2. Section 174.005 is amended by adding a new paragraph (i) to read as follows:

§ 174.005 Applicability.

* * * * *

(i) Oceangoing ships greater than 500 gross tons, as calculated by the International Convention on Tonnage Measurement of Ships, 1969, designed primarily for the carriage of dry cargoes, including roll-on/roll-off ships.

3. Part 174 is amended by adding a new Subpart J to read as follows:

Subpart J—Special Rules Pertaining to Dry Cargo Ships

Subpart J—Special Rules Pertaining to Dry Cargo Ships

§ 174.350 Specific applicability.

This subpart applies to each new ship of 500 gross tons or over, as calculated by the International Convention on Tonnage Measurement of Ships, 1969, designed primarily for the carriage of dry cargoes, including roll-on/roll-off ships and integrated tug and barges (ITBs) when operating as a combined unit.

§ 174.355 Definitions.

New ship means a ship:

(1) For which the building contract is placed on or after February 1, 1992; or

(2) In the absence of a building contract, the keel of which is laid or which is at a similar stage of construction on or after August 1, 1992; or

(3) The delivery of which is on or after February 1, 1997; or

(4) Which has undergone a major conversion:

(i) For which the contract is placed on or after February 1, 1992; or

(ii) In the absence of a contract, the construction work of which is begun on or after August 1, 1992; or

(iii) Which is completed on or after February 1, 1997.

Subdivision Length (L_s) as used in this subpart, is the greatest projected molded length of that part of the ship at or below the deck or decks limiting the vertical extent of flooding with the ship at the deepest subdivision load line. Integrated tug and barges (ITBs) shall be considered a single ship when establishing subdivision length.

§ 174.360 Calculations.

(a) For each ship to which this subpart applies, calculations must be performed which demonstrate compliance with The International Convention for the Safety of Life at Sea, 1974, as amended, Chapter II–1, Part B–1. This compliance must be reflected in information on loading restrictions, such as a maximum height of the center of gravity (KG) or minimum metacentric height (GM) curve that is part of the stability information required by § 170.110 of this chapter.

(b) For ships with a subdivision length (L_s) of less than 328 feet (100 meters) the required index must be calculated from the following equation:

$$R_{<100} = 1 - (1/(1 + (L_s/100) * (R_{100}/(1 - R_{100}))))$$

Where:

R_{100} is the required index calculated for a ship with a subdivision length of 328 feet (100 meters) and L_s is in meters.

Dated: July 14, 1992.

J.W. Kime,

Admiral, U.S. Coast Guard Commandant.

[FR Doc. 92-17001 Filed 7-21-92; 8:45 am]

BILLING CODE 4910-14-M

federal register

Wednesday
July 22, 1992

Part III

Department of Health and Human Services

Administration for Children and Families

Office of Refugee Resettlement; Discretionary Grants for Fiscal Year 1992; Notice of Request for Applications

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Office of Refugee Resettlement; Request for Applications for Micro-Enterprise Development Projects Under the Office of Refugee Resettlement's Fiscal Year 1992 Discretionary Grants Program for Services to Refugees

AGENCY: Administration for Children and Families, HHS.

ACTION: Request for applications for Micro-Enterprise Development projects under the Office of Refugee Resettlement's Fiscal Year 1992 discretionary grants program for services to refugees.[1]

SUMMARY: The Office of Refugee Resettlement (ORR) announces that competing applications will be accepted for grants pursuant to the Director's discretionary authority under section 412(c) of the Immigration and Nationality Act (INA), as amended by section 412 of the Refugee Act of 1980 (Pub. L. No. 96-212), 8 U.S.C. 1522(c); section 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. No. 96-422), 8 U.S.C. 1522 note, insofar as it incorporates by reference with respect to Cuban and Haitian entrants the authorities pertaining to assistance for refugees established by section 412(c) of the INA, as cited above; and the Refugee Assistance Extension Act of 1986 (Pub. L. No. 99-605).

Grants made under this program announcement are subject to the availability of funds for support of these activities. Awards, made on a competitive basis, will be for a one-year budget period, although project periods may be for three years. Applications for continuation grants funded under these awards beyond the one-year budget period but within the three-year project period will be entertained in subsequent years on a noncompetitive basis, subject to availability of funds, timely and successful completion of the project, and ORR's determination that this would be in the best interest of the government. This announcement contains forms and instructions for submitting an application.

CLOSING DATE: The closing date for submission of applications to be considered for FY 1992 is August 18, 1992.

FOR FURTHER INFORMATION CONTACT: Carmel Clay Thompson, Office of Refugee Resettlement, 370 L'Enfant Promenade SW., Washington, DC 20447, Telephone: (202) 401-4560.

SUPPLEMENTARY INFORMATION:

Part A. General Information

1. Legislative Authority

Section 412(c)(1)(A) of the INA authorizes the Director to make grants to, and enter into contracts with, public or private nonprofit agencies for projects specifically designed—(iii) to provide where specific needs have been shown and recognized by the Director, health (including mental health) services, social services, educational, and other services. Additionally, INA section 412(a)(4)(A) states in carrying out this section, the Director, the Secretary of State, and such other appropriate administering official are authorized—(i) to make loans.

2. Agency Goal

The Director has established a broad agency goal of promoting innovative program design, within the framework of joint public-private partnerships, in response to the challenge of reducing welfare dependency and advancing the attainment of economic self-sufficiency among refugees. To this end, ORR announces the availability of funding for Micro-Enterprise Development.

3. Purpose and Methodology

The purpose of this program is to provide grants to intermediary agencies to develop and administer micro-enterprise programs consisting of (a) small-scale financing available through microloans to refugees who have been, or currently are, engaged in an activity designed to generate income, regardless of how small its size; and (b) technical assistance through training for micro-enterprise development to refugee entrepreneurs receiving the microloans.

This program also provides for technical assistance to the agencies funded under this announcement to coordinate their policies and procedures for developing and administering refugee microloan funds.

The targeted population for these loans may include refugees who are receiving public assistance, or are at risk of receiving public assistance, and who lack the financial resources, credit history, or personal assets to otherwise qualify for small loans through standard commercial institutions. Only refugees who have arrived in the United States within the five year period preceding enrollment in the project are eligible to receive ORR-funded microloans. All refugees may participate in all other components of the program.

Secondarily, ORR is interested in seeing the extent to which this initiative may result in the growth of micro-enterprises in refugee communities and the expansion of entrepreneurial skills and expertise among refugees.

4. Eligible Applicants

Eligible applicants are States and public or private, nonprofit organizations and institutions. A partnership or consortium of eligible organizations may submit a joint application to participate in a micro-enterprise program as a single entity, so long as one organization is clearly identified as the grant recipient with primary administrative and fiscal responsibilities. Once a grant has been awarded to an affiliated group of applicants, a single partner of the group would be precluded from continuing the project alone without prior approval of ORR.

5. Availability of Funds

ORR expects to award up to $550,000 in the fourth quarter of Fiscal Year 1992 for new grants. ORR anticipates awarding approximately four micro-enterprise development grants, at a funding level of approximately $125,000 for each award, and an additional single grant in the amount of $50,000 to an organization to assist with participating agencies' technical planning.

The Director reserves the right to award more or less than the funds described above in the absence of worthy applications or under such other circumstances as may be deemed to be in the best interest of the Government. Applicants may be requested to reduce the scope of selected projects to accommodate the level of assistance provided.

6. Prohibition on the Use of Funds

ORR will not fund projects where the role of the applicant is primarily to serve as a conduit for funds to organizations other than the applicant. This does not bar subgranting or contracting for specific services or activities.

[1] In addition to persons who meet all requirements of 45 CFR 400.43, eligibility for refugee social services also includes: (1) Cuban and Haitian entrants, under section 501 of the Refugee Education Assistance Act of 1980 (Pub. L. No. 96-422); (2) certain Amerasians from Vietnam who are admitted to the U.S. as immigrants under section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1988, as included in the FY 1988 Continuing Resolution (Pub. L. No. 100-202); and (3) certain Amerasians from Vietnam, including U.S. citizens, under title II of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1989 (Pub. L. No. 100-461). For convenience, the term "refugee" is used in this notice to encompass all such eligible persons unless the specific context indicates otherwise.

ORR does not anticipate approving the funding of applications which propose to subgrant or contract all or most of the proposed activities under this initiative to an unrelated entity.

7. Project Periods

Projects will be approved on a competitive basis for a three-year period. Budget periods will be limited to 12 months each. Continuation applications will be entertained subsequently on a non-competitive basis, subject to the availability of funds, grantee's performance, continued need, and the best interest of the Government.

8. Definition of Terms

For purposes of applications under this announcement, the following definitions apply:

Business is any lawful activity that generates income regardless of its size.

General program income refers to all program income accruing to a grantee during the period of grant support or to a subgrantee during the period of subgrant support.

Intermediary agencies are micro-enterprise grantees responsible for developing and administering micro-enterprise programs.

Peer borrower groups are comprised of several prospective loan fund borrowers, each of whom is developing a separate micro-enterprise. Intermediary agencies typically make loans to peer borrower groups who collectively determine which member of the group will receive a loan and in what order. Members of a peer borrower group provide technical assistance and support to each other, and the loan repayment record of each member may influence the group's ability to receive future loans.

Self-sufficiency is, minimally, a condition whereby individuals or families do not require or qualify for financial support in the form of public assistance, by reason of earned income.

Microloans consist of small, short term amounts of credit, generally in sums less than $5,000, made by an intermediary agency to low-income entrepreneurs or potential entrepreneurs for start-up or very small micro-enterprise endeavors. These entrepreneurs typically have few personal assets, little savings, and do not qualify for standard commercial loans.

Part B. Program Description

1. Use of Grant Funds by Intermediary Agencies

ORR funds may be used for the administrative costs associated with managing and servicing a microloan portfolio, and for the provision of entrepreneurial technical assistance to prospective borrowers, to loan recipients and to grantee intermediary agencies. Grantees may also propose a model in which one or several of these activities will be provided by a subgrantee.

Applicants whose project design includes ORR-funded microloans must establish a revolving loan fund to disburse these funds. Funds residing in revolving loan funds may be utilized multiple times as loans to individuals. ORR grant funds for a revolving loan fund will be capped for all new grantees at $50,000 for the first budget period. ORR does not anticipate funding projects that propose individual loans for periods greater than three years.

Program Income. General program income, in the form of interest earned on a loan principal, may be retained by the intermediary agency during the period of grant support and used for costs of the project so long as these costs further the objectives of the grant and the Federal statute under which the grant was made. Specifically, program income of this type may be used to expand the number of micro-enterprise loans to be made available to the client population, in accordance with 45 CFR 74.42(e), *Additional Costs Alternative*. Program income generated by the repayment of the loan principal is to be placed in the revolving loan fund to be used for making microloans to eligible borrowers.

Applicants must include in the project design a schedule for the collection and liquidation of all loans and the reversion of repaid loan equity (including interest) to the Federal Government within a three-year period after the expiration of the grant. The applicant must also define the average anticipated loan period and the maximum loan period.

ORR encourages the submission of applications which propose to establish a revolving loan fund based on a peer borrowing group model. (Applicants interested in exploring peer group borrowing may wish to investigate current models in the field of micro-enterprise development, such as that of the Grameen Bank of Bangladesh which provides credit to very small enterprises.)

ORR also encourages the submission of applications which propose to establish a partnership with a commercial bank or other traditional lending institution whereby Federal grant money will be leveraged by commercial loans, and refugee borrowers will have the opportunity of establishing credit-worthy histories with traditional lending institutions. To that end, ORR does not encourage the use of below-market level rates of interest for the loan funds. If appropriate, applicants should include letters of intent or interest from a commercial bank in their application.

Successful applicants will be required to establish an advisory committee with representatives from the local commercial sector and from the refugee community.

To ensure the exchange of technical and training information among participants, all grantee agencies and designated partners are strongly encouraged to attend two training conferences during each year of their participation in the Program at their own cost. Grant funds may be used to offset the cost of attendance.

2. Microloans to Refugee Entrepreneurs

Overview

Successful applicants for these funds will establish refugee revolving loan funds, using ORR grant funds, funds obtained from commercial lending institutions, or a combination of both, to provide and manage microloans to individuals. The intended purpose of the loan funds is to address gaps in the existing capital market for micro-entrepreneurs and prospective micro-entrepreneurs, that is, small, individual entrepreneurs seeking to expand their income-generating capacity.

Intermediary Agency Responsibilities

The micro-enterprise grantees, referred to as intermediary agencies, will have primary responsibility for determining the eligibility and credit-worthiness of refugee borrowers. Intermediary agencies will also determine lending policies, procedures and loan amounts, and are responsible for collecting and servicing microloan payments. In support of these, intermediary agencies must maintain written loan policies and procedures.

Proceeds from loan collections are to be recycled through the revolving loan fund to be used for re-lending to eligible borrowers.

Restriction on Loan Amount

ORR grant funds may be used for microloans to individual refugee entrepreneurs in sums not to exceed $5,000. The total loan amount may exceed the $5,000 limitation only to the extent that the intermediary agency is able to match the ORR-supported microloan amount with funding from other resources on a one-to-one basis. In no case may a microloan exceed $10,000 under this program.

Interest Rate

The interest rate charged on microloans may not exceed four percentage points above the New York Prime lending rate at the time of loan approval.

Maturity

Microloans will have a maximum maturity of three years.

Fees

The intermediary agency may not charge fees, points, or other amounts to the individual borrower applying for a microloan other than actual costs associated with obtaining, approving and closing the approved microloan. Additionally, individual borrowers may not be solicited for contributions toward the cost of training or technical assistance received under this program.

Use of Loans

Microloans may be used for working capital, inventory, supplies, furniture, fixtures, machinery, tools, equipment, building renovation and/or leasehold improvements.

Microloan funds may not be used for the following types of businesses:

• As venture capital for established businesses that are attempting major expansion, particularly where such businesses may qualify for commercial loans.

• For concerns engaged in gambling or speculation of any type.

• For any illegal activity or production, or for the service or distribution of illegal products.

• For purposes not related to micro-enterprise development, e.g., for the purchase of an auto for transportation.

Examples of micro-enterprises which might qualify for this type of loan or business credit are found in small-scale repair, manufacturing, service, or agricultural businesses.

Eligibility

Eligibility for individual loan applicants is limited to those refugees who have arrived in the United States within the five years preceding enrollment in the project. Applicants are encouraged to target a refugee population that has arrived in the United States within the two years preceding project enrollment.

3. Application Content

Each application must contain the following documents:

a. A description of the applicant's organizational structure.

b. A copy of the applicant's IRS Tax Exemption Certificate and identification of IRS code citation of tax exempt status.

c. Copies of the last two fiscal year financial statements, including balance sheets and income statements.

d. A monthly cash flow chart for the three year period beginning October 1, 1992 anticipating selection into this program at the requested funding level.

e. A program narrative that includes a description of the project and project activities, a plan for fiscal and project management, a time table for activities, a project organization chart, a description of staffing, and resumes or qualifications of staff.

Additionally, applicants should include the following information:

• An analysis of capital needs and interest in micro-enterprise development of targeted refugee populations;

• The purpose of the project, a description of the types of loans to be made, the types of micro-enterprises to which it will be targeted, and the credit needs these enterprises are anticipated to have;

• A description of the structure, approach or model of the project, e.g., the extent to which loans will be made on an individual or group basis; outreach activities; the relationship to affiliate agencies; provisions for credit enhancements, such as loan loss reserves; performance criteria to be used in evaluating loans and making decisions with intermediaries or commercial lending institutions; a description of the management and operation of the project, and the management and servicing of the loan funds; and a discussion of the applicant's lending history, if applicable;

• A discussion of the extent to which the applicant proposes to leverage grant monies with other sources of capital for program participants through access to other funding sources or linkage with other financial institutions;

• The anticipated size of the revolving loan fund and its terms (e.g., maximum number of loans and loan size to be made available, interest rates, repayment terms and policies, projected default rates, requirements for loan loss reserves, candidate screening and lending criteria, application procedures, projected loan activity and the activities for which loans to individuals may be used; and a schedule for the collection and liquidation of all loans and reversion of repaid loan equity to the Federal Government;

• A description of the entrepreneurial technical assistance proposed for refugee loan borrowers (individuals or groups);

• A profile of the refugee participants, including: projected employment and/or welfare status; qualifying income, length of time in the United States; and the degree to which English language proficiency will be a prerequisite to participation in the project;

• A discussion of the impact of loan funds and business assets on clients' welfare status if the project proposes to target borrowers who are receiving public assistance;

• A budget narrative which includes a discussion of administrative costs;

• A description of the data collection, management procedures and analysis for tracking project milestones, the outlays under the project and of the loan funds, loan repayments, profit and loss statements or business reports, site visits, and technical assistance needs of project participants;

• Projected performance, including the estimated number of micro-enterprise loans, dollars invested; the costs associated with creation of a micro-enterprise or job; business survival rates; average income earned; the extent to which participating refugees achieve self-support; the ability of the fund itself to achieve self-sufficiency; and savings to the Federal Government in welfare costs discontinued by project participants due to earned self-employment income;

• Policies and procedures proposed regarding program or grant-related income and its disposition.

Part C. Criteria for Competitive Review of Applications

Applications will be reviewed competitively and scored by a review panel of experts in accordance with the HHS Grants Administration Manual and according to the criteria stated below for each program area. The results of the review panel's scores and explanatory comments will assist the Director, ORR, in making recommendations for funding to the Assistant Secretary. Reviewers' scores will weigh heavily in funding decisions but will not be the only factors considered. Applications generally will be considered in order of the average scores assigned by reviewers. However, highly ranked applications are not guaranteed funding since other factors are taken into consideration, including: Comments of reviewers; ACF/ORR officials; previous program performance of applicants; compliance with grant terms under previous DHHS grants; audit reports; and investigative reports. Final funding decisions will be made by the Director, ORR.

Specific review criteria are as follows:

Overall appropriateness of targeted population, to include, (1) an analysis of capital needs and evidence of refugee interest in micro-enterprise; and (2) a discussion of the extent to which the project structure, policies and procedures are consistent with the entrepreneurial knowledge base and skill level of the project participants. (25 points maximum).

Organizational management capability and history of experience with either refugees or low-income loan applicants. Factors to be considered here include the applicant's financial resources, performance and creditworthiness. (30 points maximum).

Clarity and appropriateness of the project design, demonstrating an understanding of the concept of micro-enterprise endeavors, clear and appropriate implementation procedures, a financial plan and a time table. (30 points maximum).

Appropriateness and reasonableness of the proposed budget, including a description of the applicant's plan for fiscal management of each proposed activity, including start-up time, ongoing timelines, and a narrative justification to support each line. (15 points maximum).

Bonus points: (20 points maximum).

Up to ten (10) bonus points may be scored on applications which propose to match ORR grant dollars used in microloan revolving funds with financing from commercial lending institutions or other non-Federal financial sources.

Up to ten (10) additional bonus points may be scored on applications which propose a project design in which a majority of the refugee borrowers will have arrived in the United States within the two-year period prior to enrollment in the project.

Part D. Grant for Assistance to Intermediary Agencies

ORR intends that the loan programs will be complementary to each other in design and implementation features. To that end, ORR will award one grant in an amount not to exceed $50,000 to a private non-profit, non-participating agency for the purpose of assisting grantees (intermediary agencies) in the administration of microloan funds, in the development of appropriate financial systems for administering these projects, and for securing additional financing for microloans from commercial lending institutions. Intermediary agencies will be given access to standardized documents, policies and procedures that have been developed or gathered during the first year of this initiative.

Interested organizations should submit an application package, in accordance with instructions stated below in part E, Application Preparation and Submission, including the following:

1. A description of the applicant's organizational structure, staff qualifications, experience in micro-enterprise development, and expertise in business management principles and the operation of revolving loan funds.

2. A narrative description of technical assistance activities for approximately 6 grantee intermediary agencies, with a timetable and schedule for the preparation of site-visit reports.

3. A line-item budget and budget narrative.

Applicants for the technical assistance grant will be reviewed competitively and scored by a review panel of experts in accordance with the HHS Grants Administration Manual and according to the criteria stated below. Funding decisions will be made in accordance with the procedures outlined in part C above. Specific review criteria are as follows:

Organizational expertise and history of experience in microenterprise development and in providing technical assistance and training to intermediary agencies (40 points maximum).

Clarity and appropriateness of the project design for technical assistance (30 points maximum).

Reasonableness and appropriateness of the proposed budget. (30 points maximum).

Part E. Application Preparation and Submission

1. Availability of Forms

Attachments contain all of the standard forms necessary for the application for awards under this announcement.

Copies of the **Federal Register** containing this announcement are available at most local libraries and Congressional District Offices for reproduction. If copies are not available at these sources, they may be obtained by writing or telephoning the following office: Office of Refugee Resettlement, 370 L'Enfant Promenade SW., Washington, DC 20447, Telephone: (202) 401–4560.

2. Contents of the Application

Each application should include one signed original and two additional copies of the following:

a. A completed Standard Form 424 which has been signed by an official of the organization applying for the grant who has authority to obligate the organization legally. The applicant must be aware that in signing and submitting the application for this award, it is certifying that it will comply with the Federal requirements concerning the drug- free workplace and debarment regulations.

b. The typed or printed names, titles and signatures of parties within the applicant agency who have fiduciary responsibility for microloan notes and/or microloan closing documents, to the extent these differ from a. above.

c. A completed "Budget Information—Non-Construction Programs" form (SF–424A).

d. A signed "Assurances—Non-Construction Programs" form (SF–424B).

e. Signed certifications for a Drug-Free Workplace, Debarment, and Anti-Lobbying.

f. A Project Narrative consisting of the elements described under part B, section 3, above.

3. Application Procedures and Submission

Applications for awards under this program announcement must be submitted on Standard Form (SF)–424 provided for that purpose. The instructions and forms required for submission of applications are attached. The forms may be reproduced for use in submitting applications. Applications must be submitted by the closing date of (Date to be determined).

a. Deadlines: Applications will be considered as meeting an announced deadline if they are either:

(1) Received on or before the deadline date at a place specified in the program announcement, or

(2) Sent on or before the deadline date and received by the granting agency in time for the independent review. (Applicants must be cautioned to request a legibly edited U.S. Postal Service postmark or to obtain a legibly dated receipt from a commercial carrier or the U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.)

b. Late Applications: Applications which do not meet the criteria in paragraph a. of this section are considered late applications. The granting agency shall notify each late applicant that its application will not be considered in the current competition.

c. Extension of Deadlines: The granting agency may extend the deadline for all applicants because of acts of God such as floods, hurricanes, etc., or when there is a widespread disruption of the mails. However, if the granting agency does not extend the deadline for all applicants, it may not waive or extend the deadline for any applicant.

d. Once an application has been submitted, it is considered as final and no additional materials will be accepted by ORR. An application with an original signature and two copies is required. Applications, if mailed, should be addressed to: Administration for Children and Families, Division of Discretionary Grants, 370 L'Enfant Promenade, SW., 6th Floor, Washington, DC 20447.

Applications, if hand delivered, should be taken to: Administration for Children and Families, Division of Discretionary Grants, 901 D Street SW., 6th Floor, Washington, DC 20447.

Intergovernmental Review

(For State applicants only).

This program is covered under Executive Order 12372, "Intergovernmental Review of Federal Programs," and 45 CFR part 100, "Intergovernmental Review of Department of Health and Human Services Programs and Activities." Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs.

All States and Territories except Alaska, Idaho, Kansas, Louisiana, Minnesota, Nebraska, Oregon, Virginia, Pennsylvania, American Samoa and Palau have elected to participate in the Executive Order process and have established Single Points of Contact (SPOCs). Applicants from these eleven jurisdictions need take no action regarding Executive Order 12372. Applicants for projects to be administered by Federally recognized Indian Tribes are also exempt from the requirements of Executive Order 12372. Otherwise, applicants should contact their SPOCs as soon as possible to alert them of the prospective application and to receive any necessary instructions. Applicants must submit any required material to the SPOCs as soon as possible so that the program office can obtain and review SPOC comments as part of the award process. It is imperative that the applicant submit all required materials, if any, to the SPOC and indicate the date of this submittal (or the date of contact if no submittal is required) on the Standard Form 424, item 16a.

Under 45 CFR 100.8(a)(2), an SPOC has 30 days from the application deadline date to comment on proposed new or competing continuation awards.

SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to differentiate clearly between mere advisory comments and those official State process recommendations which they intend to trigger the "accommodate or explain" rule.

When comments are submitted directly to ACF, they should be addressed to: Department of Health and Human Services, Administration for Children and Families, Division of Discretionary Grants, 6th Floor, OFM/DDG, 370 L'Enfant Promenade SW., Washington, DC 20447.

A list of single points of contact for each State and Territory is included as Attachment E of this announcement.

Applicable Regulations

The following HHS regulations are applicable under these grants:

42 CFR Part 441, Services: Requirements and Limits Applicable to Specific Services—
Subpart E, Abortions
Subpart F, Sterilizations
45 Part 16, Procedures of the Departmental Grant Appeals Board
45 CFR Part 46, Protection of Human Subjects
45 CFR Part 74, Administration of Grants
Sections 74.62(a) Non-Federal Audits
74.173 Hospitals
74.174(b) Other non-profit organizations
74.304 Final decisions in disputes
74.710 Real property, equipment, and supplies
74.715 General program income
45 CFR Part 76, Governmentwide Debarment and Suspension (Non-procurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)
Subpart F, Drug-Free Workplace Requirements (Grants)
45 CFR Part 80, Nondiscrimination Under Programs Receiving Federal Assistance Through the Department of Health and Human Services Effectuation of Title VI of the Civil Rights Act of 1964
45 CFR Part 81, Practice and Procedures for Hearings Under Part 80 of this Title
45 CFR Part 84, Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Federal Financial Assistance
45 CFR Part 86, Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefitting from Federal Financial Assistance
45 CFR Part 91, Nondiscrimination on the Basis of Age in HHS Programs or Activities Receiving Federal Financial Assistance
45 CFR Part 92, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments
45 CFR Part 93, New Restrictions on Lobbying
45 CFR Part 95, General Administration—Grant Programs (Public Assistance and Medical Assistance)
(Subpart E, Cost Allocation Plans)
45 CFR Part 100, Intergovernmental Review of Department of Health and Human Services Programs and Activities
45 CFR Part 400, Refugee Resettlement Program
45 CFR Part 401, Cuban/Haitian Entrant Program

Post-Award Requirements—Records and Reports

Grantees are required to file Financial Status (SF–269) and Program Progress Reports on a quarterly basis. Funds shall be accounted for and reported upon separately from all other grant activities. Successful applicants for micro-enterprise development projects will be given specific instructions by ORR, following the award of the grant, for reporting grant performance and loan portfolio information.

The official receipt of all correspondence is the Division of Discretionary Grants. The original copy of each report shall be submitted to the Grants Management Specialist, Department of Health and Human Services, Administration for Children and Families, Division of Discretionary Grants, 6th Floor, OFM/DDG, 370 L'Enfant Promenade SW., Washington, DC 20447. A copy should be sent simultaneously to the Division of Operations, ORR. The mailing address is: Office of Refugee Resettlement, Division of Operations, Aerospace Building, Sixth Floor, 370 L'Enfant Promenade, SW., Washington, DC 20447.

The final Financial and Program Progress Reports shall be due 90 days after the budget expiration date or termination of grant support.

Although ORR does not expect the proposed components/projects to include evaluation activities, it does expect grantees to maintain adequate records to track and report on project outcomes and expenditures by budget line item. The following certifications are attached: Drug-Free Workplace, Debarment, and Anti-Lobbying.

The Catalog of Federal Domestic Assistance (CFDA) number assigned to this announcement is 93.038.

Dated: July 13, 1992.

Chris Gersten,

Director, Office of Refugee Resettlement.

BILLING CODE 4130-01-M

Attachment A

APPLICATION FOR FEDERAL ASSISTANCE

OMB Approval No. 0348-0043

2. DATE SUBMITTED | Applicant Identifier

1. TYPE OF SUBMISSION:
Application
☐ Construction
☐ Non-Construction
Preapplication
☐ Construction
☐ Non-Construction

3. DATE RECEIVED BY STATE | State Application Identifier

4. DATE RECEIVED BY FEDERAL AGENCY | Federal Identifier

5. APPLICANT INFORMATION

Legal Name:

Organizational Unit:

Address (*give city, county, state, and zip code*):

Name and telephone number of the person to be contacted on matters involving this application (*give area code*)

6. EMPLOYER IDENTIFICATION NUMBER (EIN): ☐☐ – ☐☐☐☐☐☐☐

7. TYPE OF APPLICANT: (*enter appropriate letter in box*) ☐

A. State
B. County
C. Municipal
D. Township
E. Interstate
F. Intermunicipal
G. Special District
H. Independent School Dist.
I. State Controlled Institution of Higher Learning
J. Private University
K. Indian Tribe
L. Individual
M. Profit Organization
N. Other (Specify): ____________

8. TYPE OF APPLICATION:

☐ New ☐ Continuation ☐ Revision

If Revision, enter appropriate letter(s) in box(es): ☐ ☐

A. Increase Award B. Decrease Award C. Increase Duration
D. Decrease Duration Other (*specify*):

____

9. NAME OF FEDERAL AGENCY:

10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER: ☐☐ - ☐☐☐

TITLE:

11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT:

12. AREAS AFFECTED BY PROJECT (*cities, counties, states, etc.*):

13. PROPOSED PROJECT:		14. CONGRESSIONAL DISTRICTS OF:	
Start Date	Ending Date	a. Applicant	b. Project

15. ESTIMATED FUNDING:

a. Federal	$	.00
b. Applicant	$	.00
c. State	$	.00
d. Local	$	.00
e. Other	$	.00
f. Program Income	$	.00
g. TOTAL	$	.00

16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?

a. YES. THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON:

DATE ____________________

b. NO. ☐ PROGRAM IS NOT COVERED BY E.O. 12372

☐ OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW

17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT?

☐ Yes If "Yes," attach an explanation. ☐ No

18. TO THE BEST OF MY KNOWLEDGE AND BELIEF, ALL DATA IN THIS APPLICATION/PREAPPLICATION ARE TRUE AND CORRECT, THE DOCUMENT HAS BEEN DULY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED

a. Typed Name of Authorized Representative	b. Title	c. Telephone number
d. Signature of Authorized Representative		e. Date Signed

Previous Editions Not Usable

Standard Form 424 (REV 4-88)
Prescribed by OMB Circular A-102

Authorized for Local Reproduction

BILLING CODE 4130-01-C

INSTRUCTIONS FOR THE SF 424

This is a standard form used by applicants as a required facesheet for preapplications and applications submitted for Federal assistance. It will be used by Federal agencies to obtain applicant certification that States which have established a review and comment procedure in response to Executive Order 12372 and have selected the program to be included in their process, have been given an opportunity to review the applicant's submission.

Item and entry:

1. Self-explanatory.

2. Date application submitted to Federal agency (or State if applicable) and applicant's control number (if applicable).

3. State use only (if applicable).

4. If this application is to continue or revise an existing award, enter present Federal identifier number. If for a new project, leave blank.

5. Legal name of applicant, name of primary organizational unit which will undertake the assistance activity, complete address of the applicant, and name and telephone number of the person to contact on matters related to this application.

6. Enter Employer Identification Number (EIN) as assigned by the Internal Revenue Service.

7. Enter the appropriate letter in the space provided.

8. Check appropriate box and enter appropriate letter(s) in the space(s) provided:

—"New" means a new assistance award.

—"Continuation" means an extension for an additional funding/budget period for a project with a projected completion date.

—"Revision" means any change in the Federal Government's financial obligation or contingent liability from an existing obligation.

9. Name of Federal agency from which assistance is being requested with this application.

10. Use the Catalog of Federal Domestic Assistance number and title of the program under which assistance is requested.

11. Enter a brief descriptive title of the project. If more than one program is involved, you should append an explanation on a separate sheet. If appropriate (e.g., construction or real property projects), attach a map showing project location. For preapplications, use a separate sheet to provide a summary description of this project.

12. List only the largest political entities affected (e.g., State, counties, cities).

13. Self-explanatory.

14. List the applicant's Congressional District and any District(s) affected by the program or project.

15. Amount requested or to be contributed during the first funding/budget period by each contributor. Value of in-kind contributions should be included on appropriate lines as applicable. If the action will result in a dollar change to an existing award, indicate *only* the amount of the change. For decreases, enclose the amounts in parentheses. If both basic and supplemental amounts are included, show breakdown on an attached sheet. For multiple program funding, use totals and show breakdown using same categories as item 15.

16. Applicants should contact the State Single Point of Contact (SPOC) for Federal Executive Order 12372 to determine whether the application is subject to the State intergovernmental review process.

17. This question applies to the applicant organization, not the person who signs as the authorized representative. Categories of debt include delinquent audit disallowances, loans and taxes.

18. To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for you to sign this application as official representative must be on file in the applicant's office. (Certain Federal agencies may require that this authorization be submitted as part of the application.)

BILLING CODE 4130-01-M

OMB Approval No. 0348-0044

BUDGET INFORMATION — Non-Construction Programs

SECTION A - BUDGET SUMMARY

Grant Program Function or Activity (a)	Catalog of Federal Domestic Assistance Number (b)	Estimated Unobligated Funds		New or Revised Budget		
		Federal (c)	Non-Federal (d)	Federal (e)	Non-Federal (f)	Total (g)
1.		$	$	$	$	$
2.						
3.						
4.						
5. TOTALS		$	$	$	$	$

SECTION B - BUDGET CATEGORIES

6 Object Class Categories	GRANT PROGRAM, FUNCTION OR ACTIVITY				Total (5)
	(1)	(2)	(3)	(4)	
a. Personnel	$	$	$	$	$
b. Fringe Benefits					
c. Travel					
d. Equipment					
e. Supplies					
f. Contractual					
g. Construction					
h. Other					
i. Total Direct Charges (sum of 6a - 6h)					
j. Indirect Charges					
k. TOTALS (sum of 6i and 6j)	$	$	$	$	$
7. Program Income	$	$	$	$	$

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Standard Form 424A (4-88)
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SECTION C - NON-FEDERAL RESOURCES

(a) Grant Program	(b) Applicant	(c) State	(d) Other Sources	(e) TOTALS
8.	$	$	$	$
9.				
10.				
11.				
12. TOTALS (sum of lines 8 and 11)	$	$	$	$

SECTION D - FORECASTED CASH NEEDS

	Total for 1st Year	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
13. Federal	$	$	$	$	$
14. NonFederal					
15. TOTAL (sum of lines 13 and 14)	$	$	$	$	$

SECTION E - BUDGET ESTIMATES OF FEDERAL FUNDS NEEDED FOR BALANCE OF THE PROJECT

(a) Grant Program	FUTURE FUNDING PERIODS (Years)			
	(b) First	(c) Second	(d) Third	(e) Fourth
16.	$	$	$	$
17.				
18.				
19.				
20. TOTALS (sum of lines 16 -19)	$	$	$	$

SECTION F - OTHER BUDGET INFORMATION

(Attach additional Sheets if Necessary)

21. Direct Charges:	22. Indirect Charges:
23. Remarks	

SF 424A (4-88) Page 2
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INSTRUCTIONS FOR THE SF-424A

General Instructions

This form is designed so that application can be made for funds from one or more grant programs. In preparing the budget, adhere to any existing Federal grantor agency guidelines which prescribe how and whether budgeted amounts should be separately shown for different functions or activities within the program. For some programs, grantor agencies may require budgets to be separately shown by function or activity. For other programs, grantor agencies may require a breakdown by function or activity. Sections A,B,C, and D should include budget estimates for the whole project except when applying for assistance which requires Federal authorization in annual or other funding period increments. In the latter case, Sections A,B, C, and D should provide the budget for the first budget period (usually a year) and Section E should present the need for Federal assistance in the subsequent budget periods. All applications should contain a breakdown by the object class categories shown in Lines a-k of Section B.

Section A. Budget Summary, Lines 1–4, Columns (a) and (b)

For applications pertaining to a *single* Federal grant program (Federal Domestic Assistance Catalog number) and *not requiring* a functional or activity breakdown, enter on Line 1 under Column (a) the catalog program title and the catalog number in Column (b).

For applications pertaining to a *single* program *requiring* budget amounts by multiple functions or activities, enter the name of each activity or function on each line in Column (a), and enter the catalog number in Column (b). For applications pertaining to multiple programs where none of the programs require a breakdown by function or activity, enter the catalog program title on each line in *Column* (a) and the respective catalog number on each line in Column (b).

For applications pertaining to *multiple* programs where one or more programs *require* a breakdown by function or activity, prepare a separate sheet for each program requiring the breakdown. Additional sheets should be used when one form does not provide adequate space for all breakdown of data required. However, when more than one sheet is used, the first page should provide the summary totals by programs.

Lines 1–4, Columns (c) through (g)

For new applications, leave Columns (c) and (d) blank. For each line entry in Columns (a) and (b), enter in Columns (e), (f), and (g) the appropriate amounts of funds needed to support the project for the first funding period (usually a year).

For continuing grant program applications, submit these forms before the end of each funding period as required by the grantor agency. Enter in Columns (c) and (d) the estimated amounts of funds which will remain unobligated at the end of the grant funding period only if the Federal grantor agency instructions provide for this. Otherwise, leave these columns blank. Enter in columns (e) and (f) the amounts of funds needed for the upcoming period. The amount(s) in Column (g) should be the sum of amounts in Columns (e) and (f).

For supplemental grants and changes to existing grants, do not use Columns (c) and (d). Enter in Column (e) the amount of the increase or decrease of Federal funds and enter in Column (f) the amount of the increase or decrease of non-Federal funds. In Column (g) enter the new total budgeted amount (Federal and non-Federal) which includes the total previous authorized budgeted amounts plus or minus, as appropriate, the amounts shown in Columns (e) and (f). The amount(s) in Column (g) should not equal the sum of amounts in Columns (e) and (f).

Line 5—Show the totals for all columns used.

Section B. Budget Categories

In the column headings (1) through (4), enter the titles of the same programs, functions, and activities shown on Lines 1–4, Column (a), Section A. When additional sheets are prepared for Section A, provide similar column headings on each sheet. For each program, function or activity, fill in the total requirements for funds (both Federal and non-Federal) by object class categories.

Lines 6a–i—Show the totals of Lines 6a to 6h in each column.

Line 6j—Show the amount of indirect cost.

Line 6k—Enter the total of amounts on Lines 6i and 6j. For all applications for new grants and continuation grants the total amount in column (5), Line 6k, should be the same as the total amount shown in Section A, Column (g), Line 5. For supplemental grants and changes to grants, the total amount of the increase or decrease as shown in Columns (1)–(4), Line 6k should be the same as the sum of the amounts in Section A, Columns (e) and (f) on Line 5.

Line 7—Enter the estimated amount of income, if any, expected to be generated from this project. Do not add or subtract this amount from the total project amount. Show under the program narrative statement the nature and source of income. The estimated amount of program income may be considered by the federal grantor agency in determining the total amount of the grant.

Section C. Non-Federal-Resources

Lines 8–11—Enter amounts of non-Federal resources that will be used on the grant. If in-kind contributions are included, provide a brief explanation on a separate sheet.

Column (a)—Enter the program titles identical to Column (a), Section A. A breakdown by function or activity is not necessary.

Column (b)—Enter the contribution to be made by the applicant.

Column (c)—Enter the amount of the State's cash and in-kind contribution if the applicant is not a State or State agency. Applicants which are a State or State agencies should leave this column blank.

Column (d)—Enter the amount of cash and in-kind contributions to be made from all other sources.

Column (e)—Enter totals of Columns (b), (c), and (d).

Line 12—Enter the total for each of Columns (b)-(e). The amount in Column (e) should be equal to the amount on Line 5, Column (f), Section A.

Section D. Forecasted Cash Needs

Line 13—Enter the amount of cash needed by quarter from the grantor agency during the first year.

Line 14—Enter the amount of cash from all other sources needed by quarter during the first year.

Line 15—Enter the totals of amounts on Lines 13 and 14.

Section E. Budget Estimates of Federal Funds Needed for Balance of the Project

Lines 16–19—Enter in Column (a) the same grant program titles shown in Column (a), Section A. A breakdown by function or activity is not necessary. For new applications and continuation grant applications, enter in the proper columns amounts of Federal funds which will be needed to complete the program or project over the succeeding funding periods (usually in years). This section need not be completed for revisions (amendments, changes, or supplements) to funds for the current year of existing grants.

If more than four lines are needed to list the program titles, submit additional schedules as necessary.

Line 20—Enter the total for each of the Columns (b)-(e). When additional schedules are prepared for this Section, annotate accordingly and show the overall totals on this line.

Section F. Other Budget Information

Line 21—Use this space to explain amounts for individual direct object-class cost categories that may appear to be out of the ordinary or to explain the details as required by the Federal grantor agency.

Line 22—Enter the type of indirect rate (provisional, predetermined, final or fixed) that will be in effect during the funding period, the estimated amount of the base to which the rate is applied, and the total indirect expense.

Line 23—Provide any other explanations or comments deemed necessary.

ASSURANCES—NON-CONSTRUCTION PROGRAMS

Note: Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the awarding agency. Further, certain Federal awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant I certify that the applicant:

1. Has the legal authority to apply for Federal assistance, and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project costs) to ensure proper planning, management and completion of the project described in this application.

2. Will give the awarding agency, the Comptroller General of the United States, and if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.

3. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.

4. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.

5. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. 4728-4763) relating to prescribed standards for merit systems for programs funded under one of the nineteen statutes or regulations specified in appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).

6. Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (Pub. L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. 6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (Pub. L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (Pub. L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) sections 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. 290 dd-3 and 290 ee-3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.

7. Will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or federally assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.

8. Will comply with the provisions of the Hatch Act (5 U.S.C. 1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

9. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. 276a to 276a-7), the Copeland Act (40 U.S.C. 276c and 18 U.S.C. 874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), regarding labor standards for federally assisted construction subagreements.

10. Will comply, if applicable, with flood insurance purchase requirements of section 102(a) of the Flood Disaster Protection Act of 1973 (Pub. L. 93-234) which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more.

11. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (Pub. L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.); (f) conformity of Federal actions to State (Clear Air) Implementation Plans under section 176(c) of the Clear Air Act of 1955, as amended (42 U.S.C. 7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended, (Pub. L. 93-523); and (h) protection of endangered species under the Endangered Species Act of 1973, as amended, (Pub. L. 93-205).

12. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. 1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.

13. Will assist the awarding agency in assuring compliance with section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a-1 et seq.).

14. Will comply with Public Law 93-348 regarding the protection of human subjects involved in research, development, and related activities supported by this award of assistance.

15. Will comply with the Laboratory Animal Welfare Act of 1966 (Pub. L. 89-544, as amended, 7 U.S.C. 2131 et seq.)

pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by this award of assistance.

16. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4801 et seq.) which prohibits the use of lead based paint in construction or rehabilitation of residence structures

17. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act of 1984.

18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations and policies governing this program.

Signature of authorized certifying official

Title

Applicant organization

Date submitted

BILLING CODE 4130-01-M

Attachment B

U.S. Department of Health and Human Services

Certification Regarding Drug-Free Workplace Requirements

Grantees Other Than Individuals

By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

This certification is required by regulations implementing the Drug-Free Workplace Act of 1988, 45 CFR Part 76, Subpart F. The regulations, published in the May 25, 1990 Federal Register, require certification by grantees that they will maintain a drug-free workplace. The certification set out below is a material representation of fact upon which reliance will be placed when the Department of Health and Human Services (HHS) determines to award the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, HHS, in addition to any other remedies available to the Federal Government, may taken action authorized under the Drug-Free Workplace Act. False certification or violation of the certification shall be grounds for suspension of payments, suspension or termination of grants, or governmentwide suspension or debarment.

Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios.)

If the workplace identified to HHS changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see above).

Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees' attention is called, in particular, to the following definitions from these rules:

"Controlled substance" means a controlled substance in Schedules I through V of the Controlled Substances Act (21 USC 812) and as further defined by regulation (21 CFR 1308.11 through 1308.15).

"Conviction" means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

"Criminal drug statute" means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

"Employee" means the employee of a grantee directly engaged in the performance of work under a grant, including: (i) All "direct charge" employees; (ii) all "indirect charge" employees unless their impact or involvement is insignificant to the performance of the grant; and, (iii) temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the grantee's payroll; or employees of subrecipients or subcontractors in covered workplaces).

The grantee certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an ongoing drug-free awareness program to inform employees about:

(1) The dangers of drug abuse in the workplace; (2) The grantee's policy of maintaining a drug-free workplace; (3) Any available drug counseling, rehabilitation, and employee assistance programs; and, (4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will:

(1) Abide by the terms of the statement; and, (2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the agency in writing, within ten calendar days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted:

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or, (2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant (use attachments, if needed):

Place of Performance (Street address, City, County, State, ZIP Code)____________________

Check ___ if there are workplaces on file that are not identified here.

Sections 76.630(c) and (d)(2) and 76.635(a)(1) and (b) provide that a Federal agency may designate a central receipt point for STATE-WIDE AND STATE AGENCY-WIDE certifications, and for notification of criminal drug convictions. For the Department of Health and Human Services, the central receipt point is: Division of Grants Management and Oversight, Office of Management and Acquisition, Department of Health and Human Services, Room 517-D, 200 Independence Avenue, S.W., Washington, D.C. 20201.

DGMO Form#2 Revised May 1990

BILLING CODE 4130-01-C

Attachment C—Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions

By signing and submitting this proposal, the applicant, defined as the primary participant in accordance with 45 CFR part 76, certifies to the best of its knowledge and belief that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal Department or agency;

(b) Have not within a 3-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a 3-year period preceding this application/proposal had one or more public transactions (Federal, State, or local) terminated for cause or default.

The inability of a person to provide the certification required above will not necessarily result in denial of participation in this covered transaction. If necessary, the prospective participant shall submit an explanation of why it cannot provide the certification. The certification or explanation will be considered in connection with the Department of Health and Human Services (HHS) determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

The prospective primary participant agrees that by submitting this proposal, it will include the clause entitled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion—Lower Tier Covered Transaction" provided below without modification in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

(To Be Supplied to Lower Tier Participants)

By signing and submitting this lower tier proposal, the prospective lower tier participant, as defined in 45 CFR part 76, certifies to the best of its knowledge and belief that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any federal department or agency.

(b) Where the prospective lower tier participant is unable to certify to any of the above, such prospective participant shall attach an explanation to this proposal.

The prospective lower tier participant further agrees by submitting this proposal that it will include this clause entitled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion—Lower Tier Covered Transactions" without modification in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

Attachment D—Certification Regarding Lobbying

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant loan or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantee and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Signature

Title

Organization

Date

BILLING CODE 4130-01-M

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OM 0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. **Type of Federal Action:** ☐ a. contract b. grant c. cooperative agreement d. loan e. loan guarantee f. loan insurance	2. **Status of Federal Action:** ☐ a. bid/offer/application b. initial award c. post-award	3. **Report Type:** ☐ a. initial filing b. material change **For Material Change Only:** year ______ quarter ____ date of last report ________

4. **Name and Address of Reporting Entity:** ☐ Prime ☐ Subawardee Tier ____, *if known:* Congressional District, *if known:*	5. **If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:** Congressional District, *if known:*
6. **Federal Department/Agency:**	7. **Federal Program Name/Description:** CFDA Number, *if applicable* ________
8. **Federal Action Number,** *if known:*	9. **Award Amount,** *if known:* $
10. a. **Name and Address of Lobbying Entity** *(if individual, last name, first name, MI):*	b. **Individuals Performing Services** *(including address if different from No. 10a)* *(last name, first name, MI):*

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

11. **Amount of Payment** *(check all that apply):* $ ____________ ☐ actual ☐ planned	13. **Type of Payment** *(check all that apply):* ☐ a. retainer ☐ b. one-time fee ☐ c. commission ☐ d. contingent fee ☐ e. deferred ☐ f. other; specify: ____________
12. **Form of Payment** *(check all that apply):* ☐ a. cash ☐ b. in-kind; specify: nature ____________ value ____________	

14. **Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:**

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

15. **Continuation Sheet(s) SF-LLL-A attached:** ☐ Yes ☐ No

16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.	**Signature:** ____________ **Print Name:** ____________ **Title:** ____________ **Telephone No.:** ________ **Date:** ________
Federal Use Only:	Authorized for Local Reproduction Standard Form - LLL

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Attachment E

STATE SINGLE POINTS OF CONTACT

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federal register

Wednesday
July 22, 1992

Part IV

Department of Energy

10 CFR Part 707

Workplace Substance Abuse Programs at DOE Sites; Final Rule

DEPARTMENT OF ENERGY

10 CFR Part 707

Workplace Substance Abuse Programs at DOE Sites; Final Rule

AGENCY: Office of Procurement, Assistance and Program Management, Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is establishing minimum requirements for DOE contractors to use in developing and implementing programs that deal with the use of illegal drugs by their employees and certain other individuals. Minimum requirements address: (1) Prohibition on the use, possession, sale, distribution, or manufacture of illegal drugs; (2) education and training; (3) testing of certain employees in sensitive positions; (4) employee assistance; (5) removal, discipline, treatment, and rehabilitation of employees; and (6) notification to DOE. The rule provides for drug testing for: (1) contractor employees in, and applicants for, testing designated positions at sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954, as amended, and (2) individuals with unescorted access to the control areas of certain DOE reactors. The Department has determined that possible risks of serious harm to the environment and to public health, safety, and national security justify the imposition of a uniform rule establishing a baseline workplace substance abuse program, including drug testing.

EFFECTIVE DATE: August 21, 1992.

FOR FURTHER INFORMATION CONTACT: Juanita E. Smith, Office of Contractor Human Resource Management (PR-15), Department of Energy, at (202) 586-9033.

SUPPLEMENTARY INFORMATION:

I. General

The Department of Energy published in the **Federal Register** on July 3, 1991, a proposed regulation to create a new Part 707 of Title 10, Code of Federal Regulations, entitled "Workplace Substance Abuse Programs at DOE Facilities" (56 FR 30644).

DOE is issuing this rule under its broad authorities to carry out the purpose of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2012, 2013, 2051, 2061, 2165, 2201; the Energy Reorganization Act, 42 U.S.C. 5814, 5815; the Department of Energy Organization Act, 42 U.S.C. 7151, 7251, 7254, and 7256; and the Drug-Free Workplace Act of 1988, 41 U.S.C. 701 *et seq.*

Program requirements will include the following: training and education, testing of certain employees in sensitive positions, employee assistance, disciplinary measures for employees determined to have used illegal drugs in violation of this rule, and DOE actions in response to inadequate contractor programs. It is the intent of DOE to allow contractors a degree of flexibility in developing their programs; however, program components are subject to review and approval by DOE to assure that they meet the minimum baseline requirements.

Through implementation of the requirements of this rule, DOE expects to mitigate the potential for harm to the environment, public health and safety, and national security, and further reduce the possibility of accidents at DOE facilities by employees who use illegal drugs. Pursuant to Executive Order 12564, "Drug-Free Federal Workplace," DOE has implemented a Drug-Free Federal Workplace Program that includes testing provisions for Federal employees that are comparable to provisions in this rule. The final rule published today will assist DOE in assuring that contractor employees in sensitive and critical positions do not use illegal drugs.

Individual rights to protection and privacy were important considerations to DOE in the development of this rule. The program scope and requirements have been balanced to assure that any intrusiveness is minimized. The types of positions subject to testing under this program have been limited to those performing only the most sensitive or critical work having a direct effect on the environment, public health and safety, or national security. These positions are held by personnel representing less than 30 percent of all DOE contractor employees. Program elements and testing provisions included in this rule represent the minimum requirements necessary for DOE to implement a responsible program and establish reasonable measures to assure that employees in these positions perform their duties safely.

Approximately 65 percent of all contractor employees subject to testing under this program are currently tested under comparable requirements through programs administered by DOE contractors as a matter of corporate policy or by other Federal agencies. For these employees, DOE will not be imposing substantial additional requirements or costs. An objective of DOE in promulgating this rule is to promote a measure of uniformity and consistency in the existing programs of DOE contractors. DOE has made every effort to avoid any undue burdens on contractors and employees, particularly with regard to drug testing.

The rule will apply to all of DOE's management and operating contractors and certain other DOE selected contractors and subcontractors performing work at sites operated under the authority of the Atomic Energy Act of 1954, as amended; but drug testing provisions will apply only if those contractors and subcontractors have employees in positions subject to testing under the program.

The rule requires contractors to submit to DOE a written program that meets the rule's minimum requirements. All employees in testing designated positions will be subject to random testing for illegal drugs, and will also be subject to testing for illegal drugs upon reasonable suspicion or as a result of an occurrence, as defined in the rule. Applicants for testing designated positions and individuals with unescorted access to the control areas of certain DOE reactors will also be subject to testing under the conditions described in this part. DOE anticipates that a number of existing contractor drug-free workplace programs will meet or exceed the baseline requirements established by this part; such programs will be submitted to DOE for review and determination that they meet these baseline requirements.

In developing this proposed rule, DOE generally followed the models provided by related drug-free workplace programs, especially the program now in place for Federal employees under Executive Order 12564, "Drug-Free Federal Workplace," of September 15, 1986. This rule incorporates the requirements of the Drug-Free Workplace Act of 1988, 41 U.S.C. 701, *et seq.*, and the relevant implementing provisions of the Federal Acquisition Regulation (FAR): Subpart 23.5, section 52.223-5, and section 52.223-6; and Code of Federal Regulations (CFR): 48 CFR 23.5, 48 CFR 52.223-5, and 48 CFR 52.223-6. The Drug-Free Workplace Act requires certain entities that are awarded Government contracts for property or services of a value of $25,000 or more, and all individuals awarded contracts, to certify to the contracting agency that they will provide a drug-free workplace for the performance of the contract. Today's rule is consistent with such statutory requirements and the relevant provisions of the FAR.

Under the provisions of this rule, existing contracts will be modified, to the extent necessary, to ensure that the requirements set forth in the final rule are included as contract provisions. A contract clause to be added to the Department of Energy Acquisition Regulation, 48 CFR part 9, and relating to this rule, is being published today in the **Federal Register** as an interim final rule, on which comments are invited.

This rule only relates to certain aspects of a workplace substance abuse program. Contractors are not relieved by this rule from any additional responsibilities they may have for law enforcement and security procedures, such as investigations, searches, and arrests for criminal violations, which are covered by other applicable laws, rules, and orders of appropriate governmental authorities.

II. DOE Response to Comments Received

In its Notice of Proposed Rulemaking (NOPR), DOE allowed a 60-day period for public comment. Two public hearings were also scheduled to take place within that 60-day period. One of the public hearings was canceled for lack of interest, as allowed in the original NOPR. (See 56 FR 35798, July 26, 1991.) The other public hearing was conducted as scheduled in Washington, DC, on July 29, 1991 where two interested persons presented views. In addition, a total of seventeen written comments were received from commenters that included contractors, unions, professional associations, public interest groups, and universities. The comments fell under relatively few general headings, and some commenters raised the some points as others. Following is a summary of the substantive comments, and the DOE response. References are to section numbers of the proposed rule.

Comment: One commenter stated the rule is Constitutionally dubious. It raises serious questions of violations of the Fourth Amendment and will subject contractors to unnecessary and costly litigation. The testing required under the rule is "governmental action" subject to the "reasonableness" standard of the Fourth Amendment. The governmental interests sought to be advanced by the rule do not rise above individuals' expectations of privacy.

Response: The Supreme Court has established that drug testing *per se* is not unconstitutional, and that drug testing programs can be designed so as not to infringe upon Fourth Amendment protections. See *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, and *Skinner* v. *Railway Labor Executives' Association*, 489 U.S. 602, both decided on March 21, 1989. Since the Supreme Court's decisions in the Von Raab and Skinner cases, the clear trend of case law has been in favor of allowing drug testing of employees in sensitive positions, where there is a strong governmental interest to be protected or advanced and certain procedural safeguards are observed. The governmental interests that DOE seeks to protect or advance by this rule should be readily apparent. DOE, among other responsibilities, is charged with the development and production of all our nation's nuclear weapons and other functions vital to our national interests and security. The Department's activities in these areas could pose serious health, safety, environmental, or security threats if improperly carried out. The risks of harm, whether accidental or deliberate, are substantially increased if employees in sensitive positions use illegal drugs. In its most basic essentials, this rule is designed to address a legitimate security concern. DOE, in conjunction with the Department of Justice and other Federal agencies, continues to monitor its drug testing programs for compliance with the latest judicial interpretations. The Department is confident that the provisions of this rule meet the standards for Constitutionally valid drug testing, as set by the courts. Litigation costs incurred by a management and operating contractor in complying with a DOE contract requirement can be claimed for reimbursement under normal cost principles.

Comment: The scope of the rule is unclear; or, alternatively, the scope should be narrowed so as to exclude certain classes of contractors and subcontractors.

Response: The "scope" section of the rule (section 707.2) makes it clear that the rule applies to all "management and operating" contractors, and to other contractors and subcontractors that meet certain criteria. However, no contractor or subcontractor otherwise within the scope of the rule will be required to carry out the testing provisions of the rule unless some of its employees are in "testing designated positions" and performing "sensitive duties," as described in the rule. All contractors and subcontractors within the scope of the rule will be required to implement the non-testing provisions, *e.g.*, education and counseling.

Comment: Commenters indicated at least one contract clause will have to be added to the Department of Energy Acquisition Regulation before contractors can be expected to comply with this rule.

Response: A contract clause is being published today in the **Federal Register** as an interim final rule. Persons interested in or affected by this rule are invited to comment on the clause.

Comment: Proposed § 707.5(a)(1) requires contractors to prohibit "individuals in testing designated positions who are not free from the effects of the use of illegal drugs from entering or remaining on sites owned or controlled by DOE." This goes beyond § 707.14(b), which only requires that such individuals be removed from sensitive duties, and conflicts with the further requirement that such individuals be placed in non-testing designated positions, if possible, pending rehabilitation.

Response: Section 707.5(a)(1) has been amended to conform with the provisions of § 707.14(b).

Comment: Proposed section 707.5(a)(8) requires that an employee in a testing designated position report to the Medical Review Officer the use, pursuant to a valid prescription, of any of the drugs to be tested for and listed in § 707.11. This places too great a burden on individual employees, who may not know that certain drugs they are taking by prescription must be reported.

Response: DOE adopted this comment. Section 707.13(b) has been amended to allow an employee or applicant an opportunity to report use of prescription and over-the-counter drugs to the MRO when there has been a confirmed positive test result, and proposed § 707.5(a)(8) has been deleted.

Comment: In § 707.5(c), the contractor should be allowed to develop its program on employee sanctions without being tied to standards applicable to Federal employees.

Response: The reference to Federal employees has been removed. Each contractor will be allowed to apply its own disciplinary standards, but employees who are determined, for the first time, to have used illegal drugs may be offered an opportunity for rehabilitation, consistent with the contractor's policies. Like other aspects of the program, disciplinary provisions will be reviewed by the DOE for a determination that they meet baseline requirements.

Comment: Section 707.7(b)(3)(v), as proposed, could apply to persons who are only peripherally connected with activity involving hazardous material, or handling only minute amounts of such substances, and subject those persons to testing.

Response: The section has been renumbered as § 707.7(b)(3)(E) and revised to cover only personnel "directly engaged" in activity involving amounts of hazardous material sufficient to cause "significant harm" to the environment, national security, or public health and safety.

Comment: The list of reactors in § 707.7(c) should distinguish between those that are "operating" and those in "cold standby" or otherwise not operating.

Response: DOE considers that all these reactors can present an environmental or safety hazard or a security risk, and has not shortened the list or amended the section.

Comment: Section 707.9 ("Drug testing as a result of an occurrence") is vague and indefinite.

Response: DOE has expanded the definition of "occurrence" in § 707.4 to clarify this section.

Comment: In proposed § 707.10(a), the Site Medical Director must be able to delegate the decision for testing on reasonable suspicion to another physician.

Response: Reference to the "site medical director" has been replaced with "a physician from the site occupational medical department." In any event, the rule is written so as to allow, but not require, participation of a physician in the decision to conduct reasonable suspicion testing.

Comment: The Medical Review Officer should not be required to report employee non-cooperation to DOE security officials, as in proposed § 707.12(b)(1).

Response: The section has been amended to reassign this responsibility to contractor management.

Comment: An employee subject to urinalysis testing should be allowed to retain a portion of the urine sample for independent testing.

Response: If any employee were allowed to retain a portion of the urine sample, there would be no way to maintain a secure chain of custody for that retained sample. It would not, of course, affect the security of the chain of custody of the urine sample under the control of DOE. However, a new § 707.14(f) has been added to allow an individual who has been notified of a positive test result to request DOE to conduct a retest at a certified laboratory.

Comment: Several commenters objected strongly to the provision in § 707.14(b) of the Notice of Proposed Rulemaking which provided that in the event of a first time determination that an employee had used an illegal drug, the employee shall be offered a reasonable opportunity for rehabilitation and placed in a non-testing designated position during the rehabilitation, if such a position is available. One commenter said this requirement would require the contractor to reverse its well-established position of terminating employees who use drugs, including first-time drug users. Another commenter objected to the mandated action stating it would be unnecessarily restrictive of the contractor's personnel policies and not allow for facts in individual situations to influence the action taken. A third commenter also stated that contractors should have the right to determine the appropriate discipline for employees found in violation of the employer's substance abuse program and, in addition, the policy was inconsistent with "accountability" rules for management and operating contractors promulgated recently by DOE. In summary, the commenter said these rules specifically hold contractors accountable for actions by their employees, such as damage to government property, while under the influence of a prohibited substance.

Response: DOE recognizes that the requirement to allow a "second chance" pursuant to a first-time finding of use of illegal drugs may override the personnel policies of some contractors. These policies require that the employee be terminated, rather than offered an opportunity for treatment and return to duty, when it is determined that it is safe to be reinstated. The provision may appear inconsistent with the Department's responsibilities for safety and security at its facilities. In proposing its rule, DOE's primary objective was to establish minimum requirements to assure that contractor employees employed in safety or security sensitive positions do not use illegal drugs, consistent with its responsibility for the protection of public health and safety and national security. DOE sought to balance these concerns with minimum intrusion in both the individual's right to protection and due process and the contractor's exercise of discretion in determining the appropriate personnel action to take pursuant to a finding of illegal drug use.

DOE has reviewed carefully the comments received regarding mandatory rehabilitation and reemployment or job security opportunities that are proposed for contractor employees. The Department considered the arguments offered to defend the right of contractors to terminate an employee who tests positive for illegal drugs and not offer a chance for rehabilitation. Arguments in defense of offering a single opportunity for rehabilitation to an employee who is identified as having used illegal drugs through drug testing were also considered. DOE has determined that it can substantially meet its obligation to mitigate the risk of accidents and harm to national security through the requirement in the rule for immediate removal of an employee from a testing designated position who has been tested and found to have used illegal drugs. Thereafter, the contractor may apply its employment policies regarding rehabilitation of employees with a substance abuse problem. If the contractor offers employees the opportunity for rehabilitation, the contractor must place the employee in a non-testing designated position, or if there is no such position available, place the employee on sick, annual, or other leave to permit rehabilitation. Upon successful completion of rehabilitation and a determination by the site occupational medical department that the employee can safely return to work, the employee may be reinstated in the same or comparable position to that held prior to removal. In addition, contractors have the full range of disciplinary action available to them for those actions of employees that result from violations of workplace rules other than having an initial positive drug test.

Comment: Proposed § 707.14 does not provide employees with fundamental due process. A positive test will result in an automatic removal from duty, and an effective termination in situations where there is no non-sensitive job available.

Response: A removal from sensitive duties is imperative in the event of a positive test result, because of the grave risks presented by drug use by employees in testing designated positions. However, DOE has amended the rule to provide that the employee may be placed on sick, annual, or other leave status for periods sufficient to permit rehabilitation, so that an employee in this situation will not necessarily be terminated.

Comment: The requirement that employees who have made a successful rehabilitation be reinstated will be burdensome and costly to the contractors.

Response: The reinstatement provision of the rule is viewed by DOE to be within its statutory power and in the Department's interest. DOE believes that qualified and capable contractor employees are a valuable and essential resource at DOE facilities. When rehabilitation is offered by the contractor, reinstatement of an employee who successfully completes rehabilitation, and is determined by the site occupational medical department to be capable of safely performing sensitive duties, will avoid the unnecessary loss of an otherwise productive employee. Because a determination to return an employee to work is essentially a "fitness-for-duty" determination, it is more appropriate for the site occupational medical department rather than the Medical Review Officer.

Comment: The comments from several labor unions implied that the rule did not clearly state that participation in a drug testing program is a condition of employment and, as such, is a mandatory subject of bargaining between affected contractors and their respective unions. Other commenters acknowledged that § 707.15 of the rule does address collective bargaining rights, but recommended that the one year time limit to complete negotiations be eliminated. These commenters expressed concern that contractors either would not be able to satisfy their legal duty to bargain over the complex issues involved in drug testing within the one year time frame required by the section, or that instances could arise where they might fail to obtain mutual consent to reopen bargaining agreements during the one year period. One commenter stated that unilateral implementation by the contractor, if the union(s) refuses to agree to provisions in the rule, would violate another Federal agency's requirement, presumably the National Labor Relations Board. Some contractors requested additional guidance to cover those instances where a union refuses to accept modifications to the labor agreement.

Response: DOE does not agree that the rule fails to permit negotiations over drug testing programs to take place. On the contrary, § 707.15 of the rule explicitly provides for collective bargaining over the impact on working conditions of the baseline requirements of the rule. Further, nothing in the rule prevents collective bargaining over contractor requirements that exceed the baseline program elements set forth in the rule. DOE also believes that one year generally is sufficient to complete negotiations. However, to provide for situations where the parties may not have reached agreement within that time period, DOE has modified the rule so that the contractor is expected to negotiate to impasse, which is defined to mean one year of good faith bargaining prior to implementing the necessary provisions without agreement, at which time the contractor will implement unilaterally. DOE is confident that such unilateral implementation would not violate precedents of the National Labor Relations Board interpreting section 8(a)(5) of the National Labor Relations Act (29 U.S.C. 158(a)(5)). The Board's precedents permit such unilateral action by an employer who has bargained in good faith to impasse, but also provide for appropriate response to that action by the union(s) involved.

Comment: Provisions of the proposed rule dealing with records and confidentiality are in potential conflict with statute and other regulations, particularly 42 U.S.C. 290dd-3 and 290ee-3 and 42 CFR part 2.

Response: DOE takes the view that the proposed rule could have been interpreted and implemented in conformity with those statutes and regulations. Nevertheless, to remove any ambiguity, DOE has adopted part of a commenter's suggested alternative.

That section now makes specific reference to the above-mentioned statutes and regulations, which are those most pertinent to the procedures prescribed in this part. DOE expects that this change will make little or no difference in the practical application and implementation of the rule. In addition, DOE has begun the process for establishing a system of records to maintain any documents generated in accordance with the provisions of this part.

In response to other comments and following a final review, DOE has made these additional changes in the final rule:

In the Notice of Proposed Rulemaking, § 707.5(b), DOE stated that each contractor would have to "comply with relevant requirements of the Drug-Free Workplace Act of 1988 (Pub. L. No. 100-690) and its implementing rules in the Federal Acquisition Regulation (FAR)." The NOPR did not, however, include the specific requirements of the Act or the relevant FAR sections. To eliminate confusion and aid contractors subject to this part, DOE has now incorporated in § 707.5(a) all minimum requirements that contractors and subcontractors must include as baseline elements of their programs. This does not add any new requirements that were not present in the NOPR, but it will eliminate the need for a cross-reference between regulations.

Section 707.7(c) of the proposed rule provided that an individual, who is not an employee, with unescorted access to a reactor control area would be precluded from such unescorted access in the event of a positive drug test. The rule has been clarified to permit such an individual unescorted access if the individual provides evidence of successful completion of a counseling or rehabilitation program, undergoes a drug test with a negative result, and has been evaluated by the site occupational medical department which determines that the individual may be safely permitted access to such a reactor control area. Upon a second positive drug test, the individual will be denied unescorted access for at least three years, and then may be permitted unescorted access only if DOE approves.

The definition of "hazardous material" has been refined from that in the proposed rule, which was considered by some commenters to be overbroad. As proposed, the definition would have brought within the testing programs employees only tangentially involved with minute quantities of substances that are hazardous only in much larger quantities or concentrations. The testing of these additional employees would have increased the cost and intrusiveness of contractors' plans without significantly improving protection of public health and safety. The new definition, drafted in consultation with DOE technical program offices, will clarify the types and quantities of substances covered by this rule.

In response to the comments from a professional association, DOE modified the definition of "Counseling" and provisions dealing with employee assistance, but did not adopt the suggestions of two commenters for an alternative definition of "Employee Assistance Program." DOE has made a minor editorial change to the definition, but believes that the definition is appropriate to DOE operations. The definition of "drug certification" also has been clarified.

DOE also has deleted the definition of and references to "permanent record book," and replaced it with "specimen chain of custody form," based upon comments provided by the Department of Health and Human Services. This was determined to be desirable because the "batch" chain of custody concept is no longer used. Rather, a multi-part specimen chain of custody form has been determined to be preferable. One copy of the form will be retained at the collection site and will contain the same information that would have been found in the permanent record book.

The rule is being clarified to incorporate into § 707.5 requirements for the individual to report any arrest for or conviction of a drug-related offense, consistent with DOE security requirements. In addition, the individual will have to report the results of any positive drug test that the individual may have taken, for example, as a result of military service. The rule is also being clarified to require the contractor to identify in the plan what actions, if any, will be taken regarding an individual in a testing designated position for an arrest for or conviction of a drug-related offense.

References in the proposed rule to actions to be taken by the Head of Contracting Activity ("HCA") have been changed in this final rule to simply "DOE." A requirement that the HCA take certain actions was seen as too restrictive for a codified regulation.

A comparison of the final rule with the proposed rule will show that DOE made additional non-substantive refinements to the rule, largely editorial in nature, in response to public comments and following a final review. These changes were designed to make the rule more understandable to persons affected by it. The reasons for all changes, if not specifically explained above, should be apparent from the context of the rule.

III. Review Under Executive Order 12291

Under Executive Order 12291, agencies are required to determine whether rules are major rules as defined in the Order. DOE has reviewed this rule and has determined that it is not a major rule because: Implementing the additional human reliability requirements in this rule will not have an annual effect of $100 million or more on the economy; will not result in a major increase in costs or prices to consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises. Prior to publication, the rule was submitted to the Director of the Office of Management and Budget pursuant to Executive Order 12291. The Director has concluded his review.

IV. Review Under the Regulatory Flexibility Act

This rule was reviewed under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* DOE concluded that there was no need to prepare a regulatory flexibility analysis because the rule will affect only DOE contractors whose places of performance are at Government-owned or controlled sites operated under the authority of the Atomic Energy Act of 1954, as amended, and their subcontractors. It will not have a significant economic impact on a substantial number of small entities.

V. Review Under the National Environmental Policy Act

This rule is not a major action significantly affecting the quality of the human environment. The rule is part of an overall employee human reliability and standards of conduct program that deals only with requirements for certain DOE contractors and subcontractors to include specified minimum elements in a workplace substance abuse program. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

VI. Review under Executive Order 12778

Section 2 of Executive Order 12778 instructs each agency subject to Executive Order 12291 to adhere to certain requirements in promulgating new regulations and reviewing existing regulations. These requirements, set forth in sections 2(a) and (b)(2), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards (whether they be engineering or performance standards), and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation: Specifies clearly any preemptive effect, effect on existing Federal law or regulation, and retroactive effect; describes any administrative proceedings to be available prior to judicial review and any provisions for the exhaustion of such administrative proceedings; and defines key terms. DOE certifies that today's proposal meets the requirements of sections 2(a) and (b) of Executive Order 12778.

VII. Review Under Executive Order 12612

The principal impact of this rule will be on government contractors and certain subcontractors and their employees. The rule is unlikely to have a substantial direct effect on the States, the relationship between the States and the Federal government, or the distribution of power and responsibilities among various levels of government. No Federalism assessment under Executive Order 12612 is required. Although the rule, at section 705.5(i), contains a provision for the preemption of conflicting State and local law, DOE believes preemption will be rare, if it occurs at all. The Atomic Energy Act of 1954, as amended, reserves exclusively to the Federal government the entire field of the development and production of this country's nuclear weapons, including the production of "special nuclear material" and the control of "source material" and "byproduct material," as well as the exclusive control of "restricted data," as all of those terms are defined in the Act. This rule provides for preemption only in the rare instance where a State or local requirement interferes with DOE's conduct of health and safety or security programs within Federal enclaves and concerning an exclusively Federal function. DOE is well aware that preemption of State law is a serious matter, that it is disfavored, and only to be exercised with the greatest prudence. In its Notice of Proposed Rulemaking, DOE explicitly sought comment on situations that may exist that would require preemption of State law. No such situations were mentioned by commenters.

VIII. Review Under the Paperwork Reduction Act

This rule imposes no additional paperwork burden on the public other than that already approved under OMB Control Number 1910–0600.

List of Subjects in 10 CFR Part 707

Classified information, Drug testing, Employee assistance programs, Energy, Government contracts, Health and safety, National security, Reasonable suspicion, Special nuclear material, Substance abuse.

Issued in Washington, DC, on July 15, 1992.

Berton J. Roth,

Acting Director, Office of Procurement, Assistance and Program Management.

For the reasons set forth above, DOE hereby amends chapter III of title 10 of the Code of Federal Regulations by adding a new part 707, to read as follows:

PART 707—WORKPLACE SUBSTANCE ABUSE PROGRAMS AT DOE SITES

Authority: 41 U.S.C. 701 *et seq.*; 42 U.S.C. 2012, 2013, 2051, 2061, 2165, 2201b, 2201i, and 2201p; 42 U.S.C. 5814 and 5815; 42 U.S.C. 7151, 7251, 7254, and 7256.

Subpart A—General Provisions

§ 707.1 Purpose.

The Department of Energy (DOE) promulgates this part in order to protect the environment, maintain public health and safety, and safeguard the national security. This part establishes policies, criteria, and procedures for developing and implementing programs that help to maintain a workplace free from the use of illegal drugs. It applies to DOE contractors and subcontractors performing work at sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954, as amended, and to individuals with unescorted access to the control areas of certain DOE reactors. The procedures include detection of the use of illegal drugs by current or prospective contractor employees in testing designated positions.

§ 707.2 Scope.

(a) This part applies to the following contracts with DOE, at sites owned or controlled by DOE which are operated under the authority of the Atomic Energy Act of 1954, as amended:

(1) Management and operating contracts; and

(2) Other contracts or subcontracts with a value of $25,000 or more, and which have been determined by DOE to involve:

(i) Access to or handling of classified information or special nuclear materials;

(ii) High risk of danger to life, the environment, public health and safety, or national security; or

(iii) Transportation of hazardous materials to or from a DOE site.

(b) Individuals described in § 707.7 (b) and (c) will be subject to random drug testing; to drug testing as a result of an occurrence, as described in § 707.9; and to drug testing on the basis of reasonable suspicion, as described in § 707.10.

(c) Applicants for employment in testing designated positions will be tested in accordance with § 707.8.

§ 707.3 Policy.

It is the policy of DOE to conduct its programs so as to protect the environment, maintain public health and safety, and safeguard the national security. This policy is advanced in this rule by requiring contractors and subcontractors within its scope to adopt procedures consistent with the baseline requirements of this part, and to impose significant sanctions on individuals in testing designated positions or with unescorted access to the control areas of certain DOE reactors, who use or are involved with illegal drugs.

§ 707.4 Definitions.

For the purposes of this part, the following definitions apply:

Collection Site Person means a technician or other person trained and qualified to take urine samples and to secure urine samples for later laboratory analysis.

Confirmed Positive Test means, for drugs, a finding based on a positive initial or screening test result, confirmed by another positive test on the same sample. The confirmatory test must be by the gas chromatography/mass spectrometry method.

Counseling means assistance provided by qualified professionals to employees, especially, but not limited to those employees whose job performance is, or might be, impaired as a result of illegal drug use or a medical-behavioral problem; such assistance may include short-term counseling and assessment, crisis intervention, referral to outside treatment facilities, and follow-up services to the individual after completion of treatment and return to work.

Drug Certification means a written assurance signed by an individual with known past illegal drug involvement, as a condition for obtaining or retaining a DOE access authorization, stating that the individual will refrain from using or being involved with illegal drugs while employed in a position requiring DOE access authorization (security clearance).

Employee Assistance means a program of counseling, referral, and educational services concerning illegal drug use and other medical, mental, emotional, or personal problems of employees, particularly those which adversely affect behavior and job performance.

Hazardous Material means any material subject to the placarding requirements of 49 CFR 172.504, table 1, and materials presenting a poison-inhalation hazard that must be placarded under the provisions of 49 CFR 172.505.

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

Management and Operating Contract means an agreement for the operation, maintenance, or support, on behalf of the Government, of a Government-owned or controlled research, development, special production, or testing establishment wholly or principally devoted to one or more major programs of DOE.

Medical Review Officer (MRO) means a licensed physician, approved by DOE to perform certain functions under this part. The MRO is responsible for receiving laboratory results generated by an employer's drug testing program, has knowledge of illegal drug use and other substance abuse disorders, and has appropriate medical training to interpret and evaluate an individual's positive test result, together with that person's medical history and any other relevant biomedical information. For purposes of this part a physician from the site occupational medical department may be the MRO.

Occurrence means any event or incident that is a deviation from the planned or expected behavior or course of events in connection with any Department of Energy or Department of Energy-controlled operation, if the deviation has environmental, public health and safety, or national security protection significance. Incidents having such significance include the following, or incidents of a similar nature:

(1) Injury or fatality to any person involving actions of a Department of Energy contractor employee.

(2) Involvement of nuclear explosives under Department of Energy jurisdiction which results in an explosion, fire, the spread of radioactive material, personal injury or death, or significant damage to property.

(3) Accidental release of pollutants which results or could result in a significant effect on the public or environment.

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

Random Testing means the unscheduled, unannounced urine drug testing of randomly selected individuals in testing designated positions, by a process designed to ensure that selections are made in a non-discriminatory manner.

Reasonable Suspicion means a suspicion based on an articulable belief that an employee uses illegal drugs, drawn from particularized facts and reasonable inferences from those facts, as detailed further in § 707.10.

Referral means the direction of an individual toward an employee assistance program or to an outside treatment facility by the employee assistance program professional, for assistance with prevention of illegal drug use, treatment, or rehabilitation from illegal drug use or other problems. Referrals to an employee assistance program can be made by the individual (self-referral), by contractor supervisors or managers, or by a bargaining unit representative.

Rehabilitation means a formal treatment process aimed at the resolution of behavioral-medical problems, including illegal drug use, and resulting in such resolution.

Special Nuclear Material has the same meaning as in section 11aa of the Atomic Energy Act of 1954 (42 U.S.C. 2014(aa)).

Specimen Chain of Custody Form is a form used to document the security of the specimen from time of collection until receipt by the laboratory. This form, at a minimum, shall include specimen identifying information, date and location of collection, name and signature of collector, name of testing laboratory, and the names and signatures of all individuals who had custody of the specimen from time of collection until the specimen was prepared for shipment to the laboratory.

Testing Designated Position names a position whose incumbents are subject to drug testing under this part.

Subpart B—Procedures

§ 707.5 Submission, approval, and implementation of baseline workplace substance abuse program.

(a) Each contractor subject to this part shall develop a written program consistent with the requirements of this part and the guidelines of the Department of Health and Human Services and subsequent amendments to those guidelines ("Mandatory Guidelines for Federal Workplace Drug Testing Programs," 53 FR 11970, April 11, 1988; hereinafter "HHS Mandatory Guidelines"), and applicable to appropriate DOE sites. Such a program shall be submitted to DOE for review and approval, and shall include at least the following baseline elements:

(1) Prohibition of the use; possession, sale, distribution, or manufacture of illegal drugs at sites owned or controlled by DOE;

(2) Plans for instruction of supervisors and employees concerning problems of substance abuse, including illegal drug use, and the availability of assistance through the employee assistance program and referrals to other resources, and the penalties that may be imposed upon employees for drug-related violations occurring on the DOE owned or controlled site;

(3) Provision for distribution to all employees engaged in performance of the contract on the DOE owned or controlled site of a statement which sets forth the contractor's policies prohibiting the possession, sale, distribution, or manufacture of illegal drugs at the DOE owned or controlled site. The statement shall include notification to all employees that as a condition of employment under the contract, the employee will:

(i) Abide by the terms of the statement; and

(ii) Notify the employer in writing of the employee's conviction under a criminal drug statute for a violation occurring on the DOE owned or controlled site no later than 10 calendar days after such conviction;

(4) Provision for written notification to the DOE contracting officer within 10 calendar days after receiving notice under paragraph (a)(3)(ii) of this section, from an employee or otherwise receiving actual notice of an employee's conviction of a drug-related offense;

(5) Provision for imposing one of the following actions, with respect to any employee who is convicted of a drug-related violation occurring in the workplace, within 30 calendar days after receiving such notice of conviction under paragraph (a)(4) of this section;

(i) Taking appropriate personnel action against such employee, up to and including termination; or

(ii) Offering such employee, consistent with the contractor's policies, an opportunity to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency. If the employee does not participate in such a rehabilitation program, the contractor must take appropriate personnel action, up to and including termination, in accordance with the contractor's policies.

(6) Commitment to make a good faith effort to maintain a workplace free of substance abuse through implementation of paragraphs (a)(1) through (a)(5) of this section.

(b) In addition, the following baseline elements must be included in programs developed by contractors that have identified testing designated positions (see section 707.7(b)):

(1) Notification to DOE of the positions subject to drug testing;

(2) Prohibition of individuals in testing designated positions who are not free from the use of illegal drugs from working in those positions;

(3) Sanctions for individuals in testing designated positions who violate the prohibitions of paragraphs (a)(1) or (b)(2) of this section;

(4) Provision for:

(i) Notification, at least 60 days in advance of initiating testing, to those individuals subject to drug testing, unless the contractor is currently conducting a testing program.

(ii) Urine drug analysis of applicants for testing designated positions before final selection for employment or assignment;

(iii) Random urine drug analysis for employees in testing designated positions;

(iv) Urine drug analysis for employees in testing designated positions on the basis of reasonable suspicion, as a result of an occurrence, or as a follow-up to rehabilitation; and

(v) Random urine drug analysis and urine drug analysis on the basis of reasonable suspicion or as the result of an occurrence, for any individual with unescorted access to the control areas of certain DOE reactors (see § 707.7(c)).

(vi) Written notice to the contractor by an employee in a testing designated position of a drug-related arrest or conviction, or receipt of a positive drug test result regarding that employee, as soon as possible but within 10 calendar days of such arrest, conviction, or receipt; and

(vii) Appropriate action, if any, to be taken regarding an employee who:

(A) is arrested for or convicted of a drug-related offense; or

(B) has a positive drug test result (consistent with § 707.14).

(5) Provision to employees of the opportunity for rehabilitation, consistent with the contractor's policies, under circumstances as provided in this part (see § 707.14(b));

(6) Immediate notification to DOE security officials whenever the circumstances in connection with procedures under this part raise a security concern as provided in DOE Orders, rules and regulations; such circumstances including, but are not necessarily limited to, a determination that an individual holding a DOE access authorization has used an illegal drug.

(c) Each contractor's written policy and procedures under this part shall comply with the requirements of 10 CFR part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Significant Quantities of Special Nuclear Material."

(d) Contractors are required to submit all subcontracts they believe to be within the scope of this part to DOE for a determination as to whether the subcontract falls within the scope of this part. Subcontractors so determined to be within the scope of this part shall be required to agree to comply with its requirements, as a condition of eligibility for performing the subcontract work. Each subcontractor subject to this part shall submit its plan to the appropriate prime contractor for approval; the contractor shall be responsible for periodically monitoring the implementation of the subcontractor's program for effectiveness and compliance with this part.

(e) In reviewing each proposed workplace substance abuse plan, DOE shall decide whether the program meets the applicable baseline requirements established by this part. The responsible DOE official will reject proposed workplace substance abuse plans that are deemed not to meet the baseline requirements. DOE shall provide the contractor with a written notification regarding the decision as to the acceptability of the plan. Nothing in this rule is intended to prohibit any contractor subject to this part from implementing workplace substance abuse requirements additional to those of the baseline, including drug testing employees and applicants for employment in any position and testing for any illegal drugs. However, the contractor shall inform DOE of such additional requirements at least 30 days prior to implementation.

(f) DOE shall periodically review and evaluate each contractor's program, including the contractor's oversight of the covered subcontractors, to assure effectiveness and compliance with this part.

(g) Contractors or proposers will submit their program to DOE for review within 30 days of notification by DOE that the contract or proposed contract falls within the scope of this part. Workplace substance abuse programs, as provided in this part, shall be implemented within 30 days of approval by DOE. DOE may grant an extension to the notification or implementation period, as warranted by local conditions. Implementation may require changes to collective bargaining agreements as discussed in § 707.15 of this part.

(h) To assure consistency of application, DOE shall periodically review designated contracts and testing designated positions included in the workplace substance abuse plans approved by DOE. DOE will also periodically review implementation of programs conducted by prime contractors, to assure consistency of application among prime contracts (and subcontracts where appropriate) throughout DOE.

(i) This part preempts any State or local law, rule, regulation, order, or standard to the extent that:

(1) compliance with both the State or local requirement and any requirements in this part is not possible; or

(2) compliance with the State or local requirement is an obstacle to the accomplishments and execution of any requirement in this part.

§ 707.6 Employee assistance, education, and training.

Contractor programs shall include the following or appropriate alternatives:

(a) Employee assistance programs emphasizing preventive services, education, short-term counseling, coordination and referral to outside agencies, and follow-up. These services shall be available to all contractor on-site employees involved in the DOE contract. The contractor has no obligation to pay the costs of any individual's counseling, treatment, or rehabilitation beyond those services provided by the contractor's employee assistance program, except as provided for in the contractor's benefits programs. DOE undertakes no obligation to pay for any individual's counseling, rehabilitation, or treatment, unless specifically provided for by contract.

(b) Education and training programs for on-site employees on a periodic basis, which will include, at a minimum, the following subjects:

(1) For all on-site employees: Health aspects of substance abuse, especially illegal drug use; safety, security, and other workplace-related problems caused by substance abuse, especially illegal drug use; the provisions of this rule; the employer's policy; and available employee assistance services.

(2) For managers and supervisors:

(i) The subjects listed in paragraph (b)(1) of this section;

(ii) Recognition of deteriorating job performance or judgment, or observation of unusual conduct which may be the result of possible illegal drug use;

(iii) Responsibility to intervene when there is deterioration in performance, or observed unusual conduct, and to offer alternative courses of action that can assist the employee in returning to satisfactory performance, judgment, or conduct, including seeking help from the employee assistance program;

(iv) Appropriate handling and referral of employees with possible substance abuse problems, especially illegal drug use; and

(v) Employer policies and practices for giving maximum consideration to the privacy interests of employees and applicants.

§ 707.7 Random drug testing requirements and identification of testing designated positions.

(a)(1) Each workplace substance abuse program will provide for random testing for evidence of the use of illegal drugs of employees in testing designated positions identified in this section.

(2) Programs developed under this part for positions identified in paragraph (b)(3) of this section shall provide for random tests at a rate equal to 50 percent of the total number of employees in testing designated positions for each 12 month period. Employees in the positions identified in paragraphs (b)(1), (b)(2), and (c) of this section will be subject to random testing at a rate equal to 100 percent of the total number of employees identified, and those identified in paragraphs (b)(1) and (b)(2) of this section may be subject to additional drug tests.

(b) The testing designated positions subject to random drug testing are:

(1) Positions determined to be covered by the Personnel Security Assurance Program (PSAP), codified at 10 CFR part 710. PSAP employees will be subject to the drug testing standards of this part and any additional requirements of the PSAP rule.

(2) Positions which entail critical duties that require an employee to perform work which affords both technical knowledge of and access to nuclear explosives sufficient to enable the individual to cause a detonation (high explosive or nuclear), in what is commonly known as the Personnel Assurance Program (PAP). PAP employees will be subject to the drug testing standards of this part and any additional requirements of the PAP program.

(3) Positions identified by the contractor which entail duties where failure of an employee adequately to discharge his or her position could significantly harm the environment, public health or safety, or national security, such as:

(i) Pilots;

(ii) Firefighters;

(iii) Protective force personnel, exclusive of those covered in paragraphs (b)(1) or (b)(2) of this section, in positions involving use of firearms where the duties also require potential contact with, or proximity to, the public at large;

(iv) Personnel directly engaged in construction, maintenance, or operation of nuclear reactors; or

(v) Personnel directly engaged in production, use, storage, transportation, or disposal of hazardous materials sufficient to cause significant harm to the environment or public health and safety.

(4) Other positions determined by the DOE, after consultation with the contractor, to have the potential to significantly affect the environment, public health and safety, or national security.

(c) Each contractor shall require random testing of any individual, whether or not an employee, who is allowed unescorted access to the control areas of the following DOE reactors: Advanced Test Reactor (ATR); C Production Reactor (C); Experimental Breeder Reactor II (EBR–II); Fast Flux Test Facility (FFTF); High Flux Beam Reactor (HFBR); High Flux Isotope Reactor (HFIR); K Production Reactor (K); L Production Reactor (L); N Production Reactor (N); Oak Ridge Research Reactor (ORR); and P Production Reactor (P). A confirmed positive test shall result in such an individual being denied unescorted access. If such an individual is not an employee of the contractor, that individual may be granted unescorted access only after the individual meets the conditions established in § 707.14(d) of this part. If, after restoration of unescorted access, such an individual is determined to have used illegal drugs for a second time, unescorted access shall be denied for a period of not less than three (3) years. Such an individual thereafter shall be granted unescorted access only upon a determination by DOE that a grant of unescorted access to the individual presents no unacceptable safety or security risk. If such an individual is an employee, that individual is subject to the other requirements of this part, including appropriate disciplinary measures.

(d) A position otherwise subject to testing under this part may be exempted from such testing if it is within the scope of another comparable Federal drug testing program, as determined by DOE, after consultation with the contractor, to avoid unnecessary multiple tests.

§ 707.8 Applicant drug testing.

An applicant for a testing designated position will be tested for the use of illegal drugs before final selection for employment or assignment to such a position. Provisions of this part do not prohibit contractors from conducting drug testing on applicants for employment in any position.

§ 707.9 Drug testing as a result of an occurrence.

When there is an occurrence which is required to be reported to DOE by the contractor, under contract provisions incorporating applicable DOE Orders, rules, and regulations, it may be necessary to test individuals in testing designated positions, or individuals with unescorted access to the control areas of the DOE reactors listed in § 707.7(c), for the use of illegal drugs, if such individuals could have caused or contributed to the conditions which caused the occurrence. For an occurrence requiring immediate notification or reporting as required by applicable DOE Orders, rules, and regulations, the contractor will require testing as soon as possible after the occurrence but within 24 hours of the occurrence, unless DOE determines that it is not feasible to do so. For other occurrences requiring notifications to DOE as required by applicable DOE Orders, rules, and regulations, the contractor may require testing.

§ 707.10 Drug testing for reasonable suspicion of illegal drug use.

(a)(1) It may be necessary to test any employee in a testing designated position, or individuals with unescorted access to the control areas of the DOE reactors listed in § 707.7(c), for the use of illegal drugs, if the behavior of such an individual creates the basis for reasonable suspicion of the use of illegal drugs. Two or more supervisory or management officials, at least one of whom is in the direct chain of supervision of the employee, or is a physician from the site occupational medical department, must agree that such testing is appropriate. Reasonable suspicion must be based on an articulable belief that an employee uses illegal drugs, drawn from particularized facts and reasonable inferences from those facts.

(2) Such a belief may be based upon, among other things:

(i) Observable phenomena, such as direct observation of:

(A) The use or possession of illegal drugs; or

(B) The physical symptoms of being under the influence of drugs;

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

(iii) Arrest for a conviction of a drug related offense, or the identification of the individual as the focus of a criminal investigation into illegal drug possession use, or trafficking;

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

(v) Evidence that an employee has tampered with a drug test; or

(vi) Temperature of the urine specimen is outside the range of 32.5–37.7 degrees centigrade or 90.5–99.8 degrees Fahrenheit.

(b) The fact that an employee had a confirmed positive test for the use for the use of illegal drugs at some prior time, or has undergone a period of rehabilitation or treatment, will not, in and of itself, be grounds for testing on the basis of reasonable suspicion.

(c) The requirements of this part relating to the testing for the use of illegal drugs are not intended to prohibit the contractor from pursuing other existing disciplinary procedures or from requiring medical evaluation of any employee exhibiting aberrant or unusual behavior.

§ 707.11 Drugs for which testing is performed.

Where testing is performed under this part, at a minimum, contractors will be required to test for the use of the following drugs or classes of drugs: marijuana; cocaine; opiates; phencyclidine; and amphetamines. However, when conducting reasonable suspicion or occurrence testing, the contractor may test for any drug listed in Schedules I or II of the Controlled Substances Act.

§ 707.12 Specimen collection, handling and laboratory analysis for drug testing.

(a) Procedures for providing urine specimens must allow individual privacy, unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided. Contractors shall utilize a chain of custody procedure for maintaining control and accountability from point of collection to final disposition of specimens, and testing laboratories shall use appropriate cutoff levels in screening specimens to determine whether they are negative or positive for a specific drug, consistent with the HHS Mandatory Guidelines (see § 707.5(a)). The contractor shall ensure that only testing laboratories certified by the Department of Health and Human Services, under subpart C of the HHS Mandatory Guidelines are utilized.

(b)(1) If the individual refuses to cooperate with the urine collection (e.g., refusal to provide a specimen, or to complete paperwork), then the collection site person shall inform the MRO and shall document the non-cooperation on the specimen chain of custody form. The MRO shall report the failure to cooperate to the appropriate management authority, who shall report to DOE if the individual holds an access authorization. Individuals so failing to cooperate shall be treated in all respects as if they had been tested and had been determined to have used an illegal drug. The contractor may apply additional sanctions consistent with its disciplinary policy.

(2) The collection site person shall ascertain that there is a sufficient amount of urine to conduct an initial test, a confirmatory test, and a retest, in accordance with the HHS Mandatory Guidelines. If there is not a sufficient amount of urine, additional urine will be collected in a separate container. The individual may be given reasonable amounts of liquid and a reasonable amount of time in which to provide the specimen required. The individual and the collection site person must keep the specimen in view at all times. When collection is complete, the partial specimens will be combined in a single container. In the event that the individual fails to provide a sufficient amount of urine, the amount collected will be noted on the "Urine Sample Custody Document." In this case, the collection site person will telephone the individual's supervisor who will determine the next appropriate action. This may include deciding to reschedule the individual for testing, to return the individual to his or her work site and initiate disciplinary action, or both.

§ 707.13 Medical review of results of tests for illegal drug use.

(a) All test results shall be submitted for medical review by the MRO. A confirmed positive test for drugs shall consist of an initial test performed by the immunoassay method, with positive results on that initial test confirmed by another test, performed by the gas chromatography/mass spectrometry method (GC/MS). This procedure is described in paragraphs 2.4 (e) and (f) of the HHS Mandatory Guidelines.

(b) The Medical Review Officer will consider the medical history of the employee or applicant, as well as any other relevant biomedical information. When there is a confirmed positive test result, the employee or applicant will be given an opportunity to report to the MRO the use of any prescription or over-the-counter medication. If the MRO determines that there is a legitimate medical explanation for a confirmed positive test result, consistent with legal and non-abusive drug use, the MRO will certify that the test results do not meet the conditions for a determination of use of illegal drugs. If no such certification can be made, the MRO will make a determination of use of illegal drugs. Determinations of use of illegal drugs will be made in accordance with the criteria provided in the Medical Review Officer Manual issued by the Department of Health and Human Services [DHHS Publication No. (ADM) 88–1526].

§ 707.14 Action pursuant to a determination of illegal drug use.

(a) When an applicant for employment has been tested and determined to have used an illegal drug, processing for employment will be terminated and the applicant will be so notified.

(b)(1) When an employee who is in a testing designated position has been tested and determined to have used an illegal drug, the contractor shall immediately remove that employee from the testing designated position; if such employee also holds, or is an applicant for, an access authorization, then the contractor shall immediately notify DOE security officials for appropriate adjudication. If this is the first determination of use of illegal drugs by that employee (for example, the employee has not previously signed a DOE drug certification, and has not previously tested positive for use of illegal drugs), the employee may be offered a reasonable opportunity for rehabilitation, consistent with the contractor's policies. If rehabilitation is offered, the employee will be placed in a non-testing designated position, which does not require a security clearance, provided there is such an acceptable position in which the individual can be placed during rehabilitation; if there is no acceptable non-testing designated position, the employee will be placed on sick, annual, or other leave status, for a reasonable period sufficient to permit rehabilitation. However, the employee will not be protected from disciplinary action which may result from violations of work rules other than a positive test result for illegal drugs.

(2) Following a determination by the site occupational medical department, after counseling or rehabilitation, that the employee can safely return to duty, the contractor may offer the employee reinstatement, in the same or a comparable position to the one held prior to the removal, consistent with the contractor's policies and the requirements of 10 CFR part 710. Failure to take the opportunity for rehabilitation, if it has been made available, for the use of illegal drugs, will require significant disciplinary action up to and including removal from employment under the DOE contract, in accordance with the contractor's policies. Any employee who is twice determined to have used illegal drugs shall in all cases be removed from employment under the DOE contract. Also, if an employee who has signed a DOE drug certification violates the terms of the certification, DOE shall conduct a timely review of the circumstances of such violation, and the individual's continued eligibility for a DOE access authorization shall be determined under the provisions of 10 CFR part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Significant Quantities of Special Nuclear Material."

(c) An employee who has been removed from a testing designated position because of the use of illegal drugs may not be returned to such position until that employee has:

(1) Successfully completed counseling or a program of rehabilitation;

(2) Undergone a urine drug test with a negative result; and

(3) Been evaluated by the site occupational medical department, which has determined that the individual is capable of safely returning to duty.

(d) An individual who is not an employee of a contractor who has been denied unescorted access because of the use of illegal drugs may not have the unescorted access reinstated until that individual has:

(1) Provided evidence of successful completion of counseling or a program of rehabilitation;

(2) Undergone a urine drug test with a negative result; and

(3) Been evaluated by the site occupational medical department, which has determined that the individual is capable of being permitted unescorted access to a reactor control area.

(e) If a DOE access authorization is involved, DOE must be notified of a contractor's intent to return to a testing designated position an employee removed from such duty for use of illegal drugs. Positions identified in § 707.7(b)(1) and (2) will require DOE approval prior to return to a testing designated position.

(f) An individual who has been notified of a positive test result may request a retest of the same sample at the same or another certified laboratory. The individual shall bear the costs of transportation and/or testing of the specimen. The contractor will inform employees of their right to request a retest under the provisions of this paragraph.

(g) After an employee determined to have used illegal drugs has been returned to duty, the employee shall be subject to unannounced drug testing, at intervals, for a period of 12 months.

§ 707.15 Collective bargaining.

When establishing drug testing programs, contractors who are parties to collective bargaining agreements will negotiate with employee representatives, as appropriate, under labor relations laws or negotiated agreements. Such negotiation, however, cannot change or alter the requirements of this rule because DOE security requirements themselves are non-negotiable under the security provisions of DOE contracts. Employees covered under collective bargaining agreements will not be subject to the provisions of this rule until those agreements have been modified, as necessary; provided, however, that if one year after commencement of negotiation the parties have failed to reach agreement, an impasse will be determined to have been reached and the contractor will unilaterally implement the requirements of this rule.

§ 707.16 Records.

(a) Confirmed positive test results shall be provided to the Medical Review Officer and other contractor and DOE officials with a need to know. Any other disclosure may be made only with the written consent of the individual.

(b) Contractors shall maintain maximum confidentiality of records related to illegal drug use, to the extent required by applicable statutes and regulations (including, but not limited to, 42 U.S.C. 290dd-3, 42 U.S.C. 290ee-3, and 42 CFR part 2). If such records are sought from the contractor for criminal investigations, or to resolve a question or concern relating to the Personnel Assurance Program certification or access authorization under 10 CFR part 710, any applicable procedures in statute or regulation for disclosure of such information shall be followed. Moreover, owing to DOE's express environmental, public health and safety, and national security interests, and the need to exercise proper contractor oversight, DOE must be kept fully apprised of all aspects of the contractor's program, including such information as incidents involving reasonable suspicion, occurrences, and confirmed test results, as well as information concerning test results in the aggregate.

(c) Unless otherwise approved by DOE, the contractors shall ensure that all laboratory records relating to positive drug test results, including initial test records and chromatographic tracings, shall be retained by the laboratory in such a manner as to allow retrieval of all information pertaining to the individual urine specimens for a minimum period of five years after completion of testing of any given specimen, or longer if so instructed by DOE or by the contractor. In addition, a frozen sample of all positive urine specimens shall be retained by the laboratory for at least six months, or longer if so instructed by DOE.

(d) The contractor shall maintain as part of its medical records copies of specimen chain of custody forms.

(e) The specimen chain of custody form will contain the following information:

(1) Date of collection;

(2) Tested person's name;

(3) Tested employee/applicant's social security number or other identification number unique to the individual;

(4) Specimen number;

(5) Type of test (random, applicant, occurrence, reasonable suspicion, follow-up, or other);

(6) Temperature range of specimen;

(7) Remarks regarding unusual behavior or conditions;

(8) Collector's signature; and

(9) Certification signature of specimen provider certifying that specimen identified is in fact the specimen the individual provided.

§ 707.17 Permissible actions in the event of contractor noncompliance.

Actions available to DOE in the event of contractor noncompliance with the provisions of this part or otherwise performing in a manner inconsistent with its approved program include, but are not limited to, suspension or debarment, contract termination, or reduction in fee in accordance with the contract terms.

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July 22, 1992

Part V

Department of Energy

10 CFR Part 707

Workplace Substance Abuse Programs at DOE Sites; Proposed Rule

DEPARTMENT OF ENERGY

Office of Procurement, Assistance and Program Management

10 CFR Part 707

Workplace Substance Abuse Programs at DOE Sites

AGENCY: Department of Energy.

ACTION: Notice of proposed rulemaking and public hearing; request for comment.

SUMMARY: The Department of Energy (DOE) proposes to amend its final rule establishing Workplace Substance Abuse Programs at DOE sites through this Notice of Proposed Rulemaking (NOPR). The proposed rulemaking would ensure comprehensive substance abuse programs at DOE sites, including programs to address misuse and abuse of alcohol, as well as the use of illegal drugs. Minimum requirements address: (1) Prohibition on the misuse or abuse of alcohol; (2) education and training; (3) employee assistance; (4) discipline, treatment, and/or rehabilitation or removal of employees; and (5) notification to DOE. In addition, for employees and other individuals performing health or safety-sensitive functions at sites owned or controlled by DOE, including individuals with unescorted access to the control areas of certain DOE reactors, contractors would be required to conduct performance related random, reasonable suspicion, and occurrence testing for misuse or abuse of alcohol. The possible risks of serious harm to the environment and to public health and safety justify the imposition of restrictions relating to misuse or abuse of alcohol on individuals who perform health or safety-sensitive functions.

DATES: Written comments (six copies) must be received by September 21, 1992. A public hearing will be held beginning at 9:30 a.m. local time and ending at 4:30 p.m., unless concluded earlier, at Washington, DC, on August 28, 1992, unless there are not a sufficient number of advance requests to present views, in which event the hearing will be canceled. Requests to speak at the hearing must be received by 4:30 p.m. on August 21, 1992.

ADDRESSES: Written comments (six copies) and requests to speak at a public hearing are to be submitted to the Director, Office of Contractor Human Resource Management, Department of Energy, Washington, DC 20585. The public hearing will be held in room GJ-015, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585. Each person to be heard is requested to bring ten copies of that person's statement. In the event that any person wishing to testify cannot meet this requirement, alternative arrangements can be made with the Office of Contractor Human Resource Management in advance by requesting permission, in the letter or telephone request, to make an oral presentation..

Relevant reference materials, a transcript of the public hearing, and the entire rulemaking record, will be available for inspection between the hours of 9 a.m., and 4 p.m., Monday through Friday except Federal holidays, at the following address: DOE Freedom of Information Reading Room, United States Department of Energy, room 1E-190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-6020.

FOR FURTHER INFORMATION CONTACT: Juanita E. Smith at (202) 586-9033.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Department of Energy (DOE) today proposes to amend its final rule, published in today's **Federal Register**, that establishes a baseline for contractor programs to address substance abuse by (1) employees in testing designated positions at sites owned or controlled by DOE, and (2) other individuals with unescorted access to the control areas of certain DOE reactors. Also published in today's **Federal Register** is an interim final rule that would amend the Department of Energy Acquisition Regulations to require contractors to implement the requirements of this part. The final rule deals primarily with the use of illegal drugs. This proposed amendment would require such contractors to include alcohol misuse or abuse provisions within their Workplace Substance Abuse Programs, in order to assure comprehensive substance abuse prevention at DOE sites. DOE is proposing this rule under its broad authorities to carry out the purposes of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2012, 2013, 2051, 2061, 2165, 2201; the Energy Reorganization Act, 42 U.S.C. 5814, 5815; and the Department of Energy Organization Act, 42 U.S.C. 7151, 7251, 7254, and 7256. The possible risks of serious harm to the environment and to public health and safety as a result of alcohol misuse or abuse justify the imposition of the additional alcohol misuse and abuse requirements. This program includes training and education, testing, employee assistance, and disciplinary measures as well as sanctions for inadequate DOE contractor programs.

Through implementation of this component of the Workplace Substance Abuse Program, DOE expects to mitigate the potential for harm to the environment and to public health and safety, and further reduce the possibility of accidents at DOE sites by employees who misuse or abuse alcohol. The program elements contained in this proposed rule will assist DOE in assuring that contractor employees and other individuals performing health or safety-sensitive functions do not misuse or abuse alcohol while performing such functions. Impairment resulting from alcohol misuse or abuse is well documented. Scientific evidence is conclusive that cognitive and physicial task performance decreases as a result of the misuse or abuse of alcohol. Recent studies conducted on behalf of the Nuclear Regulatory Commission indicate that the misuse and abuse of alcohol is a serious and pervasive workplace problem. (See 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, DC; 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. These documents are available for review in the Department's reading rooms in the Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585 and the National Atomic Museum, Public Document Room, Building 20358, Wyoming Avenue, SE., Kirtland Air Force Base, Albuquerque, NM 87115.)

DOE believes that the potential effects resulting from alcohol misuse or abuse at both production and research and development sites represent a level of risk that is not compatible with the nature of work performed at these sites. The risk of alcohol misuse or abuse by employees at DOE sites warrants preventive action and intervention by DOE to ensure protection of the environment and public health and safety. The program will emphasize education and training, counseling, and employee assistance, as well as deterrence and detection of individuals who misuse or abuse alcohol.

Individual rights to protection and privacy are important to DOE and were major considerations in the development of this proposed rule. The program scope and requirements have been balanced to assure that intrusion on these rights is minimized. The types of positions subject to testing under this program have been limited to only those performing the most sensitive or critical work, with potential for having a direct effect on the environment or public health and safety. These positions represent less than 30 percent of all DOE contractor employees. Program standards and testing provisions included in this rule represent the minimum requirements necessary for DOE to implement a responsible program and establish reasonable measures to assure that employees in these positions perform their duties safely.

The proposed rule would require contractors to include in their written programs, in addition to the minimum workplace substance abuse requirements currently set forth at 10 CFR part 707, an alcohol misuse or abuse component, including education, testing, and employee assistance programs. Contractors to be covered by the proposed alcohol component would include those contractors who are already subject to the requirements of 10 CFR part 707. The individuals to be covered by this rule, those performing health or safety-sensitive functions, are likely to be the same individuals who encumber testing designated positions, as currently provided in part 707—those individuals who perform work at sites owned or controlled by DOE and who occupy positions affording the potential to cause direct and/or immediate harm to the environment, to public health and safety, or to national security. Individuals performing health or safety-sensitive functions would be subject to testing for misuse or abuse of alcohol (a) on a random basis while performing the health or safety-sensitive functions, (b) upon reasonable suspicion, or (c) as a result of an occurrence. In developing this proposed rule, DOE has used as a model the rules of the Nuclear Regulatory Commission (NRC) for its licensees (10 CFR part 26).

II. Elements of an Alcohol Misuse and Abuse Program Relating to Contractor Employees

A. Requirements

Each contractor program would be required to assure that individuals performing health or safety-sensitive functions (including those with unescorted access to the control areas of certain DOE reactors) who enter or remain on a DOE site do not misuse or abuse alcohol. (See definition in § 707.4.)

Included is a requirement that an individual who performs health or safety-sensitive functions must report, in writing, an alcohol-related arrest as soon as possible but within 10 calendar days of such an arrest. DOE currently requires analogous reporting for security purposes through its management directives, including completion of a standard government-wide personnel security questionnaire and a continuing obligation on individuals with security clearances to report arrests for crimes involving a fine of $100 or more or imprisonment. DOE believes that health and safety concerns are as important as security concerns, and therefore that collection of similar information for individuals who perform health or safety-sensitive functions is necessary. DOE is well aware that an arrest, in itself, is not dispositive of whether a crime has been committed or whether the individual should be precluded from performing his or her duties. Moreover, disciplinary action would not necessarily be taken as a result of such an arrest. However, given the sensitivity of the functions being performed, arrest information could be useful in identifying an individual with a serious alcohol-related problem, and helping that individual in obtaining assistance. More importantly, it could assist in removing a troubled employee from a function that could result in great harm if improperly performed.

B. Education, Training, and Employee Assistance

The proposed rule would require that the contractors include alcohol misuse and abuse education in their periodic training programs for employees, managers, and supervisors. This educational effort will familiarize employees with the program. It will also prepare managers and supervisors for the tasks they must perform effectively in order to make the program work properly.

The proposed rule would require contractors to offer employee assistance, including a provision for counseling and referral to outside agencies.

C. Testing for Alcohol

The proposed rule would provide for alcohol testing on a random basis while an individual is performing health or safety-sensitive functions, upon "reasonable suspicion," and for an "occurrence." In developing the proposed rule, DOE consulted with the Department of Transportation, the Department of Health and Human Services, the Nuclear Regulatory Commission, and the National Aeronautics and Space Administration. DOE intends to continue consulting with those agencies to assure consistency, to the extent practicable, among Federal alcohol testing programs.

The proposed rule would require individuals performing health or safety-sensitive functions to abstain from the use of alcohol for at least five hours prior to a scheduled work tour. This is consistent with the requirements of the Nuclear Regulatory Commission for comparably situated individuals. However, other Federal agencies have established differing abstention periods for alcohol for individuals who perform health or safety-sensitive functions. For example, the Federal Aviation Administration currently requires pilots to abstain from the use of alcohol for eight hours prior to flight. Other Transportation agencies require an abstention period of four hours. DOE seeks the views of the public on whether the appropriate period of abstention should be four, five, or eight hours, or some other period.

The proposed rule would provide for alcohol testing by an evidential breath testing device (EBT) to determine breath alcohol concentration. For each screening test, a breath specimen would be collected. Test procedures are discussed in new § 707.15 of the proposed rule. In cases in which the initial test using an EBT indicates a breath alcohol concentration of 0.04 percent or greater, the proposed rule would require a confirmatory breath test. Confirmatory breath tests can be performed on the same EBT that indicated the initial positive reading. The proposed rule does not provide for review of positive alcohol breath test results by a Medical Review Officer (MRO) as is required for positive drug tests. The reason for this is that, unlike drug tests, there are no specimens that are susceptible to retesting, nor are there similar potential problems with chain of custody. There is nothing for the MRO to review from a medical standpoint other than the printout from the EBT. However, if the individual is unable to provide an adequate breath sample, any documentation supporting a medical condition which would prevent the individual from providing such a sample will be provided to the site occupational medical department for review. DOE is aware that there are some prescription and over-the-counter medicines that contain alcohol, and that proper use of these legal substances may result in a positive alcohol test. Nevertheless, DOE has proposed that any individual with an alcohol concentration of 0.04 or higher, no matter how attained, will be deemed incapable of performing a health or safety-sensitive function, and therefore impaired by alcohol within the meaning of this rule.

In establishing the 0.04 minimum cut-off level, DOE has relied primarily on C. Moore, *et al.*, "Use of a 0.04% BAC Cutoff Level for Alcohol Testing," in 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. This document is available for review in the Department's reading rooms in the Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585 and the National Atomic Museum, Public Document Room, Building 20358, Wyoming Avenue, SE., Kirtland Air Force Base, Albuquerque, NM 87115.

Scientific studies suggest that consumption of alcohol resulting in an alcohol concentration of 0.04 or above results in impairment. However, DOE solicits comments on whether the proposed alcohol concentration of 0.04 is the appropriate standard, or whether the standard should be lower, given the sensitivity of the functions at issue. DOE also solicits comments on what action, if any, should be taken if an individual has an alcohol concentration lower than 0.04, for example, between 0.02 and 0.04.

Section 707.8 proposes the conduct of performance related random alcohol tests at a rate of 50 percent of the total number of employees performing health or safety-sensitive functions; except for those employees serving in positions covered by the Personnel Security Assurance Program or the Personnel Assurance Program, or individuals with unescorted access to the control areas of certain reactors who will be tested at the rate of 100 percent, consistent with the NRC testing rate for comparably situated individuals. DOE seeks comments on the proposed random alcohol testing rates and any documentation of deterrence or detection at any other rate.

DOE is requiring use of an alcohol testing form. In order to assure standardization among DOE contractors and subcontractors, DOE intends to develop a form that must be used by all contractors and subcontractors subject to this part.

D. Action Pursuant to a Determination of Alcohol Misuse or Abuse

The proposed rule would require, as a function of the facts and circumstances, certain disciplinary actions by the contractor in response to a determination of alcohol misuse or abuse. For purposes of this rule, an individual who refuses to take an alcohol test may be subject to appropriate disciplinary action. An employee performing a health or safety-sensitive function, who has a positive breath test, would be removed from that function, and, under certain conditions, from the position the employee occupies. For a first time determination of misuse or abuse of alcohol, the employee may be offered a reasonable opportunity for rehabilitation consistent with the contractor's policies. However, disciplinary measures, including permanent removal for subsequent misuse or abuse of alcohol, may be applied by the contractor. An individual permitted unescorted access to the control areas of certain reactors will not be permitted such access after the first determination of misuse or abuse of alcohol until the individual meets the requirements specified in the rule, including successful completion of counseling, a negative breath test, and an evaluation by the site occupational medical department. The proposed rule would provide for specific notice to DOE security officials in the case of an individual who was determined to have misused or abused alcohol, if that individual has, or is an applicant for, an access authorization. Continued eligibility for such an access authorization is subject to determination under 10 CFR part 710.

The proposed rule also would require alcohol testing information to be held confidential, and would permit the release of information relating to a positive alcohol test to certain individuals, on a need to know basis. These include DOE officials, the contractor, the individual, and any decisionmaker in a lawsuit, grievance, or other procedure relating to a positive alcohol test by that individual.

III. Contractor Performance

Future performance of contractors will be evaluated in part by their effectiveness and success in implementing this rule. Noncompliance with the requirements of the rule may subject the contractor to existing contractual remedies available in the Federal procurement regulations.

IV. Review Under Executive Order 12291

Under Executive Order 12291, agencies are required to determine whether or not proposed rules are major rules as defined in the Order. DOE has reviewed this proposed rule and has determined that it is not a major rule because: Implementing the additional human reliability requirements proposed in this rule will not have an annual effect of $100 million or more on the economy; will not result in a major increase in costs or prices to consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises. The proposal was submitted to the Director of the Office of Management and Budget pursuant to Executive Order 12291. The Director has concluded his review.

V. Review Under the Regulatory Flexibility Act

The proposed rule was reviewed under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* DOE has concluded that there is no need to prepare a regulatory flexibility analysis because, if promulgated, the rule will affect only DOE contractors performing work pursuant to the Atomic Energy Act whose places of performance are at Government-owned or controlled sites and their subcontractors, and will not have significant economic impact on a substantial number of small entities.

VI. Review Under Executive Order 12778

Section 2 of Executive Order 12778 instructs each agency subject to Executive Order 12291 to adhere to certain requirements in promulgating new regulations and reviewing existing regulations. These requirements, set forth in sections 2 (a) and (b)(2), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards (whether they be engineering or performance standards), and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation: Specifies clearly any preemptive effect, effect on existing Federal law or regulation, and retroactive effect; describes any administrative proceedings to be available prior to judicial review and any provisions for the exhaustion of such administrative proceedings; and defines key terms. DOE certifies that today's proposal meets the requirements of sections 2 (a) and (b) of Executive Order 12778.

VII. Review Under the National Environmental Policy Act

This rule is not a major action significantly affecting the quality of the human environment. The rule is part of an overall employee human reliability and standards of conduct program that deals only with a requirement for certain DOE contractors and subcontractors performing work pursuant to the Atomic Energy Act, to include certain minimum elements in a workplace substance abuse program. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

VIII. Review Under Executive Order 12612

The principal impact of this rule will be on government contractors and certain subcontractors and their employees. The rule is unlikely to have a substantial direct effect on the States, the relationship between the States and the Federal Government, or the distribution of power and responsibilities among various levels of government. No Federalism assessment under Executive Order 12612 is required.

IX. Review Under the Paperwork Reduction Act

The proposed rule imposes no additional paperwork burden on the public other than that already approved under OMB Control Number 1910–0600.

X. Comment and Hearing Procedures

A. Written Comments

The text of 10 CFR part 707 as it would be amended by this Notice of Proposed Rulemaking is available from the Office of Contractor Human Resource Management, Department of Energy, Washington, DC 20585 (202–586–9033).

Interested persons are invited to participate in this rulemaking by submitting data, views, or arguments with respect to the proposed rule set forth in this notice. Comments should be submitted to the address for the Director of the Office of Contractor Human Resource Management, which is given in the beginning of this notice. The envelope and written comments submitted should be identified with the designation "CAA" ("Contractor Alcohol Abuse"). Six copies should be submitted.

All comments received on or before the date specified in the beginning of this notice and all other relevant information will be considered by DOE before taking final action on this proposed rule.

Any person submitting information which that person believes to be confidential and which may be exempt by law from public disclosure should submit one complete copy, as well as six copies from which the information claimed to be confidential has been deleted. DOE reserves the right to determine the confidential status of the information or data and to treat them according to its determination. This procedure is set forth in 10 CFR 1004.11.

B. Public Hearing

DOE will hold a public hearing on the proposed rule as specified at the beginning of this notice. Any person who has an interest in the proposed rule, or who is a representative of a group or class of persons having an interest in it, may make a request for an opportunity to make an oral presentation. Such a request to speak at the hearing should be directed to the Director of the Office of Contractor Human Resource Management at the address given in the ADDRESSES section of this notice and must be received by 4:30 p.m., local time, on the date specified in the DATES section.

The person making the request should describe briefly his or her interest in the proceeding. The person should also provide a telephone number where the person may be reached. Persons requesting an opportunity to offer testimony should bring ten copies of their statements to the hearing.

DOE reserves the right to select the persons to be heard at the hearing, to schedule the respective presentations, and to establish the procedures governing the conduct of the hearing. The length of each presentation is limited to 10 minutes.

List of Subjects in 10 CFR Part 707

Alcohol, Classified information, Drug testing, Employee assistance programs, Energy, Government contracts, Health and safety, National security, Reasonable suspicion, Special nuclear material, Substance abuse.

Issued in Washington, DC, on July 15, 1992.

Berton J. Roth,

Acting Director, Office of Procurement, Assistance and Program Managment.

For the reasons set forth in the preamble, DOE proposes to amend part 707 of title 10 of the Code of Federal Regulations as set forth below.

PART 707—WORKPLACE SUBSTANCE ABUSE PROGRAMS AT DOE SITES

1. The authority citation for part 707 continues to read as follows:

Authority: 41 U.S.C. 701 *et seq.*; 42, U.S.C. 2012, 2013, 2051, 2061, 2165, 2201b, 2201i, and 2201p; 42 U.S.C. 5814 and 5815; 42 U.S.C. 7151, 7251, 7254, and 7256.

§ 707.1 [Amended]

2. Section 707.1 is amended by adding the phrase "and from the misuse or abuse of alcohol" after the phrase "illegal drugs" in the second sentence; in the last sentence by removing the period and adding the following: ", and (ii) misuse or abuse of alcohol by individuals performing health or safety-sensitive functions. This part will also require individuals who perform health or safety-sensitive functions to abstain from the use of alcohol for at least five hours prior to a scheduled working tour and during any working tour."

3. Section 707.2 is amended by redesignating paragraph (b) as (b)(1) and changing the references in (b)(1) from § 707.9 and 707.10 to 707.10 and 707.11 respectively; by adding paragraph (b)(2); and by changing the reference in (c) from § 707.8 to 707.9. Paragraph (b)(2) is set forth below:

§ 707.2 Scope.

* * * * *

(b) * * *

(2) Individuals described in § 707.8 (b) and (c) will be subject to random alcohol testing while performing health or safety-sensitive functions; and to alcohol testing as a result of an occurrence, as described in § 707.10; and on the basis of reasonable suspicion, as described in section 707.11

* * * * *

§ 707.3 [Amended]

4. Section 707.3 is amended in the final sentence by adding before the final period at the end thereof: " * * *, and on individuals performing health or safety-sensitive functions or with unescorted access to the control areas of certain DOE reactors who misuse or abuse alcohol".

§ 707.4 Definitions.

5. Section 707.4 is amended by adding in the proper alphabetical order definitions for the terms Air Blank, Alcohol, Alcohol Concentration, Alcohol Testing Form, Breath Alcohol Technician (BAT), Collection Site, Evidential Breath Testing Device, Health or Safety-Sensitive Function, Misuse or Abuse of Alcohol, and Substance Abuse to read as follows:

§ 707.4 Definitions.

Air Blank means a reading by an evidential breath testing device (EBT) of ambient air containing no alcohol.

Alcohol means any beverage, mixture, or preparation containing ethyl alcohol (including any medication).

Alcohol Concentration is a measure of the alcohol in a volume of breath, expressed in terms of grams of alcohol per 210 liters of breath. [For example, an alcohol concentration of 0.04 means that there is 0.04 gram (four one-hundredths of one gram) of alcohol in 210 liters of expired deep lung air.]

Alcohol Testing Form is a form used to document the breath test result. This form, at a minimum, shall include identifying information, including the sequential test number, the individual's identifying date and signature, date and location of the test, name signature of the breath alcohol technician, and the test results.

Breath Alcohol Technican (BAT) means a person who instructs and assists individuals in the testing process and operates the evidential breath testing device.

Collection Site means the location at which individuals subject to alcohol or drug testing are required to provide breath samples and/or urine specimens.

* * * * *

Evidential Breath Testing Device means a device which conforms to the model standards for evidential breath testing devices of the National Highway Traffic Safety Administration (NHTSA), capable of providing a printed copy of each breath test result. The model standards are available in the DOE Reading Room, room 1E–190, 1000 Independence Ave., SW., Washington, DC 20585, (202) 586–6020.

* * * * *

Health or Safety-Sensitive Function means a function with duties that, if not properly discharged, could directly and/or immediately cause significant harm to public health or safety, including any function that requires unescorted access to control areas of certain DOE reactors. (For purposes of this part, persons are considered to be performing a health or safety-sensitive function during any period when they are actually performing such functions or can be asked or directed to perform those functions. Such persons may be tested prior to, during, or following the performance of such functions.)

* * * * *

Misuse or Abuse of Alcohol means performing a health or safety-sensitive function while, (1) having an alcohol concentration at or above 0.04, (2) consuming alcohol within five hours of a scheduled working tour or during any working tour, or (3) being otherwise impaired by alcohol.

For purposes of this part, a person who refuses to take an alcohol test will be considered to have an alcohol concentration at or above 0.04.

* * * * *

Substance Abuse means the misuse or abuse of alcohol or the use of illegal drugs.

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§ 707.4 [Amended]

6. Section 707.4 is further amended by adding the sentence "The collection site person may also be the BAT for a particular site." at the end of the definition of *Collection Site Person;* by adding the sentence "For alcohol, a confirmed positive is a breath test result of 0.04 or greater alcohol concentration, performed on an evidential breath testing device and repeated on the same or another evidential breath testing device with a breath test result of 0.04 or greater alcohol concentration." at the end of the definition for *Confirmed Positive Test;* by adding the phrase ", misuse or abuse of alcohol" after the phrase "illegal drug use" in the definitions of *Counseling, Employee Assistance,* and *Referral* (both occurrences); in the definition of *Random Testing,* by adding the paragraph designator (1) after "unannounced" and adding "or (2) alcohol breath testing of individuals performing health or safety-sensitive functions or having access to the control areas of certain DOE reactors," after "designated positions,"; in the definition of *Reasonable Suspicion,* by adding the phrase "or misuse or abuse of alcohol" after "illegal drugs" and changing the section reference from 707.10 to 707.11; and by adding the phrase "and alcohol misuse or abuse" after "illegal drug use" in the definition of *Rehabilitation.*

7. Section 707.5 is amended by adding the phrase "and the misuse or abuse of alcohol" after "illegal drug use" and adding the phrase "or alcohol-related" after "drug use" in paragraph (a)(2); by adding the phrase "the use, misuse, or abuse of alcohol or" after "policies prohibiting" in the first sentence of paragraph (a)(3); by adding the phrase "for an alcohol-related offense or" after "employee's conviction" in paragraph (a)(3)(ii); by adding the phrase "or alcohol-related" after "conviction of a drug-related" in paragraph (a)(4); by adding the phrase "or alcohol-related" after "drug-related" in paragraph (a)(5); by removing the word "drug" and adding the word "substance" before "abuse assistance" in the first sentence of (a)(5)(ii); by adding the phrase "or that have individuals performing health or safety-sensitive functions (see § 707.8(b))" before the colon in the introductory text to paragraph (b); by redesignating paragraphs (b)(3) through (6) as (b)(4) through (7), respectively; by adding new paragraph (b)(3); by adding the phrase "alcohol or" after "subject to" in paragraphs (b)(1) and (b)(5)(i); by adding the phrase "or who perform health or safety-sensitive functions" after "designated positions" in paragraph (b)(4); by adding the phrase "and random alcohol breath tests for individuals who perform health or safety-sensitive functions" after "designated positions" in (b)(5)(iii); by adding the phrase "and alcohol breath tests for individuals who perform health or safety-sensitive functions" after "designated positions" in paragraph (b)(5)(iv); by adding the phrases "Alcohol breath tests," and "and § 707.8(c)" at the beginning and end, respectively, of paragraph (b)(5)(v); in paragraph (b)(5)(vi), by adding the paragraph designator (A) after the phrase "by an employee" and adding the phrase "or (B) who perform health or safety-sensitive functions of an alcohol-related arrest or conviction," after "that employee,"; by adding the phrase "or alcohol-related" after "drug-related" in paragraph (b)(5)(vii)(A); by changing the reference from § 707.14 to § 707.16 and 707.17 in paragraph (b)(5)(vii)(B); by changing the reference from § 707.14 to § 707.16 and 707.17 in paragraph (b)(6); by adding the phrase "or has misused or abused alcohol" at the end of paragraph (b)(7); by adding the phrase "alcohol or" before "drug testing" in the fourth sentence of paragraph (e); by changing the reference in the last sentence of paragraph (g) from section 707.15 to § 707.18; and by adding the phrase ", positions with health or safety-sensitive functions," after the word "contracts" in the first sentence of paragraph (h). Newly added paragraph (b)(3) is set forth below:

§ 707.5 Submission, approval, and implementation of a baseline workplace substance abuse program.

* * * * *

(b) * * *

(3) Prohibition of misuse or abuse of alcohol by individuals performing health or safety-sensitive functions;

* * * * *

§ 707.6 [Amended]

8. Section 707.6 is amended by removing the phrase ", especially illegal drug use" in paragraph (b)(1) (both occurrences) and by adding the phrase "misuse or abuse of alcohol or" before the words "illegal drug use" in (b)(2)(ii) and (iv).

§ 707.7 [Amended]

9. Section 707.7 is amended by changing the reference in the third sentence of paragraph (c) from § 707.14(d) to § 707.16(d).

10. In subpart B, the following sections are redesignated:

§§ 707.15–707.17 [Redesignated as §§ 707.18–707.20]

a. Sections 707.15 through 707.17 are redesignated as §§ 707.18 through 707.20.

§ 707.14 [Redesignated as § 707.16]

b. Section 707.14 is redesignated as § 707.16.

c. Sections 707.8 through 707.13 are redesignated as §§ 707.9 through 707.14.

10a. A new § 707.8 is added to read as follows:

§ 707.8 Performance related random alcohol testing requirements.

(a) Each workplace substance abuse program shall provide for random testing for alcohol for individuals performing health or safety-sensitive functions and for individuals with unescorted access to the control areas of certain DOE reactors.

(1) Individuals are considered to be performing a health or safety-sensitive function during any period when they are actually performing such functions or can be asked or directed to perform those functions.

(2) Individuals subject to testing under this section may be tested prior to, during, or following the performance of such health or safety-sensitive functions.

(3) Programs developed under this part for positions identified in (b)(3) of this section shall provide for performance related random tests at a rate equal to 50 percent of the total number of employees performing health or safety-sensitive functions for each 12 month period. Employees in the positions identified in paragraphs (b)(1), (b)(2), and (c) of this section will be subject to performance related random testing at a rate equal to 100 percent of the total number of employees identified, and those identified in paragraphs (b)(1) and (b)(2) of this section may be subject to additional tests.

(b) Positions containing health or safety-sensitive functions subject to performance related random alcohol testing are:

(1) Positions determined to be covered by the Personnel Security Assurance Program (PSAP), codified at 10 CFR part 710. PSAP employees will be subject to the alcohol testing standards of this part and any additional requirements of the PSAP rule.

(2) Positions which entail critical duties that require an employee to perform work which affords both technical knowledge of and access to nuclear explosives sufficient to enable the individual to cause a detonation (high explosive or nuclear), in what is commonly known as the Personnel Assurance Program (PAP). PAP employees will be subject to the alcohol testing standards of this part and any additional requirements of that program.

(3) Positions identified by the contractor which entail duties where failure of an employee adequately to discharge his or her position could directly and/or immediately cause harm to the environment or public health and safety, such as:

(i) Pilots;

(ii) Firefighters;

(iii) Protective force personnel, exclusive of those covered in paragraphs (b)(1) and (b)(2) of this section, in positions involving use of firearms where the duties also require potential contact with, or proximity to, the public at large;

(iv) Personnel directly engaged in construction, maintenance, or operation of nuclear reactors; or

(v) Personnel directly engaged in production, use, storage, transportation, or disposal of hazardous materials sufficient to cause significant harm to the environment or public health and safety.

(4) Other positions determined by DOE, after consultation with the contractor, to have the potential to significantly affect the environment, or public health and safety.

(c) Each contractor shall require random testing of any individual, whether or not an employee, who is allowed unescorted access to the control areas of the following DOE reactors: Advanced Test Reactor (ATR); C Production Reactor (C); Experimental Breeder Reactor II (EBR–II); Fast Flux Test Facility (FFTF); High Flux Beam Reactor (HFBR); High Flux Isotope Reactor (HFIR); K Production Reactor (K); L Production Reactor (L); N Production Reactor (N); Oak Ridge Research Reactor (ORR); and P Production Reactor (P). A confirmed positive test shall result in such an individual being denied unescorted access. If such an individual is an employee, that individual is subject to the other requirements of this part, including appropriate disciplinary measures.

(d) A position otherwise subject to testing under this part may be exempted from such testing if it is within the scope of another comparable Federal alcohol testing program (e.g., Nuclear Regulatory Commission, Department of Transportation), as determined by DOE, after consultation with the contractor, to avoid unnecessary multiple tests.

11. Redesignated § 707.10 is amended by revising the section heading to add "and alcohol" after "Drug", by adding the paragraph designator "(a) Drug testing." before the first paragraph, and by adding paragraph (b) as set forth below:

§ 707.10 Drug and alcohol testing as a result of an occurrence.

(a) *Drug Testing.* * * *

(b) *Alcohol testing.* When there is an occurrence which is required to be reported to DOE by the contractor, under contract provisions incorporating applicable DOE Orders, rules, and regulations, it may be necessary to test individuals performing health or safety-sensitive functions, or individuals with unescorted access to the control areas of the DOE reactors listed in § 707.8(c) for the misuse or abuse of alcohol, if such individuals could have caused or contributed to the conditions which caused the occurrence. For an occurrence requiring immediate notification or reporting as required by applicable DOE Orders, rules, and regulations, the contractor will require testing as soon as possible after the occurrence but within one hour of the occurrence, unless DOE determines that it is not feasible to do so. For other occurrences requiring notification to DOE as required by applicable DOE Orders, rules, and regulations, the contractor may require testing.

12. Redesignated § 707.11 is amended by revising the section heading to add "and alcohol" after "Drug" and "or misuse or abuse of alcohol" after "drug use", by adding the paragraph heading "Drug testing." before the first paragraph, by redesignating paragraph (a) as paragraph (a)(1), by beginning a new paragraph, designated as (2), with the words "Such a belief may be based upon, among other things:", by redesignating subparagraphs (a)(1) through (a)(6) as (a)(2)(i) through (a)(2)(vi), respectively, by redesignating paragraph (b) as paragraph (a)(3), by adding a new paragraph (b), and by adding the phrase "or for the misuse or abuse of alcohol" after the words "illegal drugs" in paragraph (c). New paragraph (b) is set forth below.

§ 707.11 Drug and alcohol testing for reasonable suspicion of illegal drug use or misuse or abuse of alcohol.

* * * * *

(b) *Alcohol testing.*

(1) It may be necessary to test any employee encumbering a position entailing health or safety-sensitive functions, as defined in § 707.8(b), or with unescorted access to the control areas of the DOE reactors listed in § 707.8(c), for the misuse or abuse of alcohol, if the behavior of such an individual creates the basis for

reasonable suspicion of the misuse or abuse of alcohol. Two or more supervisory or management officials, at least one of whom is in the direct chain of supervision of the employee, or is a physician from the site occupational medical department, must agree that such testing is appropriate. Reasonable suspicion must be based on an articulable belief that an employee misuses or abuses alcohol, drawn from particularized facts and reasonable inferences from those facts.

(2) Such a belief may be based upon, among other things:

(i) Observable phenomena, such as direct observation of:

(A) The use of alcohol on-site; or

(B) The physical symptoms of being under the influence of alcohol;

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

(iii) Arrest or conviction for an alcohol-related offense;

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

(v) Evidence that an employee has tempered with, or attempted to tamper with, an alcohol test.

(3) The fact that an employee had a confirmed positive alcohol test at some prior time, or has undergone a period of rehabilitation or treatment, will not, in and of itself, be grounds for testing on the basis of reasonable suspicion.

* * * * *

13. §§ 707.15 and 707.17 are added to read as follows:

§ 707.15 Alcohol testing requirements and procedures.

(a) *Collection Site Requirements.* (1) All necessary equipment, personnel, and materials for breath testing shall be provided at the collection site. Any forms used shall be approved or provided by DOE.

(2) The collection site shall be an enclosed room or area affording visual and aural privacy to the individual being tested to the maximum extent practicable.

(3) No unauthorized persons shall be permitted access to the collection site at any time when testing is occurring.

(4) A mobile collection facility, such as a van equipped for alcohol testing, may be used as a collection site.

(5) In unusual or emergency circumstances, a test may be conducted at a place other than a designated collection site.

(6) The breath alcohol technician (BAT) shall supervise only one person's use of the EBT at a time. The BAT shall not leave the testing site while the preparation for, and testing of, a given person are in progress.

(b) *Alcohol testing procedures.* (1) The BAT shall be trained to proficiency in the operation of the evidential breath testing device (EBT) he or she is using and in the alcohol testing procedures of this part.

(i) Proficiency shall be demonstrated by successful completion of a course of instruction, which at a minimum, provides training in the principles of EBT methodology, operation, and calibration checks; the fundamentals of breath analysis for alcohol content; and the procedures required in this part for obtaining a breath specimen, interpreting, and recording EBT results.

(ii) Courses of instruction that meet standards of the National Highway Traffic Safety Administration (NHTSA) model course or a course approved by a state department of health or other relevant state agency may be used to demonstrate BAT proficiency.

(iii) The course of instruction shall include documentation that the BAT has demonstrated competence in the operation of the specific EBT he/she will use.

(iv) Any BAT who will perform an external calibration check of an EBT shall be trained to proficiency in conducting the check on the particular model of EBT, to include practical experience and demonstrated competence in preparing the breath alcohol simulator or alcohol standards, maintenance and calibration of the EBT.

(v) The BAT shall receive additional training, as needed, to ensure proficiency concerning new or additional devices or changes in technology that he or she will use.

(vi) The employer shall maintain documentation of the training and proficiency test of each BAT for a period of five years.

(vii) To the extent practicable, the supervisor of a particular employee shall not act as a BAT for that employee.

(2)(i) An EBT used to conduct breath tests shall be inspected, maintained, and calibrated in accordance with factory specifications, specific to the circumstances in which the EBT is used. These functions shall be performed by the manufacturer or a maintenance representative certified by the EBT's manufacturer or an appropriate state agency. Records of all such inspections, maintenance, and calibrations shall be maintained by the contractor for a period of five years, and shall be made available to DOE upon request.

(A) When not in use, the EBT shall be stored in a secure space to which unauthorized persons are denied access.

(B) Any EBT taken out of service because of failure to adequately conduct air blanks should not be used for testing until a check of external calibration is conducted and the EBT is found to be within tolerance limits.

(ii) Such an EBT, independently or in conjunction with a separate printer, shall be capable of the following:

(A) Numbering breath tests consecutively, and printing the appropriate number on the breath test result;

(B) Printing in triplicate or alternatively, three consecutive identical copies;

(C) Taking an air blank prior to or following each collection of a breath sample; and

(D) Performing an external calibration check.

(iii) In order to be used in alcohol testing subject to this part, and EBT shall be a quality assurance plan developed by the manufacturer.

(A) The plan shall designate the method or methods to be used to perform external calibration checks of the device.

(B) The plan shall specify the minimal intervals for performing external calibration checks of the device. Intervals shall be specified for different frequencies of use, temperatures, and contexts of operation (*e.g.*, stationary or mobile use).

(C) The plan shall specify the tolerance on an external calibration check within which the EBT is regarded to be in proper calibration.

(D) The plan shall specify inspection, maintenance, and calibration requirements and intervals for the device.

(E) Documentation of the contractor's compliance with the quality assurance plan of the manufacturer of each EBT used for alcohol testing under this part, including records of the results of external calibration checks, shall be maintained for a period of five years.

(F) For a plan to be regarded as valid for purposes of this paragraph, the manufacturer shall have submitted the plan to NHTSA for review and have received NHTSA approval of the plan.

(3) An individual who is required to take an alcohol breath test shall report to a designated collection site. The following procedures shall be followed:

(i) The BAT will require the individual to provide positive identification, such as a photo identification. The individual may request similar identification from the BAT.

(ii) The BAT shall explain the testing procedures to the individual. The BAT shall advise the individual not to eat, drink, put any object or substance in his or her mouth, or belch, in order to avoid an artificially high alcohol reading. The test shall be conducted regardless of whether the individual has followed the instructions above. If the individual fails to follow the instructions, the BAT shall note that on the testing form.

(iii) The individual and the BAT both shall sign, date, and note the number of the breath test on an alcohol testing form. Refusal to sign the form shall be noted by the BAT on the form. Refusal to provide a breath sample, to provide an adequate breath sample, or to otherwise cooperate with the collection process shall be considered to be a refusal to take the test, and shall be noted by the BAT on the form. The contractor shall be notified by the BAT of an individual's refusal to take a test, and the contractor shall take appropriate disciplinary action.

(iv) Before the first test is administered, the BAT shall ensure that the EBT registers 0.00 on an air blank. If the EBT reading in above 0.00, the BAT shall conduct one more air blank. Testing shall not proceed unless a 0.00 reading is obtained in the second air blank.

(A) The BAT shall open on individually-sealed mouthpiece, within view of the individual to be tested, and attach it to the EBT in accordance with the manufacturer's instructions. The individual shall then be instructed to blow firmly into the mouthpiece for at least six seconds or until the EBT indicates that a sufficient breath sample has been obtained.

(B) After the initial test is administered, the BAT shall ensure that the EBT registers 0.00 on an air blank. The test is valid only if this check results in a reading of 0.00.

(C) If the initial test results in a alcohol concentration of 0.04 or above, a confirmatory test is required. Such a test may be conducted on the same or a different EBT.

(D) If a confirmatory test is required, the BAT shall advise the individual not to eat, drink, put any object or substance in his or her mouth, or belch during a 15 to 20 minute waiting period before the administration of the confirmatory test, in order to avoid an artificially high alcohol reading. The test shall be conducted at the end of the 15- to 20-minute waiting period, regardless of whether the individual has followed the instructions above. If the individual fails to follow the instructions, the BAT shall note that on the testing form. A new mouthpiece shall be used for the confirmatory test. The results of the confirmatory test shall be considered the final result for purposes of any subsequent action, including discipline.

(E) The BAT shall ensure that the test result printout is affixed to the alcohol test form if the EBT does not print the results directly on the form, and sign and date the printed result, certifying that proper procedures were followed. The individual shall sign the printed result, certifying that he or she took the test with the appropriate sequential test result. If the individual declines to sign the printed result, it shall not be considered a refusal to be tested. However, the BAT shall note the individual's refusal to sign on the form.

(F) If the individual is unable to provide a sufficient breath sample due to a medical condition, such as asthma, the individual must provide medical documentation, as soon as possible, concerning the medical condition preventing the individual from providing an adequate breath sample. The contractor shall refer the individual and/or the medical documentation to the site occupational medical department for evaluation and confirmation of the condition. If the site occupational medical department determines that a medical condition is likely to have precluded the individual from providing an adequate breath sample, the test shall be declared invalid, and a written statement, with the basis for the conclusion, shall be provided to the contractor. If the site occupational medical department determines that a medical condition is not likely to have precluded the individual from providing an adequate breath sample, the individual's failure to provide an adequate sample will be treated as a refusal to take the test.

(G) The BAT shall transmit the test result to the contractor in a confidential manner. The information shall be maintained in a manner that ensures confidentiality. Information relating to a positive alcohol test may be provided by the BAT or the contractor to DOE upon request of DOE officials with a need for those records in the performance of their official responsibilities. Such information may also be provided by the BAT, the contractor, or DOE to the decisionmaker in any lawsuit, grievance, or other proceeding relating to the individual and arising from a positive alcohol test. The individual, upon request, may have access to any records relating to his or her test. If the individual has a positive test result, the contractor shall immediately remove that individual from the performance of health or safety-sensitive functions, and must notify DOE security officials if the individual holds, or is an applicant for, an access authorization.

§ 707.17 Action pursuant to a determination of misuse or abuse of alcohol.

(a) When an individual who performs a health or safety-sensitive function has tested positive for alcohol, the contractor shall immediately remove that employee from performing such a health or safety-sensitive function; if such employee also holds, or is an applicant for, an access authorization, then the contractor shall immediately notify DOE security officials for appropriate adjudication. If this is the first determination of alcohol misuse or abuse by that individual, the individual may be offered a reasonable opportunity for rehabilitation, consistent with the contractor's policies, and placed in a position that does not require the performance of a health or safety-sensitive function, provided that there is such an acceptable position in which the individual can be placed during rehabilitation. If there is no acceptable position available, the employee will be placed on sick, annual, or other leave status for a reasonable period sufficient to permit rehabilitation. However, the employee will not be protected from disciplinary action which may result from violations of work rules other than a positive test result. Following a determination by the contractor, in consultation with the site occupational medical department, that the individual can safely return to duty, the contractor may offer the individual reinstatement in the same or a comparable position to the one held prior to the removal, consistent with the requirements of 10 CFR part 710. Failure to take the opportunity for rehabilitation, if it has been made available, for the alcohol misuse or abuse will require appropriate disciplinary action up to and including removal from employment, in accordance with the contractor's policies. Any employee who is twice determined to have misused or abused alcohol shall in all cases be removed from employment under the DOE contract.

(b) An individual who has been removed from performing a health or safety-sensitive function because of the misuse or abuse of alcohol my not be returned to such position until that employee has:

(1) Successfully completed counseling or a program of rehabilitation;

(2) Undergone a breath test with a negative result; and

(3) Been evaluated by the site occupational medical department, and has been determined to be capable of safely returning to dutv.

(c)(1) An individual who is not an employee of a contractor who has been denied unescorted access because of the misuse or abuse of alcohol may not have the unescorted access reinstated until that individual has:

(i) Provided evidence of successful completion of counseling or a program of rehabilitation;

(ii) Undergone a breath test with a negative result; and

(iii) Been evaluated by the site occupational medical department, and has been determined to be capable of being permitted unescorted access to a reactor control area.

(2) If, after restoration of unescorted access, such an individual is determined to have misused or abused alcohol for a second time, unescorted access shall be denied for a period of not less than three (3) years. Such an individual thereafter shall be granted unescorted access only upon a determination by DOE that a grant of unescorted access to the individual presents no unacceptable safety or security risk.

(d) If a DOE access authorization is involved, DOE must be notified of a contractor's intent to return an employee to performance of a health or safety-sensitive function, when such employee has been removed from the performance of such a function because of the misuse or abuse of alcohol. For an individual encumbering a position identified in § 707.8(b) (1) and (2), the individual may not return to work without prior DOE approval.

14. Redesignated § 707.19 is amended by adding the phrase "misuse or abuse of alcohol and" before the words "illegal drug use" in the first sentence of paragraph (b); by redesignating paragraph (c) as (c)(1) and adding a new paragraph (c)(2); by adding the phrase "and alcohol testing forms" after "custody forms" in paragraph (d); by adding the phrase "For illegal drugs," at the beginning of paragraph (e); and by adding paragraph (f). Paragraphs (c)(2) and (f) are set forth below:

§ 707.19 Records

* * * * *

(c) * * *

(2) Unless otherwise approved by DOE, the contractors shall ensure that all records relating to positive alcohol breath test results, including initial and confirmatory test records, are retained in such a manner as to allow retrieval of all information pertaining to the breath tests for a minimum period of five years, or longer if so instructed by DOE.

* * * * *

(f) For alcohol tests, the alcohol testing form will contain the following information:

(1) Date of breath test;

(2) Tested person's name;

(3) Tested employee's social security number or other identification number unique to the individual;

(4) Test number;

(5) Type of test (random, occurrence, reasonable suspicion, or rehabilitation follow-up);

(6) Remarks regarding unusual behavior or conditions; and

(7) BAT's signature.

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Part VI

Department of Energy

48 CFR Parts 909, 923, and 970

Acquisition Regulation; Interim Final Rule

DEPARTMENT OF ENERGY

48 CFR Parts 909, 923, and 970

Acquisition Regulation

AGENCY: Department of Energy (DOE).

ACTION: Interim final rule.

SUMMARY: DOE today publishes an interim final rule, with amends the Department of Energy Acquisition Regulation (DEAR), to implement the requirements of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites. This rule provides a mechanism to contractually impose the requirements of 10 CFR part 707 on affected contractors, and otherwise conforms the DEAR to 10 CFR part 707.

DATES: *Effective date:* The interim final rule is effective on August 21, 1992. This interim rule becomes final on September 21, 1992, unless DOE takes additional action in response to public comments and publishes a document in the **Federal Register**.

COMMENT DATE: Written comments on this interim final rule must be received by August 21, 1992.

ADDRESS: Comments should be addressed to: Edward Simpson, Office of Policy (PR–121), Office of Procurement, Assistance and Program Management, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Edward Simpson, Office of Policy (PR–121), Office of Procurement, Assistance and Program Management, U.S. Department of Energy, Washington, DC 20585, (202) 586–8246.

Mary Ann Masterson, Office of the Assistant General Counsel, for Procurement and Finance (GC–34), U.S. Department of Energy, Washington, DC 20585, (202) 586–1526.

SUPPLEMENTARY INFORMATION:

I. Background

In today's **Federal Register**, DOE is publishing a final rule establishing DOE's policies, criteria, and procedures regarding the development, implementation, and maintenance of a drug free workplace by contractors and subcontractors performing work at sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954, as amended. Because this final rule (codified at 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites) applies to certain contracts, conforming coverage in the DEAR is needed to provide a mechanism to contractually impose the requirements of 10 CFR part 707 on affected contractors. The interim final rule published today accomplishes this purpose.

DOE has determined that the promulgation of the amendments on an interim final basis is necessary to achieve the objectives of DOE's workplace substance abuse policies for contractors, as established in 10 CFR part 707. The amendments set forth in the interim final rule are derivative of the requirements of 10 CFR part 707, and impose no new requirements concerning the policies, criteria, and procedures of 10 CFR part 707. The contractual requirements, which are consistent with the statutory mandates of the Drug Free Workplace Act of 1988 (Pub. L. 100–690), are modeled after similar coverage now found in Subpart 23.5 of the Federal Acquisition Regulation (FAR). The amendments to the DEAR needed to implement 10 CFR part 707 are described below.

Item I

Part 909 is amended to add a new section 909.104–1, which adds the failure of an offeror or bidder to certify and agree to provide the contracting officer with its workplace substance abuse program as a standard in determining the offeror's eligibility for award.

Item II

Part 923 of the DEAR is amended to add a new subpart 923.5, entitled Workplace Substance Abuse Programs. This new subpart implements the requirements of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, in the DEAR in non-management and operating contracts. It provides general requirements concerning the applicability of 10 CFR part 707 and prescribes the use of the solicitation provision (a pre-award certification) and the contract clause set forth in section 970.2305–4.

An important part of this new subpart provides that contracts specifically within the scope of, and subject to, 10 CFR part 707 will not be subject to the government-wide drug free workplace requirements of FAR 23.5. DOE, in an effort to develop a stand-alone workplace substance abuse regulation at 10 CFR part 707, incorporated all of the elements of a drug free workplace program required by the Drug Free Workplace Act of 1988 in 10 CFR part 707, and has used the FAR coverage as an example in developing workplace substance abuse coverage for the DEAR.

The certification and contract clause are described in Item IV, below.

Item III

Subpart 970.23, entitled Environmental, Conservation, and Occupational Safety Programs, is amended to add a new section 970.2305, Workplace Substance Abuse Programs—Management and Operating Contracts. This section expressly implements the requirements of 10 CFR part 707 in all management and operating (M&O) contracts awarded under the authority of the Atomic Energy Act of 1954, as amended. In addition, this section requires the use of the solicitation provision and contract clause prescribed at subsection 970.2305–4 in solicitations and contracts for the management and operation of DOE-owned or -controlled sites. Finally, subsection 970.2305–5, by relying substantially on existing FAR 23.506 coverage, sets out the actions that may be taken by the Government in the event the contractor fails to comply with its approved workplace substance abuse program.

Item IV

Subpart 970.52, Contract Clauses for Management and Operating Contracts, is amended to add a solicitation provision (a pre-award certification) and a contract clause for use in implementing the requirements of 10 CFR part 707 in covered management and operating contracts.

The pre-award certification, identified as 970.5204–57, Certification Regarding Workplace Substance Abuse Programs at DOE Sites, will require the offeror/bidder to agree to provide the contracting officer with its workplace substance abuse program within 30 days after notification of selection for award, or of award of the contract, whichever is earlier. Consistent with the Drug Free Workplace Act of 1988, failure of the offeror or bidder to certify will be treated as a matter of contractor responsibility and will render the offeror/bidder ineligible for award. The certification is modeled after the certification required of offerors/bidders under FAR Subpart 23.5. That certification is found at FAR 52.223–15.

DEAR 970.5204–58, Workplace Substance Abuse Programs at DOE Sites, requires the contractor to develop, implement, and maintain a workplace substance abuse program that is consistent with the requirements of 10 CFR part 707. In addition, the clause sets out the contractual remedies that may be imposed on the contractor for failure to (1) comply with 10 CFR part 707; or (2) perform in a manner consistent with its approved program. Such remedies are consistent with remedies set forth in the Drug Free Workplace Act of 1988. The clause also addresses the responsibility of the DOE prime contractor with regard to reviewing, approving, and monitoring workplace programs of all of its subcontractors; provides that subcontracts not subject to 10 CFR part 707 will be subject to the requirements of subpart 23.5 of the FAR; establishes the flow-down requirements for the clause; and provides the requirements for notifying the contracting officer of subcontracts that may be subject to 10 CFR part 707.

II. Procedural Requirements

A. Review Under Executive Order 12291

This Executive order entitled "Federal Regulation" requires that regulations be reviewed by the Office of Management and Budget (OMB) prior to their promulgation. The Director, OMB, by memorandum dated December 14, 1984, exempted certain agency procurement regulations from Executive Order 12291. This interim final rule falls into one of the types of regulations exempted by OMB. Accordingly, this rule was not submitted to OMB for review.

B. Review Under the Regulatory Flexibility Act

This interim final rule was reviewed under the Regulatory Flexibility Act of 1980, Public Law 96–354, which requires preparation of a regulatory flexibility analysis for any rule which is likely to have significant impact on a substantial number of small entities. DOE has concluded that there is no need to prepare a regulatory flexibility analysis because the rule will affect only DOE contractors whose places of performance are at Government-owned or -controlled sites operated under the authority of the Atomic Energy Act of 1954, as amended, and their subcontractors. Therefore, DOE certifies that this rule will not have a significant economic impact on a substantial number of small entities, and no regulatory flexibility analysis has been prepared.

C. Review Under the Paperwork Reduction Act

No new information or recordkeeping requirements are imposed by this interim final rule. Accordingly, no OMB clearance is required under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, *et seq.).*

D. Review Under the National Environmental Policy Act (NEPA)

DOE has concluded that promulgation of this rule would not represent a major Federal action having significant impact on the human environment under the NEPA of 1969 (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality regulations (40 CFR parts 1500–1508), and the DOE Guidelines (40 CFR 1021). Therefore, this interim final rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

E. Review Under Executive Order 12612

Executive Order 12612 requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the National Government and the States, or in the distribution of power and responsibilities among the various levels of Government. If there are sufficient substantial direct effects, then the Executive order requires the preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action.

This interim final rule, in essence, is derivative of the regulations at 10 CFR part 707, and merely implements the requirements of 10 CFR part 707 in DOE's acquisition regulations. This interim final rule provides a mechanism by which DOE can contractually implement the requirements of 10 CFR part 707 on its contractors. Because the universe of contractors to which the requirements of 10 CFR part 707 apply does not now, and will not in the foreseeable future, include States, DOE has determined that this rule will not have substantial direct effect on the institutional interests or traditional functions of the States.

III. Public Comments

Interested persons are invited to participate by submitting data, views, or arguments with respect to the DEAR amendments set forth in this rule. Three copies of written comments should be submitted to the address indicated in the "ADDRESS" section of this notice. All written comments received by August 21, 1992 will be carefully assessed and fully considered prior to the effective date of these amendments to the DEAR as a final rule.

DOE has concluded that this interim final rule does not involve a substantial issue of fact or law, and that the interim final rule should not have a substantial impact on the Nation's economy or large numbers of individuals or businesses. Further, public hearings were conducted as part of the rulemaking process of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites. Therefore, pursuant to Public Law 95–91, the DOE Organization Act, and the Administrative Procedure Act (5 U.S.C. 553), DOE does not plan to hold a hearing on this interim final rule.

List of Subjects in 48 CFR Parts 909, 923, and 970

Government Contracts, Government Procurement.

For the reasons set out in the preamble, parts 909, 923, and 970 of title 48 of the Code of Federal Regulations are proposed to be amended as set forth below.

Issued in Washington, DC on July 15, 1992.

Berton J. Roth,

Acting Director, Office of Procurement, Assistance and Program Management.

The regulations in 48 CFR parts 909, 923, and 970 are amended as set forth below:

1. The authority citations for parts 909 and 923 continue to read as follows:

Authority: 42 U.S.C. 7254; 40 U.S.C. 486(c).

2. The authority citation for part 970 continues to read as follows:

Authority: Sec. 161 of the Atomic Energy Act of 1954 (42 U.S.C. 2201), Section 644 of the Department of Energy Organization Act, Pub. L. 95–91 (42 U.S.C. 7254), sec. 201 of the Federal Civilian Employee and Contractor Travel Expenses Act of 1985 (41 U.S.C. 420) and sec. 1534 of the Department of Defense Authorization Act, 1986, Pub. L. 99–145 (42 U.S.C. 7256a), as amended.

PART 909—CONTRACTOR QUALIFICATIONS

3. Subpart 909.1 is amended to add a new paragraph (h) in § 909.104–1, General Standards, to read as follows:

909.104–1 General Standards.

* * * * *

(h) For solicitations for contract work subject to the provisions of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, the prospective contractor must certify and agree, in accordance with 970.5204–57, Certification Regarding Workplace Substance Abuse Programs at DOE Sites, to provide the contracting officer with its written workplace substance abuse program in order to be determined as responsible and, thus, eligible to receive the contract award.

PART 923—ENVIRONMENT, CONSERVATION, AND OCCUPATIONAL HEALTH

4. Part 923 is amended by adding a new Subpart 923.5, Workplace Substance Abuse Programs, consisting of sections 923.570 through 923.570–3, to read as follows:

Subpart 923.5—Workplace Substance Abuse Programs

Subpart 923.5—Workplace Substance Abuse Programs

923.570 Workplace Substance Abuse Programs at DOE Sites.

(a) The Department of Energy (DOE), as part of its overall responsibilities to protect the environment, maintain public health and safety, and safeguard the national security, has established policies, criteria, and procedures for contractors to develop and implement programs that help maintain a workplace free from the use of illegal drugs.

(b) Regulations concerning DOE's contractor workplace substance abuse programs are promulgated at 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

923.570–1 Applicability.

(a) The policies, criteria, and procedure specified in 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, apply to contracts for work performed at site owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954, as amended, where such work:

(1) Has a value of $25,000 or more, and;

(2) Has been determined by DOE to involve:

(i) Access to or handling of classified information or special nuclear materials;

(ii) High risk of danger to life, the environment, public health and safety or national security; or

(iii) The Transportation of hazardous materials to or from a DOE site.

(b) Except as otherwise provided for in this subpart, contracts subject to the requirements of 10 CFR part 707 and this subpart shall not be subject to FAR 23.5, Drug Free Workplace.

923.570–2 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 970.5204–57, Certification Regarding Workplace Substance Abuse Programs at DOE Sites, in solicitations where the work to be performed by the contractor will occur on sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954, as amended, as specified in 923.570–1, Applicability.

(b) The contracting officer shall insert the clause at 970.5204–58, Workplace Substance Abuse Programs at DOE Sites, in contracts where the work to be performed by the contractor will occur on sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954, as amended, as specified in 923.570–1, Applicability.

923.570–3 Suspension of payments, termination of contract, and debarment and suspension actions.

(a) The contracting officer shall comply with the procedures of FAR 23.506 regarding the suspension of contract payments, the termination of the contract for default, and the debarment and suspension of a contractor relative to failure to comply with 970.5204–58, Workplace Substance Abuse Programs at DOE Sites.

(b) For purposes of 10 CFR part 707, the specific causes for suspension of contract payments, termination of the contract for default, and debarment and suspension of the contractor are:

(1) The contractor fails to either comply with the requirements of 10 CFR part 707 or perform in a manner consistent with its approved program;

(2) The contractor has failed to comply with its certification;

(3) Such a number of contractor employees having been convicted of violations of criminal drug statutes for violations occurring on the DOE-owned or -controlled site, as to indicate that the contractor has failed to make a good faith effort to provide a drug free workplace; or

(4) The offeror has submitted a false certification in response to the provision at 970.5204–57, Certification Regarding Workplace Substance Abuse Programs at DOE Sites.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

5. Subpart 970.23, Environmental, Conservation, and Occupational Safety Programs, is amended to add new sections 970.2305 through 970.2305–5 to read as follows:

970.2305 Workplace Substance Abuse Programs—Management and Operating Contracts.

970.2305–1 General.

(a) The Department of Energy (DOE), as part of its overall responsibilities to protect the environment, maintain public health and safety, and safeguard the national security, has established policies, criteria, and procedures for management and operating contractors to develop and implement programs that help maintain a workplace free from the use of illegal drugs.

(b) Regulations concerning DOE's management and operating contractor workplace substance abuse programs are promulgated at 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

970.2305–2 Applicability.

(a) All management and operating contracts awarded under the authority of the Atomic Energy Act of 1954, as amended, are required to implement the policies, criteria, and procedures of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

(b) Except as otherwise provided for in this subpart, management and operating contracts subject to the requirements of 10 CFR part 707 and this subpart shall not be subject to FAR 23.5, Drug Free Workplace.

970.2305–3 Definitions.

Terms and words relating to DOE's Workplace Substance Abuse Programs, as used in this section, have the same meanings assigned to such terms and words in 10 CFR part 707.

970.2305–4 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 970.5204–57, Certification Regarding Workplace Substance Abuse Programs at DOE Sites, in solicitations for the management and operation of DOE-owned or -controlled sites operated under the authority of the Atomic Energy Act of 1954, as amended.

(b) the contracting officer shall insert the clause at 970.5204–58, Workplace Substance Abuse Programs at DOE

Sites, in contracts for the management and operation of DOE-owned or -controlled sites operated under the authority of the Atomic Energy Act of 1954, as amended.

970.2305-5 Suspension of payments, termination of contract, and debarment and suspension actions.

(a) The contracting officer shall comply with the procedures of FAR 23.506 regarding the suspension of contract payments, the termination of the contract for default, and the debarment and suspension of a contractor relative to failure to comply with 970.5204-58, Workplace Substance Abuse Programs at DOE Sites.

(b) For purposes of 10 CFR part 707, the specific causes for suspension of contract payments, termination of the contract for default, and debarment and suspension of the contractor are:

(1) The contractor fails to either comply with the requirements of 10 CFR part 707 or perform in a manner consistent with its approved program;

(2) The contractor has failed to comply with its certification;

(3) Such a number of contractor employees having been convicted of violations of criminal drug statutes for violations occurring on the DOE-owned or -controlled site, as to indicate that the contractor has failed to make a good faith effort to provide a drug free workplace; or,

(4) The offeror has submitted a false certification in response to the provision at 970.5204-57, Certification Regarding Workplace Substance Abuse Programs at DOE Sites.

6. Subpart 970.52, Contract Clauses for Management and Operating Contracts, is hereby amended by adding a new Section 970.5204-57, Certification Regarding Workplace Substance Abuse Programs at DOE Sites, and a new Section 970.5204-58, Workplace Substance Abuse Programs at DOE Sites, to read as follows:

970.5204-57 Certification Regarding Workplace Substance Abuse Programs at DOE Facilities.

As prescribed in 970.2305-4(a), insert the following provision:

Certification Regarding Workplace Substance Abuse Programs at DOE Sites (Aug 1992)

(a) Any contract awarded as a result of this solicitation will be subject to the policies, criteria, and procedures of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

(b) The offeror/bidder certifies and agrees that it will provide to the contracting officer, within 30 days after notification of selection for award, or award of a contract, whichever occurs first, pursuant to this solicitation, its written workplace substance abuse program consistent with the requirements of 10 CFR part 707.

(c) Failure of the offeror/bidder to certify in accordance with paragraph (b) of this provision, renders the offeror unqualified and ineligible for award.

(d) In addition to other remedies available to the Government, this certification concerns a matter within the jurisdiction of an agency of the United States, and the making of false, fictitious, or fraudulent statements may render the maker subject to prosecution under Title 18, U.S.C., section 1001.

Signature of officer/employee certifying regarding the offeror's workplace substance abuse program/Date

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Typed name and title of signatory

(End of provision)

970.5204-58 Workplace Substance Abuse Programs at DOE Sites.

As prescribed in 970.5204-4(b), insert the following clause:

Workplace Substance Abuse Programs at DOE Sites (Aug 1992)

(a) *Program Implementation.* The contractor shall, consistent with 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, incorporated herein by reference with full force and effect, develop, implement, and maintain a workplace substance abuse program.

(b) *Remedies.* In addition to any other remedies available to the Government, the contractor's failure to comply with the requirements of 10 CFR part 707 or to perform in a manner consistent with its approved program may render the contractor subject to: the suspension of contract payments, or, where applicable, a reduction in award fee; termination for default; and suspension or debarment.

(c) *Subcontracts.* (1) The contractor agrees to notify the contracting officer reasonably in advance of, but not later than 30 days prior to, the award of any subcontract the contractor believes may be subject to the requirements of 10 CFR part 707.

(2) The DOE prime contractor shall require all subcontracts subject to the provisions of 10 CFR part 707 to agree to develop and implement a workplace substance abuse program that complies with the requirements of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, as a condition for award of the subcontract. The DOE prime contractor shall review and approve each subcontractor's program, and shall periodically monitor each subcontractor's implementation of the program for effectiveness and compliance with 10 CFR part 707.

(3) The contractor agrees to include, and require the inclusion of, the requirements of this clause in all subcontracts, at any tier, that are subject to the provisions of 10 CFR part 707.

(End of clause)

[FR Doc. 92-17076 Filed 7-21-92; 8:45 am]

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July 22, 1992

Part VII

Department of Transportation

Federal Aviation Administration

14 CFR Part 61

Amendment of the Annual and Biennial Flight Review Requirements; Notice of Proposed Rulemaking

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 61

[Docket No. 26927; Notice No. 92-8]

RIN 2120-AE11

Amendment of the Annual and Biennial Flight Review Requirements

AGENCY: Federal Aviation Administration (FAA).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: In this notice, the FAA proposes to delete the requirement that recreational pilots and noninstrument-rated private pilots with fewer than 400 hours of flight time (hereafter, the "affected pilots") receive 1 hour of ground and 1 hour of flight instrumentation annually. This action responds to petitions for rulemaking from the Aircraft Owners and Pilots Association (AOPA) and the Experimental Aircraft Association (EAA). In this notice the FAA also proposes to require that the biennial flight review (BFR) for all pilots consists of a minimum of 1 hour of ground instruction and 1 hour of flight instruction. This action is needed to establish a minimum standard 2-hour requirement for the BFR for all pilots. The intended effect is to eliminate inadequate flight reviews while not unduly restricting the flight instructor from requiring additional instruction. In a minor conforming change, the proposal retains in the BFR alternative means of compliance for glider pilots, which currently is contained in the annual flight review requirement.

DATES: Comments must be submitted on or before September 21, 1992.

ADDRESSES: Comments on this notice should be mailed, in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC-10), Docket No. 26927, 800 Independence Avenue SW., Washington, DC 20591. Comments delivered must be marked Docket No. 26927. Comments may be examined in room 915G weekdays between 8:30 a.m. and 5 p.m. except on Federal holidays.

FOR FURTHER INFORMATION CONTACT: Thomas Glista, Regulations Branch (AFS-850), General Aviation and Commercial Division, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267-8150.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Comments relating to the environmental, energy, federalism, or economic impact that might result from adopting the proposals in this notice are also invited. Substantive comments should be supported by adequate documentation and accompanied by cost estimates when appropriate. Comments should identify the regulatory docket or notice number and should be submitted in triplicate to the Rules Docket address specified above. All comments received on or before the closing date for comments specified will be considered by the Administrator before taking action on this proposed rulemaking. The proposal contained in this notice may be changed in light of comments received. All comments received will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a preaddressed, stamped postcard on which the following statement is made: "Comments to Docket No. 26927." The postcard will be date stamped and mailed to the commenter.

Availability of NPRM

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-430, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-3484. Communications must identify the notice number of this NPRM.

Persons interested in being placed on the mailing list for future NPRM's should request from the above office a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Background

The requirement for an annual flight review for the affected pilots originated, in part, from a petition for rulemaking submitted by the National Association of Flight Instructors (NAFI) (47 FR 11026; March 15, 1982). The Federal Aviation Administration (FAA) proposed the requirement in Notice of Proposed Rulemaking (NPRM) No. 85-13 (50 FR 26286; June 25, 1985).

In a comment to the NPRM dated October 24, 1985, the Aircraft Owners and Pilots Association (AOPA) objected to the NPRM because the FAA proposed to attach additional training requirements for already certificated pilots to NAFI's proposal for an additional pilot certificate. AOPA disputed the justification for the FAA's proposal for the annual flight review, and provided data to indicate that there was no significant difference in the accident profile of the affected pilots as compared to the profile for all pilots. However, the FAA evaluated the data in a different manner which supported the annual requirement.

The annual flight review requirement was issued in a final rule titled "Certification of Recreational Pilots and Annual Flight Review Requirements for Recreational Pilots and Non-Instrument-Rated Private Pilots with Fewer than 400 Flight Hours" [54 FR 13028; March 29, 1989]. This rule amended part 61 of the Federal Aviation Regulations (FAR), 14 CFR part 61.

By letter dated May 22, 1989, AOPA petitioned the FAA to revise FAR § 61.56(d) by deleting the annual flight review requirement. AOPA urged reconsideration of the annual flight review requirement and provided additional accident data for review.

By letter dated July 25, 1989, the Experimental Aircraft Association (EAA) also petitioned the FAA to delete the annual flight review requirement for the affected pilots.

On July 30, 1989, Secretary of Transportation Samuel Skinner spoke at EAA's annual convention in Oshkosh, Wisconsin. In response to requests from the aviation community, he promised that the FAA would review the data that was the basis and justification for requiring the annual flight review.

In further consideration of the data presented in the AOPA petition, representatives of AOPA and EAA met with FAA representatives on July 13, 1990. A record of that meeting is in Docket No. 24695. In that meeting, AOPA representatives stated that the safety data do not support singling out one particular segment of pilots for an annual flight review. EAA representatives noted the continuing decline in general aviation and commented that the general aviation public feels unduly burdened by additional rules. AOPA and EAA agreed that the current BFR requirement is vague and that standards for completion of the review vary considerably between different instructors. In lieu of the annual flight review, AOPA and EAA expressed support for a minimum hour requirement for the BFR.

As a result of the petitions from AOPA and EAA, and further discussion of their safety data, the FAA determined that the annual flight review deserved further consideration. In order to reevaluate the rule without penalizing one group of pilots, the FAA extended the compliance date for the annual flight review until August 31, 1991, in Amendment No. 61–89 (55 FR 50312; December 5, 1990).

In addition, the FAA has received comments on the BFR from persons participating in the public hearings held in conjunction with the FAR parts 61, 141, and 143 Review. Individuals commented that the current BFR requirement is vague and ineffective. There were numerous requests at these hearings to standardize the review and for the FAA to provide additional guidance on the conduct of the BFR. Some commenters stated that the FAA should publish guidelines but not in the form of additional regulations. Other commenters stated that a minimum requirement for ground and flight instruction should be incorporated into the rule.

FAA Analysis of the Annual Flight Review

In March 1990, the FAA completed a preliminary reevaluation of the data that was the basis for adopting the annual flight review requirement for the affected pilots (§ 61.56(d)). This data showed the private pilot accident totals from 1976 to 1981; it was organized into fatal and nonfatal accidents, and by pilot age and total flight hours. Accident totals were provided for the various experience levels in 100-hour increments (through 999 hours).

Because the total number of accidents was higher in each of the first four 100-hour increments than in any of the other increments, the 400-hour pilot time level was selected as the time level for the annual flight review requirement. However, the FAA determined on reevaluation that the data did not indicate whether the higher accident totals for these subgroups reflected higher accident rates per pilot, or greater activity levels (i.e., exposure), or a combination of these factors.

Also, the accident data did not distinguish between instrument-rated and noninstrument-rated pilots. Thus, it was impossible to determine the extent to which relatively inexperienced instrument-rated pilots may have contributed to the accident totals.

Based on its reevaluation, the FAA concluded that the data used in the development of the annual flight review rule was insufficient to justify imposing this requirement on the affected pilots. Therefore the FAA proposes to delete it in this notice.

As mentioned above, the FAA currently is conducting a review of parts 61, 141, and 143. In connection with this review, the FAA is completing a thorough assessment of the skills that are needed for the different types of pilot certificates, ratings, and operations.

The FAA's Office of Safety Analysis has initiated three interrelated studies on general aviation safety.

The first study addresses requirements for general aviation exposure (activity) data. When combined with accident data, reliable exposure data will help the FAA develop rates of specific types of accidents and identify relative risks.

Another study concerns developing measures of pilot proficiency; the purpose of this project is to examine the relationships between accident rates and measures such as pilot recent and total flight time, age, certificate level, and ratings to determine the impact of these factors on safety performance.

The last study involves a detailed analysis of accident causes to help evaluate the need for remedial actions in various types of flying activity.

Preliminary work on all three studies was accomplished during FY91.

FAA Analysis of Biennial Flight Review Requirements

Currently, the flight review requirements of § 61.56 are very general. Section 61.56(a) requires a review of the current general operating and flight rules of part 91 of the FAR and a review of those maneuvers and procedures which, at the discretion of the person giving the review, are necessary for the pilot to demonstrate the safe exercise of the privileges of the pilot certificate. This requirement could be interpreted in many different ways. At one extreme, a flight review could consist of a short discussion during preflight and a 10-minute flight with one takeoff and one landing. At the other extreme, a flight review could consist of a multihour oral and flight review of all of the maneuvers and procedures listed in the practical test standards for each certificate and rating the applicant holds.

To assist the general aviation public in maintaining proficiency, the FAA created the "Pilot Proficiency Award Program" (Wings) to provide pilots with the opportunity to establish and participate in a personal recurrent training program. This voluntary program has been very successful in reducing the number of accidents for participating pilots. The Report of the Safety Review Task Force of the Federal Aviation Administration Flight Safety Program, August 1985, stated that the Wings program has an outstanding record. Only 81 accidents, with a total of 10 fatalities, have occurred among the group of 45,000 airmen who have participated in the program since 1979. In addition, statistics show that participation in the Wings program has increased 42 percent between 1986 and 1988. This trend indicates that the general aviation public recognizes the need for recurrent training. Amendment 61–490 (56 FR 11308; March 15, 1991) amended § 61.56 to state that persons who have satisfactorily completed one or more phases of an FAA-sponsored pilot proficiency award program need not accomplish the flight review.

In spite of this recognition of the need for recurrent training by the majority of general aviation pilots, the FAA has determined that there is a segment of the pilot population which may not receive a satisfactory flight review. Therefore, a minimum of 1 hour of ground instruction and 1 hour of flight instruction should be required biennially to ensure that each person receiving a BFR receives a satisfactory review commensurate to the certificates and ratings held.

Requiring a minimum of 1 hour of flight instruction and 1 hour of ground instruction will help to eliminate inadequate flight reviews while not restricting the flight instructor from requiring additional instruction if, in his or her opinion, it is needed to ensure that the pilot is capable of exercising the privileges of the certificates and ratings held.

The FAA assumes that 1 hour of flight instruction and 1 hour of ground instruction is the average duration of a flight review for pilots who have recently and consistently been exercising the privilege of their certificates and ratings. This is consistent with the recommendations of Advisory Circular AC–61–98A, described below. The FAA realizes that there are occasions when a flight review will require more than 1 hour each of ground and flight instruction. For example, if the pilot being reviewed has not exercised the privileges of the certificate for an extended period (i.e., more than 2 years), it is very likely that the flight instructor would require the pilot to receive more than 1 hour each of ground and flight instruction. Thus, this minimum requirement of 1 hour each of ground and flight instruction does not restrict the flight instructor from requiring additional instruction, as needed, depending on the experience and skills of the pilot.

In addition, in response to comments that the FAA should publish guidelines concerning maneuvers and procedures, the FAA has developed Advisory Circular AC–61–98A, Currency and Additional Qualification Requirements for Certified Pilots. The purpose of AC–61–98A, in part, is to provide information for certified pilots and flight instructors to use in complying with the flight review required by § 61.56. The Advisory Circular recommends that all flight reviews consist of a minimum of 1 hour of flight instruction and 1 hour of ground instruction for all pilots. The FAA has determined, however, that setting specific maneuvers and procedures requirements in the rules would unduly restrict a flight instructor's discretion in reviewing an individual's ability to safely exercise the privileges of the certificates and ratings held. Due to different pilot abilities, experience levels, type of operation, certificates, ratings, and aircraft, the flight review needs to be tailored to the individual pilot. Thus, guidance in the form of an AC will supplement this proposed rule and will continue to provide a useful reference source in putting together a BFR appropriate for the person receiving the review. The goals and objectives of the BFR still must be met in that the flight instructor must be able to determine whether the individual being reviewed can safely exercise the privileges of the certificates and ratings held.

Other, Conforming Changes

On October 5, 1989, the FAA issued an amendment to the recreational pilot rule [Amendment No. 61–86; 54 FR 41234]. This amendment, in part, modified the annual flight review requirements for certain glider-rated private pilots. The amendment allowed glider-rated private pilots to substitute three instructional flights in a glider, each of which included a 360-degree turn, in lieu of the 1 hour of flight instruction. That change resulted, in part, from comments submitted by the Soaring Society of America on the requirements for an annual review contained in the recreational pilot rule.

The FAA has determined that the proposed change to the BFR should provide glider-rated pilots the same option for complying with the 1 hour each of ground and flight instruction as provided in Amendment No. 61–86 for glider-rated private pilots receiving the annual flight review. In order to incorporate this alternative means of compliance for glider pilots into the proposed change to the BFR, the amendatory language that allows this alternative means of compliance is retained in § 61.56(b).

Economic Evaluation

Executive Order 12291, dated February 17, 1981, directs Federal agencies to promulgate new regulations or modify existing regulations only if benefits to society for each regulatory change outweigh potential costs. Accordingly, the FAA has prepared a detailed preliminary economic evaluation of this proposal and placed it in the docket. The evaluation identifies and analyzes both the quantifiable and nonquantifiable economic effects of the proposal. Based on the results of its investigation, the FAA has concluded that this proposal is cost-beneficial.

This section contains a summary of the benefits and costs analyzed in the preliminary regulatory evaluation. In addition, it includes an initial regulatory flexibility determination required by the 1980 Regulatory Flexibility Act and an international trade impact assessment. If more detailed economic information is desired than is contained in this summary, the reader is referred to the full preliminary regulatory evaluation contained in the docket.

A pilot who has not satisfactorily completed an FAA-sponsored pilot proficiency award program, or a pilot proficiency check for a certificate, rating, or operating privilege within the past 2 years currently is required to receive a BFR. There may be cases where a BFR consists of an inadequate review that takes only a few minutes and other cases where a BFR consists of a multihour review. The FAA assumes, however, that most flight instructors are following the recommendations of AC 61–98A and are conducting BFRs that consist of 1 hour of ground instruction and 1 hour of flight instruction.

Since this proposal would merely codify in the rule what already is outlined in the AC and is generally accepted as standard practice, the FAA has concluded it has minimal associated costs.

The estimated benefits of the proposed rule are the cost savings from the elimination of the annual flight review requirement for the affected pilots. The FAA estimates that in 1992, approximately 129,600 pilots would be affected by the elimination of this requirement at a cost savings of $6.4 million in 1992. These estimated cost savings were calculated using representative rental rates for flight instruction and ground instruction by category of aircraft. Based on the estimate of the affected number of pilots from 1992 to 2001, the total estimated cost savings would be $65 million, or $44 million discounted at 10 percent over the period. The cost associated with this rule, resulting from requiring additional time in flight or ground instruction for some pilots as part of the BFR, are believed to be minimal since most pilots already meet the standards contained in the AC. In addition, because the data used in the development of the annual flight review were insufficient to justify imposing this requirement on the affected pilots, the FAA proposes to delete it in this notice. Therefore, the FAA has concluded that the proposed rule is cost-beneficial.

International Trade Impact Analysis

This proposed rule would have a negligible impact on trade opportunities for U.S. firms doing business overseas or on foreign firms doing business in the U.S. The proposed rule primarily affects recreational pilots and noninstrument-rated private pilots with fewer than 400 hours of flight time, not businesses involved in the sale of aviation products or services.

Regulatory Flexibility Determination

The proposed rule would not have a significant economic impact, positive or negative, on small entities. Pilots, rather than business entities, would be affected by this proposed rule. Where a noninstrument-rated private pilot with fewer than 400 hours is also the sole proprietor of a small business, and exercises the privileges of his or her certificate in operations that are incidental to that business, the proposed rule would have a negligible impact. The FAA estimates that these pilots would save between $98 and $185 every other year, depending on the aircraft they used for their annual reviews.

Federalism Impact

The proposals contained herein will 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. Therefore, in accordance with Executive Order 12612, it is determined that this amendment does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Conclusion

This notice proposes to amend § 61.56 of the FAR by deleting the annual flight review requirement for the affected pilots that was established in the "Certification of Recreational Pilots and Annual Flight Review Requirements for Recreational Pilots and Noninstrument-Rated Private Pilots with Fewer than 400 Flight Hours" final rule.

For the reasons discussed in the preamble, and based on the findings in the initial Regulatory Flexibility Determination and the International Trade Impact Analysis, the FAA has determined that this final rule is not major under Executive Order 12291. In addition, the FAA certifies that this rule will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. This rule is considered significant under Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). A draft regulatory evaluation of this rule, including an initial Regulatory Flexibility Determination and International Trade Impact Analysis, has been placed in the docket. A copy may be obtained by contacting the person identified under "FOR FURTHER INFORMATION CONTACT."

List of Subjects in 14 CFR Part 61

Aeronautical knowledge, Aviation safety, Cross-country flight privileges, Eligibility requirements, Limitations, Operational experience, Student pilots.

The Proposed Amendment

Accordingly, part 61 of the Federal Aviation Regulations (14 CFR part 61) is proposed to be amended as follows:

PART 61—CERTIFICATION: PILOTS AND FLIGHT INSTRUCTORS

1. The authority citation for part 61 is revised to read as follows:

Authority: 49 U.S.C. Appendix 1354(a), 1355, 1421, 1422, and 1427; 49 U.S.C. 106(g).

2. Section 61.56 is revised to read as follows:

§ 61.56 Flight review.

(a) A flight review consists of a minimum of 1 hour of flight instruction and 1 hour of ground instruction. The review must include—

(1) A review of the current general operating and flight rules of Part 91 of this chapter; and

(2) A review of those maneuvers and procedures which, in the discretion of the person giving the review, are necessary for the pilot to demonstrate the safe exercise of the privileges of the pilot certificate.

(b) Glider pilots may substitute a minimum of three instructional flights in a glider, each of which includes a 360-degree turn, in lieu of the 1 hour of flight instruction required in paragraph (a) of this section.

(c) Except as provided in paragraphs (d) and (e) of this section, no person may act as pilot-in-command of an aircraft unless, since the beginning of the 24th calendar month before the month in which that pilot acts as pilot in command, that person has—

(1) Accomplished a flight review given in an aircraft for which that pilot is rated by an appropriately rated instructor certificated under this part or other person designated by the Administrator; and

(2) A logbook endorsed by the person who gave the review certifying that the person has satisfactorily completed the review.

(d) A person who has, within the period specified in paragraph (c) of this section, satisfactorily completed a pilot proficiency check conducted by the FAA, an approved pilot check airman, or a U.S. Armed Force, for a pilot certificate, rating, or operating privilege, need not accomplish the flight review required by this section.

(e) A person who has, within the period specified in paragraph (c) of this section, satisfactorily completed one or more phases of an FAA-sponsored pilot proficiency award program need not accomplish the flight review required by this section.

(f) The requirements of this section may be accomplished in combination with the requirements of § 61.57 and other applicable recency requirements at the discretion of the instructor.

Issued in Washington, DC, July 14, 1992

Thomas C. Accardi,

Director, Flight Standards Service.

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