

expected to have little effect on U.S. marketers and consumers.

### Alternatives Considered

This rule has been prompted by the need to restrict the importation of PSB host material into the United States from Canada in order to help prevent the introduction of PSB into noninfested areas of the United States. In assessing the need for this rule, we considered several alternatives to the chosen course of action. These alternatives are discussed in the "Regulatory Flexibility" section of the full economic analysis.

In conclusion, we anticipate limited costs associated with this rule, which is parallel to Canadian restrictions imposed on U.S. exports of PSB host material. Some shippers and other importers will be subject to certain costs and other inconveniences in securing the proper documentation for importation of affected products. However, these costs and inconveniences should be limited where they are incurred. There is no charge to obtain a written permit from APHIS, and the information required is not extensive. Obtaining a PC or certificate should cost less than 1 percent of the shipment value. Inspection costs should range from under 0.3 percent to 3.1 percent of shipment value. Because the movement of pine nursery stock, cut pine Christmas trees, pine forest products with bark attached, and pine bark from PSB-infested areas within Canada is already regulated by the Government of Canada, Canadian producers already meeting these standards will incur no additional burden in providing the additional declarations for the PC or certificate. Hence, we expect little reduction in U.S. imports of Canadian products, with small effects on U.S. marketers and consumers. U.S. producers of nursery stock, Christmas trees, and pine products who are located in the United States may benefit slightly to the extent they can market their products at lower costs than Canadian imported products subject to PSB restrictions.

We expect that gains from reducing the risk of further spread of PSB to outweigh the costs of this action. Implementation of this rule will enable APHIS to better prevent the movement of infested PSB host material from Canada into noninfested areas of the United States. This action is equivalent to what is being done domestically. Keeping areas in the United States free from PSB will result in avoided damages to forest resources. Growers will not have to expend funds to control PSB damage or to maintain PSB free

status in relation to exports. Federal, State, and local governments will not have to expend funds to control the further spread of the pest. Entities located in noninfested areas and engaged in the movement of PSB host material will not have to deal with domestic movement controls, export restrictions, or inspection and/or treatment of the regulated articles before they can be moved as is the case in U.S. quarantined areas.

### Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

### Paperwork Reduction Act

This final rule contains information collection requirements that differ from those in our October 2004 interim rule. Specifically, there has been a reduction of 24 hours in the burden associated with import permits for nonpropagative material that is moving to a destination other than a U.S. facility operating under a compliance agreement for specified handling or processing. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this information collection requirement has been approved by the Office of Management and Budget (OMB) under OMB control number 0579-0257.

### E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734-7477.

### List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

■ Accordingly, the interim rule amending 7 CFR part 319 that was published at 69 FR 61577-61589 on October 20, 2004, is adopted as a final rule with the following changes:

## PART 319—FOREIGN QUARANTINE NOTICES

■ 1. The authority citation for part 319 continues to read as follows:

**Authority:** 7 U.S.C. 450, 7701-7772, and 7781-7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

■ 2. In § 319.40-3, paragraph (a)(1)(i) is revised to read as follows:

**§ 319.40-3 General permits; articles that may be imported without a specific permit; articles that may be imported without either a general permit or an importer document.**

(a) \* \* \*

(1) \* \* \*

(i) From Canada: Regulated articles, other than the following:

(A) Regulated articles of the subfamilies Aurantioideae, Rutoideae, and Toddalioideae of the botanical family Rutaceae, and;

(B) Regulated articles of pine (*Pinus* spp.) that are not completely free of bark from Provinces in Canada that are considered to be infested or partially infested with pine shoot beetle (*Tomicus pinniperda*), as determined by the Canadian Food Inspection Agency, and that are moving to a United States facility operating under a compliance agreement for specified handling or processing under the provisions of § 319.40-8.

\* \* \* \* \*

Done in Washington, DC, this 25th day of September 2006.

**Bruce Knight,**

*Under Secretary for Marketing and Regulatory Programs.*

[FR Doc. E6-16079 Filed 9-28-06; 8:45 am]

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## DEPARTMENT OF ENERGY

### 10 CFR Parts 709 and 710

[Docket No. CN-03-RM-01]

RIN 1992-AA33

### Counterintelligence Evaluation Regulations

**AGENCY:** Office of Intelligence and Counterintelligence, Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy (DOE or Department) today is publishing a final rule to establish new counterintelligence evaluation regulations to minimize the potential for disclosure of classified information, data, and materials. The rule published today, which replaces the current DOE polygraph regulations contained at 10

CFR part 709, requires counterintelligence evaluations for applicants of certain high-risk positions and every five years for incumbents of those positions.

**EFFECTIVE DATE:** This rule is effective October 30, 2006.

**FOR FURTHER INFORMATION CONTACT:** Charles Costa, U.S. Department of Energy, Office of Intelligence and Counterintelligence, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-5901; or Robert Newton, U.S. Department of Energy, Office of the General Counsel, GC-53, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-6980.

**SUPPLEMENTARY INFORMATION:**

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  - H. Treasury and General Government Appropriations Act, 1999
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**I. Introduction**

DOE's existing counterintelligence polygraph regulations are set forth at 10 CFR part 709. Under section 3152(a) of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. 107-107 (NDAA for FY 2002), DOE is obligated to prescribe revised regulations for a new counterintelligence polygraph program the stated purpose of which is " \* \* \* to minimize the potential for release or disclosure of classified data, materials, or information" (42 U.S.C. 7383h-1(a).) Section 3152(b) requires DOE to " \* \* \* take into account the results of the Polygraph Review," which is defined by section 3152 (e) to mean " \* \* \* the review of the Committee to Review the Scientific Evidence on the Polygraph of the National Academy of Sciences" (42 U.S.C. 7383h-1(b), (e)).

Upon promulgation of final regulations under section 3152, and "effective 30 days after the Secretary submits to the congressional defense committees the Secretary's certification that the final rule \* \* \* has been fully

implemented, \* \* \*" section 3154 of the National Defense Authorization Act for Fiscal Year 2000 (NDAA for FY 2000) (42 U.S.C. 7383h), is repealed by operation of law. (42 U.S.C. 7383h-1(c).) The repeal of section 3154 would eliminate the existing authority which underlies DOE's current counterintelligence polygraph regulations but would not preclude the retention of some or all of those regulations through this rulemaking pursuant to the later-enacted section 3152 of the NDAA for FY 2002.

On January 7, 2005, DOE published a Supplemental NOPR at 70 FR 1383 to solicit public comments on proposed new counterintelligence evaluation regulations, including revised regulations governing the use of polygraph examinations. The Supplemental NOPR requested written comments by March 8, 2005, and invited oral comments at a public hearing held in Washington, DC on March 2, 2005. Written comments were received from 10 sources, including members of the public, current and former DOE employees and two groups representing employees at two DOE national laboratories. No oral comments were presented at the public hearing.

Part II of this **SUPPLEMENTARY INFORMATION** presents background information useful in understanding the statutory and regulatory background of both DOE's current counterintelligence polygraph examination program, contained in 10 CFR part 709, and the new Counterintelligence Evaluation Program set forth in the regulations that DOE publishes in this notice.

In Part III of this **SUPPLEMENTARY INFORMATION** DOE responds to the major issues raised in the public comments on the Supplemental NOPR.

**II. Background Information**

For more than 50 years, DOE, like its predecessor the Atomic Energy Commission, has had to balance two sets of considerations. On the one hand, we must attract the best minds that we can to do cutting edge scientific work at the heart of DOE's national security mission, and we must allow sufficient dissemination of that work to allow it to be put to the various uses that our national security demands. On the other hand, we must take all reasonable steps to prevent our enemies from gaining access to the work we are doing, lest that work end up being used to the detriment rather than the advancement of our national security. There are no easy answers to the dilemma of how best to reconcile these competing considerations.

The question of whether and to what extent DOE should use the polygraph as a tool for screening individuals for access to our most sensitive information is the latest manifestation of this perennial struggle. This particular chapter begins in 1988, when Congress enacted the Employee Polygraph Protection Act of 1988. That legislation generally restricted employers from using polygraphs to screen potential employees. Congress, however, included three exceptions that are relevant. First, Congress decided that it would not apply any of the legislation's prohibitions to the United States or other governmental employers with respect to their own employees. Second, Congress specifically allowed the Federal Government to administer polygraphs to Department of Defense contractors and contractor employees, and Department of Energy contractors and contractor employees in connection with the Department's atomic energy defense activities. And finally, Congress specifically provided that the Federal Government could administer polygraphs to contractors and contractor employees of the intelligence agencies and any other contractor or contractor employee whose duties involve access to top secret information or information that has been designated as within a special access program.

In February 1998, President Clinton issued Presidential Decision Directive-61. In that classified directive, entitled U.S. Department of Energy Counterintelligence Program, the Department was ordered to enhance its protections against the loss or compromise of highly sensitive information associated with certain defense-related programs by considering a variety of improvements to its counterintelligence program. One of these was the use of polygraph examinations to screen individuals with access to this information.

In order to carry out this directive, after initially proceeding through an internal order governing only Federal employees, on August 18, 1999 (64 FR 45062), the Department proposed a rule, entitled 'Polygraph Examination Regulation,' that would govern the use of the polygraph as a screening tool. It proposed that employees at DOE facilities, contractor employees as well as Federal employees, with access to certain classified information and materials, as well as applicants for such positions, be subject to a counterintelligence polygraph before they received initial access to the information and materials and at five-year intervals thereafter.

In the NDAA for FY 2000, Congress directed that the Department administer a counterintelligence polygraph to all Department employees, consultants, and contractor employees in 'high risk programs' prior to their being given access to the program. Congress specified that these programs were the 'Special Access Programs' and 'Personnel Security and Assurance Programs.'

On January 18, 2000, the Department finalized essentially the rule it had proposed, which included individuals with access to these programs and others in the screening requirement. Thereafter, on October 30, 2000, Congress enacted the NDAA of FY 2001, which added DOE employees, consultants, and contractor employees in programs that use 'Sensitive Compartmented Information' and all others already covered by the Department's prior rule to those to whom the polygraph screening mandate applied.

More recently, in the NDAA for FY 2002 (Pub. L. 107-107), enacted on December 28, 2001, Congress required the Secretary of Energy to carry out, under regulations, a new counterintelligence polygraph program for the Department. Congress directed that the purpose of the new program should be to minimize the potential for release or disclosure of classified data, materials, or information. Congress further directed that the Secretary, in prescribing the regulation for the new program, take into account the results of a not-yet-concluded study being done by the National Academy of Sciences. That study was being conducted pursuant to a contract DOE had entered into with the National Academy of Sciences in November 2000, in which the Department requested the Academy to conduct a review of the existing research on the validity and reliability of polygraph examinations, particularly as used for personnel security screening. Congress directed the Department to propose a new rule regarding polygraphs no later than six months after publication of the NAS study.

The NAS study, entitled *The Polygraph and Lie Detection*, was published in October 2002 (hereinafter referred to as 'NAS Report' or 'NAS Study'). The Department published a Notice of Proposed Rulemaking on April 14, 2003 (68 FR 17886). In that Notice, the Department indicated its then-current intent to continue the current polygraph program under a new rule. As the Secretary of Energy said upon release of that proposed rule, he 'concluded that it was appropriate at the present time to' retain the current

system 'in light of the current national security environment, the ongoing military operations in Iraq, and the war on Terrorism.' At the same time, the Secretary recognized that in the longer term some changes might be appropriate. Therefore, the Department explicitly asked for public comment during a period which ended on June 13, 2003. The Secretary also personally wrote all laboratory directors inviting their comments and views on the proposed rule.

DOE received comments that were mostly critical of the proposal to retain the existing regulations. The comments especially took issue with DOE's proposal, despite the NAS Report, to continue with mandatory employee screening in the absence of an event or other good cause to administer a polygraph examination. Some of the comments recommended random screening as an alternative to mandatory screening. Others complained about the adequacy of the regulatory protections in 10 CFR part 709 against adverse personnel-related action resulting from reliance on adverse polygraph examination results. Some of the management comments of the DOE weapons laboratories expressed concern about the effect of the counterintelligence polygraph program on employee morale and recruitment.

Following the close of the comment period and consideration of public comments, DOE conducted an extensive review of the then current polygraph policy and its implementation history, the NAS Report, and the public and internal comments resulting from the April 2003 Notice of Proposed Rulemaking. Following this review, DOE published a Supplemental NOPR at 70 FR 1383 (January 7, 2005). The Supplemental NOPR proposed a new mandatory counterintelligence (CI) evaluation program including mandatory polygraph screening for individuals with "regular and routine access" to DOE's most sensitive information, in particular all DOE-originated "Top Secret" information, including Top Secret "Restricted Data" and Top Secret "National Security Information." The proposed rule, like the current polygraph regulations, provided for a mandatory CI evaluation and CI-scope polygraph exam prior to initial access being granted, as well as periodic CI evaluations at intervals not to exceed five years. In deciding to propose continued use of mandatory polygraph screening, the Supplemental NOPR noted that the NAS Report's conclusion on the use of the polygraph exam as a screening tool only addresses the use of polygraph results as the *sole*

basis for access determinations. The Supplemental NOPR pointed out that, in fact, the NAS Report acknowledges that the use of the polygraph examination as an investigative lead, in conjunction with other investigative tools can ameliorate the problems the NAS Report attributes to polygraph screening. The NOPR emphasized that the proposed rule would make clear that polygraph exams are only one element to be used in counterintelligence evaluations. Reviews of personnel security files and, as necessary and appropriate, personal interviews and review of financial and credit information, net worth analyses, analyses of foreign travel and foreign contacts and connections, would be employed in conjunction with the polygraph.

The Supplemental NOPR proposed that some elements of the mandatory screening population remain essentially the same as under the current regulation. DOE also proposed a random CI evaluation program including polygraph intended to achieve the objectives of deterrence with the minimum reasonable percentage or number of individuals to which it would apply. In addition to the mandatory and random screening programs, DOE also proposed a provision for conducting "specific-incident" polygraph examinations in response to specific facts or circumstances with potential counterintelligence implications with a defined foreign nexus. That proposal also grew out of the NAS Report, which noted that this kind of use of the polygraph is the one for which the existing scientific literature provides the strongest support. The proposed rule also provided for employee-requested polygraph examinations in the context of a specific incident.

### III. DOE's Response to Comments

The following discussion describes the major issues raised in the comments received from 10 sources, provides DOE's response to these comments, and describes any resulting changes in the final regulations. The comments overwhelmingly focused on the use of the polygraph examination in the proposed new Counterintelligence Evaluation Program. Only one of the commenters supported DOE's proposed reliance on the polygraph examination as an integral part of the Counterintelligence Evaluation Program. The remaining commenters strongly opposed DOE's proposal to continue with mandatory polygraph screening. Some of these commenters objected to the proposed random screening program

and to the use of polygraph testing in specific incident investigations. Some of these commenters also raised objections with respect to specific elements of the proposed new polygraph examination regulations. DOE responds first to the general comments and thereafter to the specific comments.

#### A. Response to General Comments

The commenters opposed to DOE's continued reliance on the polygraph examination argued principally that polygraph testing is not supported by sound science. Most of these commenters cited the NAS Report to support their positions, and they challenged DOE's interpretation of the NAS Report's findings and conclusions. According to the commenters, because polygraph testing lacks scientific reliability, there is a high probability of an unacceptable number of "false positives" and, in part due to what they perceive as the efficacy of countermeasures, "false negatives." [The phenomena of "false positive" and "false negative" examination findings are described in greater detail in the Supplemental NOPR at 70 FR 1383–1389.] Because of problems associated with examination results that produce "false positives" and "false negatives," many of the commenters contended that continued use of polygraph testing would have a highly negative effect on employee morale, retention of present employees, and recruitment of new employees. Additionally, commenters asserted that the likelihood of false negatives undermined any deterrence value of polygraph testing. One commenter urged DOE to reject the use of polygraph testing in its Counterintelligence Evaluation Program and to focus instead on the development of new techniques for the behavioral, psychological, or physiological assessments of individuals in security and counterintelligence evaluations.

In DOE's view, the commenters' arguments for eliminating the use of polygraph testing entirely simply cannot be reconciled with the Congress' direction to DOE in the NDAA for FY 2002. In section 3152 of that Act, Congress required the Secretary of Energy, taking into account the NAS Report, to adopt regulations for a new counterintelligence polygraph program to minimize the potential for release or disclosure of classified data, materials or information. When enacting section 3152, Congress was well aware of the controversy with regard to the scientific basis for polygraph examinations. Nevertheless, Congress' direction was to adopt new polygraph regulations, and DOE believes it would not be

permissible to interpret section 3152 as authorizing a new polygraph regulation that would provide for the total abandonment of polygraph testing.

Nor have the arguments advanced by the commenters caused us to change our view that polygraph testing, including mandatory polygraph screening, may be both a necessary and effective measure in appropriate circumstances for protecting classified data, information and materials.

Consistent with the practices of the Intelligence Community, and the NAS Report, DOE has decided to alter the role of polygraph testing as a required element of the counterintelligence evaluation program by eliminating such testing for general screening of applicants for employment and incumbent employees without specific cause. The rule published today requires a counterintelligence evaluation for applicants for certain high-risk positions and every five years for incumbents of those positions. A polygraph examination only will be required in five situations: (1) If a counterintelligence evaluation of an applicant or an incumbent employee reveals foreign nexus issues which warrant a polygraph exam; (2) if an incumbent employee is to be assigned within DOE to activities involving another agency and a polygraph examination is required as a condition of access to the activities by the other agencies; (3) if an incumbent employee is proposed to be assigned or detailed to another agency and the receiving agency requests DOE to administer a polygraph examination as a condition of the assignment or detail; (4) if, as described below, an incumbent employee is selected for a random counterintelligence evaluation; or (5) if, as described below, an incumbent employee is required to take a specific-incident polygraph examination.

These changes to the proposed rule will significantly reduce the number of individuals who will undergo a polygraph examination. Under the rule, a counterintelligence evaluation consists of a counterintelligence-based review of a "covered person's" personnel security file, and review of other relevant information available in DOE. If the counterintelligence evaluation, including a possible polygraph exam, discloses unresolved foreign nexus issues, DOE may undertake a more comprehensive evaluation that may, in appropriate circumstances, include evaluation of financial, credit, travel, and other relevant information to resolve the issues. Participation by Office of Intelligence and Counterintelligence

personnel in this extended evaluation is subject to Executive Order 12333, the DOE "Procedures for Intelligence Activities," and other relevant laws, guidelines, as may be applicable.

The final rule includes, as proposed, random counterintelligence evaluations, including polygraph screening, to deter unauthorized releases or disclosures of classified information or materials. The rule also includes provision, as proposed, for conducting specific incident polygraph examinations to respond to specific cases presenting facts or circumstances with potential counterintelligence implications with a defined foreign nexus.

As proposed in the Supplemental NOPR, DOE also will retain the policy in the present rule against taking any adverse personnel action solely based on the test results of polygraph examinations. Finally, we will retain the present policy that no adverse decision on access to certain information or programs will be made solely on the basis of such test results.

#### B. Response to Comments on Specific Proposed Regulatory Provisions

##### 1. Random Screening Program

Two of the commenters questioned the scientific merits of the proposed random screening program (section 709.3(c)), contending, without offering support for the proposition, that random screening will neither contribute to good security nor to deterrence. As DOE noted in the Supplemental NOPR, the NAS Report observed that "the value, or utility, of polygraph testing does not lie only in its validity for detecting deception. It may have a deterrent value \* \* \*" and "predictable polygraph testing (e.g. fixed-interval testing of people in specific job classifications) probably has less deterrent value than random testing." This led DOE to conclude that it is appropriate to include random testing as a component of the new Counterintelligence Evaluation Program, to enhance the deterrent value of the polygraph. Another commenter, while expressing support for random screening as an alternative to the mandatory screening program, urged DOE to ensure that the system for identifying individuals who will be subject to random testing is fair. DOE's Energy Information Administration's Statistics and Methods Group has designed the statistical model which will be utilized in the random screening program, and DOE believes that the EIA model will ensure selection fairness.

## 2. Specific Incident Polygraph Examinations

Two commenters contended that the likelihood of a certain percentage of "false negative" and "false positive" responses in polygraph examinations, which could impede an investigation, argue against the use of polygraph testing in specific incident investigations. In DOE's view these comments are largely speculative. As DOE noted in the Supplemental NOPR, the proposed provision [section 709.3(d)] for conducting specific incident polygraph examinations grew out of the NAS Report, which observed that this kind of use of the polygraph is one for which the existing scientific literature provides the strongest support. In the absence of a showing which rebuts the NAS Report, DOE has determined not to abandon what the NAS Report considers a potentially useful investigative tool, employed in appropriate circumstances in conjunction with other investigative techniques, in specific incident investigations, and thus DOE retains the proposed provision in the final rule.

## 3. Other Information Provided to an Individual Prior to a Polygraph Examination

One commenter recommended DOE revise paragraph (a) of proposed section 709.24 (Other information provided to the individual prior to a polygraph examination) in two respects. First, the commenter noted that the proposed provision does not actually require video and audio recording and recommended DOE modify the provision to require these recordings, as a means of protecting both the individual and the examiner. DOE agrees that such a requirement would help protect both the individual being examined as well as the examiner. Section 709.24(a), as modified, reads:

(a) Inform the covered person that video and audio recordings of the examination session will be made, and that other observation devices, such as two-way mirrors and observation rooms, also may be employed.

The commenter also recommended that section 709.24 be revised to provide that a copy of the videotape be made available to the individual, if not routinely at least if the individual challenges the Office of Intelligence and Counterintelligence's determination pursuant to section 709.17 (Final disposition of CI evaluation findings and recommendations). DOE examined this issue in the **Federal Register** notice (64 FR 70962) publishing the current polygraph regulations and adopted the

following position, which DOE reaffirms today:

DOE will not establish a policy of releasing the polygraph reports or videotapes of examinations or permitting individuals to record all or any portion of the polygraph examination or related interviews. Such materials contain information concerning investigative procedures and techniques of the Department. However, an individual may file a request for the release of these materials under the Freedom of Information Act or the Privacy Act and the request will be processed in accordance with applicable regulations.

## 4. Topics Within the Scope of a Polygraph Examination; Defining Polygraph Examination Questions

Several commenters were critical of the question format DOE uses in polygraph examinations (section 709.11), which is known as the "Test for Espionage and Sabotage Format." One commenter claimed that notwithstanding DOE's description of the question format in section 709.11, and section 709.12 ("Defining polygraph examination questions"), the TES methodology actually permits the examiner to go beyond national security questions and to engage in a "fishing expedition" in areas potentially unrelated to the stated scope of DOE's polygraph examination. DOE disagrees. The question format and question methodology employed by DOE examiners has been approved by the Department of Defense Polygraph Institute (DODPI) and is generally used throughout the Federal government. Additionally, DOE polygraph examiners are subject to rigorous training requirements and standards (sections 709.31 and 709.32) and examiners as well as polygraph program results are subject to bi-annual DODPI quality assurance reviews. DOE does not believe the commenters have supported the need for changes to the proposed provisions pertaining to the topics within the scope of a polygraph examination and defining polygraph examination questions, respectively.

## 5. Need for Independent Oversight

Three commenters who questioned the credibility and integrity of DOE's polygraph examination process recommended that DOE include in the regulations provision for independent oversight of the examination process by an independent board. DOE believes that the regulations provide sufficient safeguards to ensure the integrity of the examination process and is not persuaded that there is justification or need for independent oversight board. Following a polygraph examination, examinees have the opportunity and are encouraged to complete and to submit

to DOE a quality assurance questionnaire and comments or complaints concerning the examination (section 709.24(f)). Examinees also might submit complaints to the appropriate line Program Manager or laboratory or facility manager. Secondly, as noted in the previous section, DOE polygraph examiners are subject to rigorous training requirements and standards (sections 709.31 and 709.32) and, additionally, as already noted DOE as well as other Federal Departments and agencies are subject to bi-annual DODPI quality assurance reviews.

## 6. Accelerated Access Authorization Program (AAAP)

One commenter, opposed to DOE's use of polygraph examinations, recommended that DOE terminate its AAAP, which DOE discussed in the Supplemental NOPR. As explained in the Supplemental NOPR, DOE reviewed the use of polygraph examinations in the AAAP, in light of the NAS Report, to determine if the AAAP was unduly reliant on the polygraph examination in granting interim access authorizations. DOE's review found that there are sufficient checks and balances in place that the continued use of polygraph examinations, together with other components of the AAAP, is appropriate. In any event, however, DOE determined not to retain in the new counterintelligence evaluation regulations the provision on the use of polygraph exams in the AAAP, since the AAAP is not a component of DOE's Counterintelligence Evaluation Program.

The Secretary has approved for publication this notice of final rulemaking.

## IV. Procedural Requirements

### A. Review Under Executive Order 12866

The Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB) has determined that today's regulatory action is a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993). OMB has completed its review of this notice of final rulemaking.

### B. Review Under the Regulatory Flexibility Act

This rule was reviewed under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) which requires preparation of an initial regulatory flexibility analysis for any rule that is likely to have a significant economic impact on a substantial number of small entities. This rulemaking does not directly

regulate small businesses or small governmental entities. It applies principally to individuals who are employees of, or applicants for employment by, some of DOE's prime contractors, which generally are large businesses. There may be some affected small businesses that are subcontractors, but the rule will not impose unallowable costs. Accordingly, DOE certifies that the rule will not have a significant economic impact on a substantial number of small entities.

#### *C. Review Under the Paperwork Reduction Act*

DOE has determined that this rulemaking does not contain any new or amended record keeping, reporting, or application requirements, or any other type of information collection requirements that require the approval of OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* OMB has defined the term "information" to exclude certifications, consents, and acknowledgments that entail only minimal burden (5 CFR 1320(h)(1)).

#### *D. Review Under the National Environmental Policy Act*

The final rule published today establishes procedures for counterintelligence evaluations to include polygraph examinations and therefore will have no impact on the environment. DOE has determined that this rule is covered under the Categorical Exclusion in DOE's National Environmental Policy Act regulations in paragraph a.5 of appendix A to subpart D, 10 CFR part 1021, which applies to rulemakings amending an existing regulation that does not change the environmental effect of the regulations being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

#### *E. Review Under Executive Order 13132*

Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March

14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined today's rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

#### *F. Review Under Executive Order 12988*

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

#### *G. Review Under the Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531 *et seq.*, requires a Federal agency to perform a detailed assessment of the costs and benefits of any rule imposing a Federal mandate with costs to State, local, or tribal government, or to the private sector of \$100 million or more. The final rule adopted today does not

impose a Federal mandate requiring preparation of an assessment under the Unfunded Mandates Reform Act of 1995.

#### *H. Treasury and General Government Appropriations Act, 1999*

The Treasury and General Government Appropriations Act, 1999 (Public Law 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

#### *I. Review Under the Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's information quality guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's implementing guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's notice under the OMB and DOE information quality guidelines and has concluded that it is consistent with applicable policies in those guidelines. DOE also has concluded that today's notice is consistent with OMB's "Information Quality Bulletin for Peer Review" applicable to agency disseminations of "influential scientific information" and "highly influential scientific assessments," published at 70 FR 2664 (January 14, 2005). As discussed above, today's final regulations take into account the 2002 report entitled "The Polygraph and Lie Detection" of the Committee to Review the Scientific Evidence on the Polygraph of the National Academy of Sciences. OMB's Peer Review Bulletin permits agencies, as an alternative to the Bulletin's peer review requirements otherwise applicable to disseminations of influential scientific information and highly scientific assessments, to rely on the principal findings, conclusions and recommendations of a report produced by the National Academy of Sciences.

#### *J. Review Under Executive Order 13211*

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001) requires Federal agencies to

prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any significant energy action under Executive Order 12866 that are likely to have a significant adverse effect on the supply, distribution, or use of energy. This rulemaking, although significant, will not have such an effect. Consequently, DOE has concluded that there is no need for a Statement of Energy Effects.

#### K. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress promulgation of today's rule prior to its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

#### List of Subjects

##### 10 CFR Part 709

Lie detector test, Privacy.

##### 10 CFR Part 710

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

Issued in Washington, DC, on September 25, 2006.

#### Rolf Mowatt-Larssen,

Director, Office of Intelligence and Counterintelligence.

■ For the reasons stated in the preamble, DOE hereby amends Chapter III of Title 10 of the Code of Federal Regulations to read as follows:

■ 1. Part 709 is revised to read as follows:

### PART 709—COUNTERINTELLIGENCE EVALUATION PROGRAM

#### Subpart A—General Provisions

Sec.

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#### Subpart D—Polygraph Examination and Examiner Standards

709.31 DOE standards for polygraph examiners and polygraph examinations.

709.32 Training requirements for polygraph examiners.

**Authority:** 42 U.S.C. 2011, *et seq.*, 7101, *et seq.*, 7144b, *et seq.*, 7383h-1; 50 U.S.C. 2401, *et seq.*

#### Subpart A—General Provisions

##### § 709.1 Purpose.

This part:

(a) Describes the categories of individuals who are subject for counterintelligence evaluation processing;

(b) Provides guidelines for the counterintelligence evaluation process, including the use of counterintelligence-scope polygraph examinations, and for the use of event-specific polygraph examinations; and

(c) Provides guidelines for protecting the rights of individual DOE employees and DOE contractor employees subject to this part.

##### § 709.2 Definitions.

For purposes of this part:

**Access authorization** means an administrative determination under the Atomic Energy Act of 1954, Executive Order 12968, or 10 CFR part 710 that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.

**Adverse personnel action** means:

(1) With regard to a DOE employee, the removal, suspension for more than 14 days, reduction in grade or pay, or a furlough of 30 days or less as described in 5 U.S.C. Chapter 75; or

(2) With regard to a contractor employee, the discharge, discipline, or

denial of employment or promotion, or any other discrimination in regard to hire or tenure of employment or any term or condition of employment.

**Contractor** means any industrial, educational, commercial, or other entity, assistance recipient, or licensee, including an individual who has executed an agreement with DOE for the purpose of performing under a contract, license, or other agreement, and including any subcontractors of any tier.

**Counterintelligence or CI** means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document or communications security programs.

**Counterintelligence evaluation or CI evaluation** means the process, possibly including a counterintelligence scope polygraph examination, used to make recommendations as to whether certain employees should have access to information or materials protected by this part.

**Counterintelligence program office** means the Office of Counterintelligence in the Office of Intelligence and Counterintelligence (and any successor office to which that office's duties and authorities may be reassigned).

**Counterintelligence-scope or CI-scope polygraph examination** means a polygraph examination using questions reasonably calculated to obtain counterintelligence information, including questions relating to espionage, sabotage, terrorism, unauthorized disclosure of classified information, deliberate damage to or malicious misuse of a United States Government information or defense system, and unauthorized contact with foreign nationals.

**Covered person** means an applicant for employment with DOE or a DOE contractor, a DOE employee, a DOE contractor employee, and an assignee or detailee to DOE from another agency.

**DOE** means the Department of Energy including the National Nuclear Security Administration (NNSA).

**Foreign nexus** means specific indications that a covered person is or may be engaged in clandestine or unreported relationships with foreign powers, organizations or persons, or international terrorists; contacts with foreign intelligence services; or other hostile activities directed against DOE facilities, property, personnel, programs or contractors by or on behalf of foreign powers, organizations or persons, or international terrorists.

*Human Reliability Program* means the program under 10 CFR part 712.

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

*Local commuting area* means the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual employment.

*Materials* means any "nuclear explosive" as defined in 10 CFR 712.3, and any "special nuclear material," hazardous "source material," and hazardous "byproduct material" as those terms are defined by the Atomic Energy Act of 1954 (42 U.S.C. 2014).

*National security information* means information that has been determined pursuant to Executive Order 12958, as amended by Executive Order 13292, or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.

*NNSA* means DOE's National Nuclear Security Administration.

*No opinion* means an evaluation of a polygraph test by a polygraph examiner in which the polygraph examiner cannot render an opinion.

*Polygraph examination* means all activities that take place between a Polygraph Examiner and an examinee (person taking the test) during a specific series of interactions, including the pretest interview, the use of the polygraph instrument to collect physiological data from the examinee while presenting a series of tests, the test data analysis phase, and the post-test phase.

*Polygraph examination records* means all records of the polygraph examination, including the polygraph report, audio-video recording, and the polygraph consent form.

*Polygraph instrument* means a diagnostic instrument used during a polygraph examination, which is capable of monitoring, recording and/or measuring at a minimum, respiratory, electrodermal, and cardiovascular activity as a response to verbal or visual stimuli.

*Polygraph report* means a document that may contain identifying data of the examinee, a synopsis of the basis for which the examination was conducted, the relevant questions utilized, and the examiner's conclusion.

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

*Program Manager* means a DOE official designated by the Secretary or the Head of a DOE Element to make an access determination under this part.

*Random* means a statistical process whereby eligible employees have an equal probability of selection for a CI evaluation each time the selection process occurs.

*Regular and routine* means access by individuals without further permission more than two times per calendar quarter.

*Relevant questions* are those questions used during the polygraph examination that pertain directly to the issues for which the examination is being conducted.

*Restricted data* means all data concerning the design, manufacture, or utilization of atomic weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy, but does not include data declassified or removed from the restricted data category pursuant to section 142 of the Atomic Energy Act of 1954.

*Secret* means the security classification that is applied to DOE-generated information or material the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

*Secretary* means the Secretary of Energy or the Secretary's designee.

*Significant response* means an opinion that the analysis of the polygraph charts reveals consistent, significant, timely physiological responses to the relevant questions.

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

*Suspend* means temporarily to withdraw an employee's access to information or materials protected under § 709.3 of this part.

*System Administrator* means any individual who has privileged system, data, or software access that permits that individual to exceed the authorization of a normal system user and thereby override, alter, or negate integrity verification and accountability procedures or other automated and/or technical safeguards provided by the systems security assets for normal users.

*Top Secret* means the security classification that is applied to DOE-generated information or material the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

*Unresolved issues* means an opinion by a CI evaluator that the analysis of the information developed during a CI evaluation remains inconclusive and needs further clarification before a CI access recommendation can be made.

### § 709.3 Covered persons subject to a CI evaluation and polygraph.

(a) *Mandatory CI evaluation.* Except as provided in § 709.5 of this part with regard to waivers, a CI evaluation, which may include a CI-scope polygraph examination, is required for any covered person in any category under paragraph (b) of this section who will have or has access to classified information or materials protected under this paragraph. Such an evaluation is required for covered persons who are incumbent employees at least once every five years. DOE, in its sole discretion, may require a CI-scope polygraph examination:

(1) If the CI evaluation reveals foreign nexus issues;

(2) If a covered person who is an incumbent employee is to be assigned within DOE to activities involving another agency and a polygraph examination is required as a condition of access to the activities by the other agency; or

(3) If a covered person who is an incumbent employee is proposed to be assigned or detailed to another agency and the receiving agency requests DOE to administer a polygraph examination as a condition of the assignment or detail.

(b) Paragraph (a) of this section applies to covered persons:

(1) In an intelligence or counterintelligence program office (or with programmatic reporting responsibility to an intelligence or counterintelligence program office) because of access to classified intelligence information, or sources, or methods;

(2) With access to Sensitive Compartmented Information;

(3) With access to information that is protected within a non-intelligence Special Access Program (SAP) designated by the Secretary;

(4) With regular and routine access to Top Secret Restricted Data;

(5) With regular and routine access to Top Secret National Security Information; and

(6) Designated, with approval of the Secretary, on the basis of a risk



assessment consistent with paragraphs (e) and (f) of this section, by a Program Manager for the following DOE offices and programs (and any successors to those offices and programs): The Office of the Secretary; the Human Reliability Program; the National Nuclear Security Administration (including the Office of Emergency Operations); and the Office of Health, Safety and Security.

(c) *Random CI evaluation.* Except as provided in § 709.5 of this part with regard to waivers, DOE may require a CI evaluation, including a CI-scope polygraph examination, of covered persons who are incumbent employees selected on a random basis from the following:

(1) All covered persons identified in § 709.3(b);

(2) All employees in the Office of Independent Oversight (or any successor office) within the Office of Health, Safety and Security because of access to classified information regarding the inspection and assessment of safeguards and security functions, including cyber security, of the DOE;

(3) All employees in other elements of the Office of Health, Safety and Security (or any successor office) because of their access to classified information;

(4) All employees in the NNSA Office of Emergency Operations (OEO or any successor office) including DOE field offices or contractors who support OEO because of their access to classified information;

(5) All employees with regular and routine access to classified information concerning: The design and function of nuclear weapons use control systems, features, and their components (currently designated as Sigma 15); vulnerability of nuclear weapons to deliberate unauthorized nuclear detonation (currently designated as Sigma 14); and improvised nuclear device concepts or designs; and

(6) Any system administrator with access to a system containing classified information, as identified by the DOE or NNSA Chief Information Officer.

(d) *Specific incident polygraph examinations.* In response to specific facts or circumstances with potential counterintelligence implications with a defined foreign nexus, the Director of the Office of Intelligence and Counterintelligence (or, in the case of a covered person in NNSA, the Administrator of NNSA, after consideration of the recommendation of the Director, Office of Intelligence and Counterintelligence) may require a covered person with access to DOE classified information or materials to consent to and take an event-specific polygraph examination. Except as

otherwise determined by the Secretary, on the recommendation of the appropriate Program Manager, if a covered person with access to DOE classified information or materials refuses to consent to or take a polygraph examination under this paragraph, then the Director of the Office of Intelligence and Counterintelligence (or, in the case of a covered person in NNSA, the Administrator of NNSA, after consideration of the recommendation of the Director, Office of Intelligence and Counterintelligence) shall direct the denial of access (if any) to classified information and materials protected under paragraphs (b) and (c) of this section, and shall refer the matter to the Office of Health, Safety and Security for a review of access authorization eligibility under 10 CFR part 710. In addition, in the circumstances described in this paragraph, any covered person with access to DOE classified information or material may request a polygraph examination.

(e) *Risk assessment.* For the purpose of deciding whether to designate or remove employees for mandatory CI evaluations under paragraph (b)(6) of this section, Program Managers may consider:

(1) Access on a non-regular and non-routine basis to Top Secret Restricted Data or Top Secret National Security Information or the nature and extent of access to other classified information;

(2) Unescorted or unrestricted access to significant quantities or forms of special nuclear materials; and

(3) Any other factors concerning the employee's responsibilities that are relevant to determining risk of unauthorized disclosure of classified information or materials.

(f) Based on the risk assessments conducted under paragraph (e) of this section and in consultation with the Director of the Office of Intelligence and Counterintelligence, the Program Manager shall provide recommendations as to positions to be designated or removed under paragraph (b)(6) of this section for approval by the Secretary. Recommendations shall include a summary of the basis for designation or removal of the positions and of the views of the Director of the Office of Intelligence and Counterintelligence as to the recommendations.

(g) Not less than once every calendar year quarter, the responsible Program Manager must provide a list of all incumbent employees who are covered persons under paragraphs (b) and (c) of this section to the Director of the Office of Intelligence and Counterintelligence.

#### § 709.4 Notification of a CI evaluation.

(a) If a polygraph examination is scheduled, DOE must notify the covered person, in accordance with § 709.21 of this part.

(b) Any job announcement or posting with respect to any position with access to classified information or materials protected under § 709.3(b) and (c) of this part should indicate that DOE may condition the selection of an individual for the position (709.3(b)) or retention in that position (709.3(b) and (c)) upon his or her successful completion of a CI evaluation, including a CI-scope polygraph examination.

(c) Advance notice will be provided to the affected Program Manager and laboratory/site/facility director of the covered persons who are included in any random examinations that are administered in accordance with provisions at § 709.3(c).

#### § 709.5 Waiver of polygraph examination requirements.

(a) *General.* Upon a waiver request submitted under paragraph (b) of this section, DOE may waive the CI-scope polygraph examination under § 709.3 of this part for:

(1) Any covered person based upon certification from another Federal agency that the covered person has successfully completed a full scope or CI-scope polygraph examination administered within the previous five years;

(2) Any covered person who is being treated for a medical or psychological condition that, based upon consultation with the covered person and appropriate medical personnel, would preclude the covered person from being tested; or

(3) Any covered person in the interest of national security.

(b) *Submission of Waiver Requests.* A covered person may submit a request for waiver under this section, and the request shall assert the basis for the waiver sought and shall be submitted, in writing, to the Director, Office of Intelligence and Counterintelligence, at the following address: U.S. Department of Energy, Attn: Director, Office of Intelligence and Counterintelligence, 1000 Independence Avenue, SW., Washington, DC 20585.

(c) *Disposition of Waiver Requests.* The Director, Office of Intelligence and Counterintelligence, shall issue a written decision on a request for waiver prior to the administration of a polygraph examination. The Director shall obtain the concurrence of the Secretary in his or her decision on a request for waiver under § 709.5(a)(3) and shall obtain the concurrence of the

Administrator of NNSA in a decision on a waiver request from an NNSA covered person under § 709.5(a)(1) and § 709.5(a)(2). Notification of approval of a waiver request will contain information regarding the duration of the waiver and any other relevant information. Notification of the denial of a waiver request will state the basis for the denial and state that the covered person may request reconsideration of the denial by the Secretary under § 709.5(d).

(d) *Reconsideration Rights.* If a waiver is denied, the covered person may file with the Secretary a request for reconsideration of the denial within 30 days of receipt of the decision, and the Secretary's decision will be issued prior to the administration of a polygraph examination.

### Subpart B—CI Evaluation Protocols and Protection of National Security

#### § 709.10 Scope of a counterintelligence evaluation.

A counterintelligence evaluation consists of a counterintelligence-based review of the covered person's personnel security file and review of other relevant information available to DOE in accordance with applicable guidelines and authorities. As provided in § 709.3(b), DOE also may require a CI-scope polygraph examination. As provided for in § 709.3(c), a CI evaluation, if conducted on a random basis, will include a CI-scope polygraph examination. As set forth in § 709.15(b) and (c) of this part, a counterintelligence evaluation may also include other pertinent measures to address and resolve counterintelligence issues in accordance with Executive Order 12333, the DOE "Procedures for Intelligence Activities," and other relevant laws, guidelines and authorities, as applicable.

#### § 709.11 Topics within the scope of a polygraph examination.

(a) DOE may ask questions in a specific incident polygraph examination that are appropriate for a CI-scope examination or that are relevant to the counterintelligence concerns with a defined foreign nexus raised by the specific incident.

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

(c) DOE may not ask questions that:

- (1) Probe a covered person's thoughts or beliefs;
- (2) Concern conduct that has no CI implication with a defined foreign nexus; or
- (3) Concern conduct that has no direct relevance to a CI evaluation.

#### § 709.12 Defining polygraph examination questions.

The examiner determines the exact wording of the polygraph questions based on the examiner's pretest interview of the covered person, the covered person's understanding of the questions, established test question procedures from the Department of Defense Polygraph Institute, and other input from the covered person.

#### § 709.13 Implications of refusal to take a polygraph examination.

(a) Subject to § 709.14 of this part, a covered person may refuse to take a polygraph examination pursuant to § 709.3 of this part, and a covered person being examined may terminate the examination at any time.

(b) If a covered person terminates a polygraph examination prior to the completion of the examination, DOE may treat that termination as a refusal to complete a CI evaluation under § 709.14 of this part.

#### § 709.14 Consequences of a refusal to complete a CI evaluation including a polygraph examination.

(a) If a covered person is an applicant for employment or assignment or a potential detailee or assignee with regard to an identified position and the covered person refuses to complete a CI evaluation including a polygraph examination required by this part as an initial condition of access, DOE and its contractors must refuse to employ, assign, or detail that covered person with regard to the identified position.

(b) If a covered person is an incumbent employee in an identified position subject to a CI evaluation including a polygraph examination under § 709.3(b), (c), or (d), and the covered person refuses to complete a CI evaluation, DOE and its contractors must deny that covered person access to classified information and materials protected under § 709.3(b) and (c) and may take other actions consistent with the denial of access, including administrative review of access authorization under 10 CFR part 710. If the covered person is a DOE employee, DOE may reassign or realign the DOE employee's duties, or take other action, consistent with that denial of access and applicable personnel regulations.

(c) If a DOE employee refuses to take a CI polygraph examination, DOE may

not record the fact of that refusal in the employee's personnel file.

#### § 709.15 Processing counterintelligence evaluation results.

(a) If the reviews under § 709.10 or a polygraph examination present unresolved foreign nexus issues that raise significant questions about the covered person's access to classified information or materials protected under § 709.3 of this part that justified the counterintelligence evaluation, DOE may undertake a more comprehensive CI evaluation that, in appropriate circumstances, may include evaluation of financial, credit, travel, and other relevant information to resolve any identified issues. Participation by Office of Intelligence and Counterintelligence personnel in any such evaluation is subject to Executive Order 12333, the DOE "Procedures for Intelligence Activities," and other relevant laws, guidelines, and authorities as may be applicable with respect to such matters.

(b) The Office of Intelligence and Counterintelligence, in coordination with NNSA with regard to issues concerning a NNSA covered person, may conduct an in-depth interview with the covered person, may request relevant information from the covered person, and may arrange for the covered person to undergo an additional polygraph examination.

(c) Whenever information is developed by the Office of Health, Safety and Security indicating counterintelligence issues, the Director of that Office shall notify the Director, Office of Intelligence and Counterintelligence.

(d) If, in carrying out a comprehensive CI evaluation of a covered person under this section, there are significant unresolved issues, not exclusively related to polygraph examination results, indicating counterintelligence issues, then the Director, Office of Intelligence and Counterintelligence shall notify the DOE national laboratory director (if applicable), plant manager (if applicable) and program manager(s) for whom the individual works that the covered person is undergoing a CI evaluation pursuant to this part and that the evaluation is not yet complete.

(e) Utilizing the DOE security criteria in 10 CFR part 710, the Director, Office of Intelligence and Counterintelligence, makes a determination whether a covered person completing a CI evaluation has made disclosures that warrant referral, as appropriate, to the Office of Health, Safety and Security or the Manager of the applicable DOE/NNSA Site, Operations Office or Service Center.

**§ 709.16 Application of Counterintelligence Evaluation Review Boards in reaching conclusions regarding CI evaluations.**

(a) General. If the results of a counterintelligence evaluation are not dispositive, the Director of the Office of Intelligence and Counterintelligence may convene a Counterintelligence Evaluation Review Board to obtain the individual views of each member as assistance in resolving counterintelligence issues identified during a counterintelligence evaluation.

(b) Composition. A Counterintelligence Evaluation Review Board is chaired by the Director of the Office of Intelligence and Counterintelligence (or his/her designee) and includes representation from the appropriate line Program Managers, lab/site/facility management (if a contractor employee is involved), NNSA, if the unresolved issues involve an NNSA covered person, the DOE Office of Health, Safety and Security and security directors for the DOE or NNSA site or operations office.

(c) Process. When making a final recommendation under § 709.17 of this part, to a Program Manager, the Director of Intelligence and Counterintelligence shall report on the Counterintelligence Evaluation Review Board's views, including any consensus recommendation, or if the members are divided, a summary of majority and dissenting views.

**§ 709.17 Final disposition of CI evaluation findings and recommendations.**

(a) Following completion of a CI evaluation, the Director of the Office of Intelligence and Counterintelligence must recommend, in writing, to the appropriate Program Manager that the covered person's access be approved or retained, or denied or revoked.

(b) If the Program Manager agrees with the recommendation, the Program Manager notifies the covered person that the covered person's access has been approved or retained, or denied or revoked.

(c) If the Program Manager disagrees with the recommendation of the Director, Office of Intelligence and Counterintelligence, the matter is referred to the Secretary for a final decision.

(d) If the Program Manager denies or revokes a DOE employee's access, DOE may reassign the employee or realign the employee's duties within the local commuting area or take other actions consistent with the denial of access.

(e) If the Program Manager revokes the access of a covered person assigned or detailed to DOE, DOE may remove the

assignee or detailee from access to the information that justified the CI evaluation and return the assignee or detailee to the agency of origin.

(f) Covered persons whose access is denied or revoked may request reconsideration by the head of the relevant DOE element.

(g) For cases involving a question of loyalty to the United States, the Director of the Office of Intelligence and Counterintelligence may refer the matter to the FBI as required by section 145d of the Atomic Energy Act of 1954. For cases indicating that classified information is being, or may have been, disclosed in an unauthorized manner to a foreign power or an agent of a foreign power, DOE is required by 50 U.S.C. 402a(e) to refer the matter to the Federal Bureau of Investigation.

**Subpart C—Safeguarding Privacy and Employee Rights**

**§ 709.21 Requirements for notification of a polygraph examination.**

When a polygraph examination is scheduled, the DOE must notify the covered person, in writing, of the date, time, and place of the polygraph examination, the provisions for a medical waiver, and the covered person's right to obtain and consult with legal counsel or to secure another representative prior to the examination. DOE must provide a copy of this part to the covered person. The covered person must receive the notification at least ten days, excluding weekend days and holidays, before the time of the examination except when good cause is shown or when the covered person waives the advance notice provision.

**§ 709.22 Right to counsel or other representation.**

(a) At the covered person's own expense, a covered person has the right to obtain and consult with legal counsel or another representative. However, the counsel or representative may not be present during the polygraph examination. Except for interpreters and signers, no one other than the covered person and the examiner may be present in the examination room during the polygraph examination.

(b) A covered person has the right to consult with legal counsel or another representative at any time during an interview conducted in accordance with § 709.15 of this part.

**§ 709.23 Obtaining consent to a polygraph examination.**

DOE may not administer a polygraph examination unless DOE:

(a) Notifies the covered person of the polygraph examination in writing in

accordance with § 709.21 of this part; and

(b) Obtains written consent from the covered person prior to the polygraph examination.

**§ 709.24 Other information provided to a covered person prior to a polygraph examination.**

Before administering the polygraph examination, the examiner must:

(a) Inform the covered person that audio and video recording of each polygraph examination session will be made, and that other observation devices, such as two-way mirrors and observation rooms, also may be employed;

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

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

(d) Review with the covered person the relevant questions to be asked during the examination;

(e) Advise the covered person of the covered person right against self-incrimination; and

(f) Provide the covered person with a pre-addressed envelope, which may be used to submit a quality assurance questionnaire, comments or complaints concerning the examination.

**§ 709.25 Limits on use of polygraph examination results that reflect "Significant Response" or "No Opinion".**

DOE or its contractors may not:

(a) Take an adverse personnel action against a covered person or make an adverse access recommendation solely on the basis of a polygraph examination result of "significant response" or "no opinion"; or

(b) Use a polygraph examination that reflects "significant response" or "no opinion" as a substitute for any other required investigation.

**§ 709.26 Protection of confidentiality of CI evaluation records to include polygraph examination records and other pertinent documentation.**

(a) DOE owns all CI evaluation records, including polygraph examination records and reports and other evaluation documentation.

(b) DOE maintains all CI evaluation records, including polygraph examination records and other pertinent documentation acquired in conjunction with a counterintelligence evaluation, in a system of records established under the Privacy Act of 1974 (5 U.S.C. 552a).

(c) DOE must afford the full privacy protection provided by law to information regarding a covered

person's refusal to participate in a CI evaluation to include a polygraph examination and the completion of other pertinent documentation.

(d) With the exception of the polygraph report, all other polygraph examination records are destroyed ninety days after the CI evaluation is completed, provided that a favorable recommendation has been made to grant or continue the access to the position. If a recommendation is made to deny or revoke access to the information or involvement in the activities that justified conducting the CI evaluation, then all of the polygraph examination records are retained until the final resolution of any request for reconsideration by the covered person or the completion of any ongoing investigation.

#### Subpart D—Polygraph Examination and Examiner Standards

##### § 709.31 DOE standards for polygraph examiners and polygraph examinations.

(a) DOE adheres to the procedures and standards established by the Department of Defense Polygraph Institute (DODPI). DOE administers only DODPI approved testing formats.

(b) A polygraph examiner may administer no more than five polygraph examinations in any twenty-four hour period. This does not include those instances in which a covered person voluntarily terminates an examination prior to the actual testing phase.

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

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

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

(2) The examiner must have a favorably adjudicated single-scope background investigation, complete a CI-scope polygraph examination, and must hold a "Q" access authorization, which is necessary for access to Secret Restricted Data and Top Secret National Security Information. In addition, he or she must have been granted SCI access approval.

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

##### § 709.32 Training requirements for polygraph examiners.

(a) Examiners must complete an initial training course of thirteen weeks, or longer, in conformance with the procedures and standards established by DODPI.

(b) Examiners must undergo annual continuing education for a minimum of forty hours training within the discipline of Forensic Psychophysiological Detection of Deception.

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

- (1) American Polygraph Association,
- (2) American Association of Police Polygraphists, and
- (3) Department of Defense Polygraph Institute.

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

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

**Authority:** 42 U.S.C. 2165, 2201, 5815, 7101, *et seq.*, 7383h-1; 50 U.S.C. 2401, *et seq.*; E.O. 10450, 3 CFR 1949-1953 comp., p. 936, as amended; E.O. 10865, 3 CFR 1959-1963 comp., p. 398, as amended, 3 CFR Chap. IV.

■ 3. Section 710.6 is amended by redesignating paragraph (a) as paragraph (a)(1) and by adding at the end of redesignated paragraph (a)(1) a new paragraph (a)(2) to read as follows:

##### § 710.6 Cooperation by the individual.

(a) \* \* \*

(2) It is the responsibility of an individual subject to § 709.3(d) to consent to and take an event-specific polygraph examination. A refusal to consent to or take such an examination may prevent DOE from reaching an affirmative finding required for continuing access authorization. In this event, DOE may suspend or terminate any access authorization.

\* \* \* \* \*

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#### SMALL BUSINESS ADMINISTRATION

##### 13 CFR Part 120

##### Gulf Opportunity Pilot Loan Program (GO Loan Pilot)

**AGENCY:** U.S. Small Business Administration (SBA).

**ACTION:** Notice of extension of waiver of regulatory provisions.

**SUMMARY:** This notice announces the extension of the "Notice of waiver of regulatory provisions" for SBA's Gulf Opportunity Pilot Loan Program (GO Loan Pilot) until September 30, 2007. Due to the scope and magnitude of the devastation to Presidentially-declared disaster areas resulting from Hurricanes Katrina and Rita, the Agency is extending its full guaranty and streamlined and centralized loan processing available through the GO Loan Pilot to the small businesses in the eligible parishes/counties through September 30, 2007.

**DATES:** The waiver of regulatory provisions published in the **Federal Register** on November 17, 2005, is extended under this notice until September 30, 2007.

**FOR FURTHER INFORMATION CONTACT:** Charles Thomas, Office of Financial Assistance, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416; Telephone (202) 205-6490; [charles.thomas@sba.gov](mailto:charles.thomas@sba.gov).

**SUPPLEMENTARY INFORMATION:** In November 2005, SBA initiated, on an emergency basis, the GO Loan Pilot, which was designed to provide expedited small business financial assistance to businesses located in those communities severely impacted by Hurricanes Katrina and Rita. Under this unique initiative, the Agency provides its full (85%) guaranty and streamlined and centralized loan processing to all eligible lenders that agree to make expedited SBA 7(a) loans available to small businesses located in, locating to or re-locating in the parishes/counties that have been Presidentially-declared as disaster areas resulting from Hurricanes Katrina and Rita, plus any contiguous parishes/counties.

To maximize the effectiveness of the GO Loan Pilot, on November 17, 2005, SBA published a notice in the **Federal Register** waiving for the GO Loan Pilot certain Agency regulations applicable to the 7(a) Business Loan Program. (70 FR 69645) Since the pilot was designed as a temporary program scheduled to expire on September 30, 2006, the waiver of certain Agency regulations also was due to expire on September 30, 2006. However, the Agency believes that there is a continuing, substantial need for the specific SBA assistance provided by this pilot in the affected areas. As part of a comprehensive federal initiative to assist in the continuing recovery of these highly devastated communities, the Agency believes it is essential that SBA extend this unique