs;

(2) Concern conduct that has no security implication; or

(3) Concern conduct that has no direct relevance to an investigation.

§ 709.12 How does DOE determine the wording of questions?

The examiner determines the exact wording of the polygraph questions based on the examiner's pretest interview of the examinee, the examinee's understanding of the questions, and other input from the examinee.

§ 709.13 May an individual refuse to take a polygraph examination?

(a) Yes. An individual may refuse to take a polygraph examination, and an individual being examined may terminate the examination at any time.

(b) If an individual terminates a polygraph examination prior to the completion of the examination, the DOE may treat that termination as a refusal to take a polygraph examination under § 709.14.

§ 709.14 What are the consequences of a refusal to take a polygraph examination?

(a) If the individual is an applicant for employment, assignment, or detail to one of the positions described in § 709.4(a)(1)–(8) and the individual refuses to take a polygraph examination, DOE and its contractors may refuse to employ, assign, or detail the individual to the identified position.

(b) If the individual is a DOE employee whose current position does not require a polygraph examination and is an applicant for employment, assignment, or detail to one of the positions described in § 709.4(a)(1)–(8), the individual's refusal to take a polygraph examination will not affect the individual's current employment status.

(c) If the individual is an incumbent in a position described in § 709.4(a)(1)–(8), and refuses to take a polygraph examination, DOE may deny that individual access to the information or involvement in the activities that justified conducting the examination, consistent with § 709.15. If the individual is a DOE employee, DOE may reassign or realign the individual's duties or take other action, consistent with that denial of access.

(d) If an individual refuses to take a polygraph examination as part of the Accelerated Access Authorization Program, DOE must terminate the accelerated authorization process and the individual may continue to be processed for access authorization under the standard DOE personnel security process.

(e) Since an exculpatory polygraph examination is administered at the request of an individual, DOE and its contractors may not take any adverse personnel action against an individual for refusing to request or take an exculpatory polygraph examination. DOE and its contractors may not record an individual's refusal to take an exculpatory polygraph examination in the individual's personnel security file, or any investigative file. DOE also may not record the fact of that refusal in the employee's personnel file.

(f) If a DOE employee refuses to take a polygraph examination, DOE cannot record the fact of that refusal in the employee's personnel file.

§ 709.15 How does DOE use polygraph examination results?

(a) If following the completion of the polygraph test there are any unresolved issues, the polygraph examiner must conduct an in-depth interview of the individual to address those unresolved issues.

(b) If, after the polygraph examination, there are remaining unresolved issues that raise significant questions relevant to the individual's access to the information or involvement in the activities that justified the polygraph examination, DOE must so advise the individual and provide an opportunity for the individual to undergo an additional polygraph examination. If the additional polygraph examination is not sufficient to resolve the matter, DOE must undertake a comprehensive investigation of the individual, using the polygraph examination as an investigative lead.

(c) DOE will conduct an eligibility evaluation that considers examination results, the individual's personnel security file, and other pertinent information. As part of the eligibility evaluation process, DOE may interview the individual.

(d) Upon completion of the eligibility evaluation, DOE will determine whether the individual may have or continue to have access to the information or involvement in the activities that justified the examination. If DOE decides to discontinue the individual's access to the information or involvement in the activities that justified the examination, the following may occur:

(1) DOE may deny the individual access to the information that justified conducting the examination, and if the individual is a DOE employee, DOE may reassign the individual or realign the individual's duties or take other actions consistent with the denial of access.

(2) For an individual applying for DOE access authorization (including through the AAAP) or already holding DOE access authorization (including PSAP), DOE may initiate an administrative review of the individual's access authorization eligibility under the DOE regulations governing eligibility for access authorization (security clearance) at 10 CFR part 710.

(3) For cases involving a question of loyalty to the United States, DOE may refer the matter to the Federal Bureau of Investigation as required by section 145d of the Atomic Energy Act.

(4) If the individual is an applicant for employment, assignment, or detail to one of the positions described in § 709.4(a)(1)–(8), DOE and its contractors may refuse to employ, assign or detail the individual to the identified position.

(5) For an individual assigned or detailed to DOE, DOE may remove the individual from access to the information that justified the polygraph examination and return the individual to the agency of origin.

Subpart C—Safeguarding Privacy and Employee Rights

§ 709.21 When is an individual notified that a polygraph examination is scheduled?

When a polygraph examination is scheduled, DOE must notify the individual of the date, time, and place of the polygraph examination, and the individual's right to obtain and consult with legal counsel or to secure another representative prior to the examination. DOE must offer to make a copy of these regulations available to the individual. The individual must receive the notification at least forty-eight hours, excluding weekend days and holidays, before the time of the examination except when good cause is shown or when the individual waives the advance notice provision.

§ 709.22 What rights to counsel or other representation does an individual have?

At the individual's own expense, an individual has the right to obtain and consult with legal counsel or another representative prior to the examination. The counsel or representative may not be present during the polygraph examination.

§ 709.23 How does DOE obtain an individual's consent to a polygraph examination?

DOE may not administer a polygraph examination unless DOE has:

(a) Notified the individual of the polygraph examination in writing;

(b) Offered to the individual a copy of these regulations; and

(c) Obtained voluntary written consent from the individual.

§ 709.24 What other information is provided to the individual prior to a polygraph examination?

Before administering the polygraph examination, the examiner must:

(a) Inform the individual of the use of audio and video recording devices;

(b) Explain to the individual the characteristics and nature of the polygraph instrument and examination;

(c) Explain the physical operation of the instrument and the procedures to be followed during the examination;

(d) Review with the individual the questions to be asked during the examination; and

(e) Advise the individual of the individual's privilege against self-incrimination.

§ 709.25 Are there limits on use of polygraph examination results that reflect ''deception indicated'' or ''no opinion''?

DOE or its contractors may not:

(a) Take an adverse personnel action against an individual solely on the basis of a polygraph examination result of ''deception indicated'' or ''no opinion'' except when the Secretary or the Secretary's designee makes a written determination that the information to which the individual has access is of such extreme sensitivity that access under the circumstances poses an unacceptable risk to national security or defense; or

(b) Use a polygraph examination that reflects ''deception indicated'' or ''no opinion'' as a substitute for any other required investigation.

§ 709.26 How does DOE protect the confidentiality of polygraph examination records?

(a) DOE owns all polygraph examination records and reports.

(b) Except as provided in paragraph (c) of this section, the Office of Counterintelligence maintains all polygraph examination records and reports in a system of records established under the Privacy Act of 1974, 5 U.S.C. 552a.

(c) The Office of Intelligence also may maintain polygraph examination reports generated with respect to individuals identified in § 709.4(a)(2) in a system of records established under the Privacy Act of 1974.

(d) Polygraph examination records and reports used to make AAAP determinations or generated as a result of an exculpatory personnel security polygraph examination will be maintained in a System of Records.

(e) DOE must afford the full privacy protection provided by law to information regarding an employee's refusal to take a polygraph examination.

Subpart D—Polygraph Examination and Examiner Standards

§ 709.31 What are the DOE standards for polygraph examinations and polygraph examiners?

(a) DOE adheres to the procedures and standards established by the Department of Defense Polygraph Institute (DODPI). DOE only administers DODPI approved testing formats. The DOE Test Center has been inspected, approved and/or certified by DODPI, the U.S. Air Force Office of Special Investigations, American Polygraph Association, and the American Association of Police Polygraphers

(b) The polygraph examiner must be certified to conduct polygraph examinations under this part by the DOE Psychophysiological Detection of Deception/Polygraph Program Quality Control Official.

(c) To be certified under paragraph (b) of this section, an examiner must have the following minimum qualifications:

(1) The examiner must be an experienced counterintelligence or criminal investigator with extensive additional training in using computerized instrumentation in Psychophysiological Detection of Deception and in psychology, physiology, interviewing, and interrogation.

(2) The examiner must have a favorably adjudicated Single-scope Background Investigation and complete a counterintelligence-scope polygraph examination.

(3) The examiner must receive basic Forensic Psychophysiological Detection of Deception training from the DODPI.

(4) The examiner must be certified by DOE to conduct the following tests:

(i) Test for Espionage, Sabotage, and Terrorism;

(ii) Counterintelligence-Scope Polygraph Tests;

(iii) Zone Comparison Tests;

(iv) Modified General Question Tests;

(v) Peak of Tension Tests; and,

(vi) Relevant and Irrelevant and Directed Lie Control Tests.

§ 709.32 What are the training requirements for polygraph examiners?

(a) Examiners must undergo a minimum of forty hours training annually within the discipline of Forensic Psychophysiological Detection of Deception.

(b) The following organizations provide acceptable curricula to meet the training requirement of paragraph (a) of this section:

(1) American Polygraph Association,

(2) American Association of Police Polygraphists, and

(3) Department of Defense Polygraph Institute.

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

2. The authority citation for part 710 continues to read as follows:

Authority: Sec. 145, 68 Stat. 942 (42 U.S.C. 2165) and sec. 161, 68 Stat. 948 (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; sec. 104(c), 38 Stat. 1237 (42 U.S.C. 5814); sec. 105(a), 88 Stat. 1238 (42 U.S.C. 5815); secs. 641, 644, 646, 91 Stat. 598, 599 (42 U.S.C. 7251, 7254, and 7256).

3. In § 710.57 (subpart B), paragraphs (f) through (i) are redesignated as paragraphs (g) through (j) and a new paragraph (f) is added to read as follows:

§ 710.57 Supervisory review.

* * * * *

(f) Applicants tentatively selected for PSAP positions and each individual occupying a PSAP position, but not yet holding a PSAP access authorization, must submit to a polygraph examination under 10 CFR part 709.

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PART 711—PERSONNEL ASSURANCE PROGRAM (PAP)

4. The authority citation for Part 711 continues to read as follows:

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

5. In § 711.5, paragraph (b)(8) is added to read as follows:

§ 711.5 General requirements.

* * * * *

(b) * * *

(8) Be eligible for a polygraph examination under 10 CFR part 709.

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