

## DEPARTMENT OF ENERGY

## Personnel Assurance Program

## 10 CFR Part 711

RIN 1992-AA14

[Docket No. DP-RM-97-100]

*Personnel Assurance Program; Final Rule*

AGENCY: Department of Energy.

ACTION: Final rule.

**SUMMARY:** The Department of Energy (DOE or Department) today is publishing a final rule on Personnel Assurance Program (PAP) procedures and standards for DOE and DOE contractor employees who are assigned nuclear explosive duties at DOE facilities. The PAP is a systematic program, previously established by internal DOE directive, to prevent accidental or unauthorized detonation of nuclear explosives as a result of assignment of nuclear explosives duties to employees who have become emotionally, mentally, or physically incapacitated. The rule includes medical standards for evaluating DOE and contractor employees in the PAP.

**EFFECTIVE DATE:** This rule is effective October 8, 1998.

**FOR FURTHER INFORMATION CONTACT:** For further information concerning this final rule: Mr. Randall Weidman, U.S. Department of Energy, Office of Defense Programs (DP-21), 1000 Independence Ave., SW., Washington, D.C. 20585, (301) 903-3154.

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**I. Background**

Pursuant to the Atomic Energy Act of 1954 (Act), DOE owns defense nuclear facilities in various locations in the United States which are operated by management and operating contractors

under DOE supervision. These facilities are involved in researching, testing, producing, disassembling, and transporting of nuclear explosives which, when mated with Department of Defense-provided delivery systems, become nuclear weapon systems.

Pursuant to section 161 of the Act, 42 U.S.C. 2201(b), (i)(3), and (p), DOE and its predecessor agencies have used some version of the PAP to certify, actively monitor, and periodically recertify personnel as suitable to perform nuclear explosive duties in a safe and reliable manner. PAP provides for disqualification of persons from performance of nuclear explosive duties who fail to meet PAP requirements for emotional, mental, and physical capability. In DOE's internal administrative directives, DOE Order 452.2, formerly DOE Order 5610.11, "SAFETY OF NUCLEAR EXPLOSIVE OPERATIONS," the term "Nuclear Explosive Duties" has been defined to include duties performed by DOE or contractor employees who have custody of or access to a nuclear explosive.

All PAP-certified employees are subject to continuous review and evaluation. The certification of such employees is subject to immediate review in light of facts and circumstances when an employee's behavior indicates a reliability risk that warrants protective action to neutralize a nuclear explosive hazard by having an individual immediately removed from nuclear explosive duties. Immediate removal does not constitute a determination that the individual is unsuitable for nuclear explosive duties, but rather indicates that the individual's suitability is in question.

In 1992, the Independent Guard Association of Nevada, Local No. 1, representing PAP-certifiable civilian security guards employed by Wackenhut Security, Inc., at DOE's Nevada Test Site, brought suit challenging DOE Order 5610.11, "NUCLEAR EXPLOSIVE SAFETY," which established the Department's nuclear explosive and weapons safety program, including the PAP. The DOE Order was challenged for failure to promulgate it through public notice and comment in compliance with the Administrative Procedure Act, 5 U.S.C. 553. In *Independent Guard Association of Nevada v. O'Leary*, No. CV-S-92-204-LDG-LRL (D. Nev. June 14, 1996), the District Court enjoined DOE from enforcing the requirements section (section 2) of DOE Order 5610.11, Chapter I, against contractor employees pending notice and comment rulemaking under 5 U.S.C. 553.

DOE published a notice of interim procedures and standards for the PAP on October 9, 1996 (61 FR 53018). The interim PAP procedures and standards were made effective immediately upon publication to mitigate the occupational and public safety risk during the period of time required to complete a public rulemaking proceeding.

On June 4, 1997, DOE published a notice of proposed rulemaking (NPR) to codify the PAP employee certification procedures and standards and other PAP-related policies, including the responsibilities of the Site Occupational Medical Director (SOMD) and other medical personnel. The proposed rule contained provisions that are similar to those in the notice of interim procedures and standards. The NPR also contained administrative procedures and standards for the conduct of medical assessments for PAP certification that were not included in the interim rule, but which generally conform to existing practice.

**(Note:** Unless otherwise indicated, references in this Supplementary Information section to "PAP certification," "certification," or "certification process," include annual recertification because generally the procedures and standards are the same.)

DOE received seven written comments on the proposed rule. Comments were received from two organizations that represent security guards (Independent Guard Association of Nevada, Local No. 1, and the National Council of Security Inspectors); an organization concerned about nuclear safety issues (Serious Texans Against Nuclear Dumping or STAND); the U.S. Equal Employment Opportunity Commission (two comments); the PAP Coordinator at one DOE facility; and an individual employed at another DOE facility. In addition, three individuals and a representative of the Independent Guard Association of Nevada presented oral comments on the proposed rule at public hearings that were held in Amarillo, Texas, and Las Vegas, Nevada, in July of 1997. DOE has carefully considered all of these comments in preparing this final rule.

**II. Discussion of Public Comments**

This part of the Supplementary Information section contains the Department's responses to issues raised in public comments on the proposed rule and an explanation of changes that DOE has made in this final rule in response to the public comments and as a result of additional internal review.

*A. Subpart A: PAP Certification/Recertification, Temporary Removal/Reinstatement, and Revocation of PAP Certification*

1. Definitions

In this final rule, DOE makes several changes to the definitions that apply to this part.

DOE has moved the definitions from proposed section 711.22, in subpart B, to section 711.3 to have all definitions in one location.

A definition of "PAP official" has been added to section 711.3 to clarify that the term includes any DOE manager or supervisor involved in the PAP certification process.

As proposed, the definition of "illegal drug" provided that the term would not apply to the use of a controlled substance in accordance with the terms of a valid prescription "or other uses authorized by law." In the final rule, DOE has revised the quoted phrase to read: "or other uses authorized by Federal law." This change is made to clarify that the definition of "illegal drug" used in this part would take precedence over any inconsistent state or local law.

2. General Provisions and Requirements

Two commenters objected to proposed section 711.4(b) which would have provided: "Nothing in this part shall be construed as prohibiting contractors from establishing stricter suitability standards for selecting candidates for nomination to DOE for certification or recertification in the PAP." DOE proposed this paragraph to make clear that by establishing procedures and standards for PAP certification, DOE did not intend to prevent contractors from establishing more stringent employment standards for their own business purposes. Commenters argued that this approach would result in contractors negotiating with labor organizations over PAP certification standards that would apply to their employees, and that this would produce non-uniform PAP standards. DOE does not agree with these arguments because decisions to certify or deny certification in the PAP will be made by DOE employees only in accordance with the procedures and standards in part 711. DOE employees will not use a more stringent contractor employment requirement, should any exist, in making a decision regarding a PAP individual's certification. Accordingly, DOE has not changed the substance of section 711.4(b).

These commenters also asked for clarification of proposed section 711.4(d), which provides that personnel

management actions involving an employee will be considered in making PAP certification decisions only if they are based on behavior that also affects an individual's suitability for the PAP. Stated another way, an individual's PAP certification will not be affected by any personnel management action involving the individual that is not based on behavior that raises a concern about the individual's suitability for the PAP. DOE believes the proposed language is clear and, therefore, section 711.4(d) is unchanged.

DOE has deleted proposed section 711.4(e), regarding evaluation for hallucinogen use because the substance of that provision is included in section 711.5(b)(5). This deletion from the section eliminates this redundancy.

One commenter, a PAP coordinator at a DOE facility, expressed concern that proposed section 711.5(b)(2), which would require that PAP individuals sign an acknowledgment and agreement to participate in the PAP, did not mention one form currently in use, the "Authorization and Consent to Release Personal Records in Connection with the Personnel Assurance Program" form. That form is not specifically referenced in the rule because DOE intends to consolidate the current agreement to participate and consent forms into a single form. DOE did not intend to suggest, by omitting reference to the consent to release personal records form, that DOE would not continue to require that PAP individuals consent to release of records.

Section 711.5(b)(5), and section 711.43 in subpart B, set forth a special policy for disqualification from the PAP for hallucinogen use. "Hallucinogen" is defined in section 711.3 so as to limit PAP-disqualifying hallucinogens to those hallucinogenic drugs or substances that cause flashbacks. The rule provides that use of a hallucinogen in the preceding 5 years is disqualifying. Hallucinogen use more than 5 years preceding the application for certification/recertification is not, in itself, an adequate basis for denying certification or recertification or for revocation of certification. The 5-year rule reflects a period of time that should elapse, as a protective practice, to minimize the likelihood of flashbacks. "Flashback" is the term used to describe a transient, spontaneous recurrence of certain aspects of a person's hallucinogen experience. Because flashbacks are sudden, often unpredictable, largely involuntary, dramatic alterations of emotional state, perception, sensation, and behavior, an accident could result if a flashback were to occur during the performance of a

hazardous task. Flashbacks may occur within a few days after hallucinogen use, or they may occur a few weeks, months, or even years later. In developing the 5-year rule, DOE consulted with experts at the Alcohol, Drug Abuse and Mental Health Administration of the Department of Health and Human Services. DOE placed the views, and a review of relevant studies, submitted by the National Institute on Drug Abuse, in the docket established for this rulemaking. Although an individual who used a hallucinogen more than 5 years earlier would be considered for nuclear explosive duties, section 711.43 provides that an individual who has used a hallucinogen must undergo a medical evaluation to determine reliability. In addition, the individual must have an acceptable job record and observed behavior.

DOE received comments on the hallucinogen policy, as provided in proposed section 711.5. As proposed, section 711.5(b)(5) stated that to be certified in the PAP, an individual "shall: (5) Not have used any hallucinogen in the preceding 5 years, and shall not be susceptible to flashbacks resulting from use of any hallucinogen more than 5 years before applying for certification or recertification." One commenter objected to the use of the word "susceptible," arguing that it would establish too subjective a standard for determining the risk of flashbacks occurring from hallucinogen use more than 5 years prior to filing of an application for certification or recertification. DOE has revised section 711.5(b)(5) to replace the word "susceptible" with the standard: "shall not have experienced a flashback". DOE believes this is a more measurable, yet sufficiently protective, standard.

A commenter questioned the adequacy of the requirement in proposed section 711.5(b)(6) that each individual in the PAP be tested for illegal drugs, on a random basis, "at least once each calendar year". The commenter expressed concern that the interval between drug tests could be much greater than once in each 12-month period. DOE did not intend the proposed rule to change existing practice regarding the frequency of drug testing. To clarify this in the final rule, DOE has included in sections 711.5(b)(6) and 711.5(b)(7) cross-references to the applicable requirements. For DOE employees, the applicable requirements for drug testing are in DOE Order 3792.3, "Drug-Free Federal Workplace Testing Implementation Program," and for

contractor employees, the applicable requirements are in 10 CFR Part 707, "Workplace Substance Abuse Programs at DOE Sites."

Section 711.5(d) provides that an individual will be denied certification, or will have his or her certification revoked, if drug testing confirms that the individual has used an illegal drug. A person who uses illegal drugs is not suitable for nuclear explosive duties. Proposed section 711.5(e) would have provided that an individual whose certification is revoked because of illegal drug use "may be reinstated in the PAP if the individual successfully completes a SOMD approved drug rehabilitation program as provided in § 711.42 of subpart B." One commenter argued that DOE should automatically reinstate an individual in the PAP following successful completion of an approved drug rehabilitation program. DOE has not adopted this comment because DOE cannot, for reasons of sound administration, hold open a position in the PAP for an individual who undertakes to complete a drug rehabilitation program. In addition, the PAP certifying official must base reinstatement decisions on a comprehensive evaluation of each individual case.

Section 711.6 sets forth requirements for the PAP certification process. Under section 711.6(b) each operations office manager who has jurisdiction over PAP certification shall issue implementing instructions that accomplish specified objectives. Because of the varied nature of the workforce at DOE sites, the rule does not dictate the implementation details, but rather sets forth performance standards to be achieved.

DOE received comments concerning the possible abuse of the certification process or misuse of information obtained in that process to retaliate against particular employees for actions unrelated to PAP suitability. One commenter alleged that the PAP or equivalent DOE programs have been used to stifle employee concerns and as a tool for reprisals against whistle-blowers. The commenter urged DOE to include safeguards in the rule to protect employees from misuse of information or the certification process.

While the rule gives individuals certain rights in the process for resolving PAP concerns, it does not include whistle-blower protection provisions because whistle-blower protection is provided in separate regulations. In 1992 DOE established a DOE Contractor Employee Protection Program which prescribes procedures for processing complaints by contractor employees that allege discriminatory

action by an employer in retaliation for the employee's disclosure of information related to health and safety, mismanagement, and other matters; for participation in proceedings before Congress or the Department; or for refusal to engage in illegal or dangerous activities. 57 FR 7533 (Mar. 3, 1992). The regulations are codified at 10 CFR part 708. DOE established the Contractor Employee Protection Program for employee complaints that are not covered by the whistle-blower protection program administered by the Department of Labor under 29 CFR part 24, "Procedures for the Handling of Discrimination Under Federal Employee Protection Statutes." On October 25, 1996, DOE published a Notice of Inquiry that invited public comment on experience under, and recommendations for improving, the DOE Contractor Employee Protection Program. 61 FR 55230. After considering the comments it received, DOE published a notice of proposed rulemaking on January 5, 1998, to amend part 708 (63 FR 374). DOE believes these existing laws and programs are adequate for hearing and resolving employee complaints of reprisals for actions involving health or safety violations and other violations of law.

One commenter objected to proposed section 711.6(b)(9), which would require that the operations office manager develop a mechanism for co-workers, supervisors, and managers to communicate concerns about PAP individuals' suitability for nuclear explosive duties. The commenter thinks a rule that obligates workers to share adverse information about co-workers with management will create distrust in the workplace.

The balance struck in the final rule between protection of individual rights and reporting of safety concerns is dictated by the nature of the work carried out at facilities or areas subject to the PAP. Employees in the PAP work with, or have access to, nuclear explosives, and an accident could result in severe injuries to personnel, loss of life, or damage to the environment. Therefore, it is necessary to require individuals in the PAP, as a condition of their employment, to report behavior or information about other employees that may raise a concern about an individual's ability to perform nuclear explosive duties in a safe and reliable manner. Moreover, PAP individuals must expect that other employees will report such information about them, and they are required to report such information about themselves. Section 711.5(b)(2) provides that individuals

who choose to work in the PAP must sign an agreement to participate and comply with PAP requirements.

While DOE has not made the change requested to section 711.6(b)(9), DOE has revised section 711.6(b)(5) to limit the persons who have access to information in a PAP individual's Personnel Security File.

DOE also received public comment on proposed section 711.9(b), which is a non-exclusive list of conditions and behavior that may raise PAP concerns and lead to removal of an individual from nuclear explosive duties. One commenter stated that some of the conditions or behavior listed in proposed section 711.9(b) are highly subjective and may be used by vindictive employees or managers to have employees removed from the PAP. The safety-sensitive nature of nuclear explosive duties requires that DOE grant supervisors latitude to decide if an individual's behavior or condition warrants temporary removal from the PAP pending a determination of suitability. The behavior and conditions listed in section 711.9(b) are illustrative of behavior or conditions that could cause a supervisor to question a PAP individual's ability to perform nuclear explosive duties in a safe and reliable manner. It is not possible to foreclose the possibility that a person would vindictively, or even falsely, provide derogatory information to a supervisor. It is important to recognize that temporary removal is a routine, but vital, protective measure to ensure the safety of personnel at these facilities. Moreover, under this final rule, temporary removal is followed by an elaborate process for fairly resolving concerns about an individual's suitability for the PAP.

Another commenter objected to proposed section 711.9(b)(2), concerning conduct "that is illegal or results in arrest or conviction," on the ground that DOE supervisors generally are not trained to determine what conduct is illegal. The commenter asked that the provision be limited to convictions. DOE has not accepted the suggestion to limit this provision to evidence of a conviction because an arrest for certain criminal activity could raise a concern about an individual's suitability for the PAP. However, DOE has revised section 711.9(b)(2) in the final rule by replacing the word "illegal" with the words "warrants referral for a criminal investigation." This change eliminates the requirement for a conclusion of law by the supervisor.

### 3. Procedures for Temporary Removal, Reinstatement in the PAP, and Denial or Revocation of PAP Certification

Two commenters objected to the omission in proposed section 711.12(b) of any deadline for completion of the PAP certifying official's evaluation and decision regarding the suitability of an individual who has been removed from nuclear explosive duties. DOE does not think it is desirable to place a time limit on the PAP certifying official's evaluation and suitability determination. The amount of time required to gather pertinent data and reach a decision regarding suitability for nuclear explosive duties will vary depending on the information or allegations that led to removal. DOE does not think the absence of a time limit will cause an individual to be in "limbo" for an extended time, as one commenter suggested. The need for the individual's services and the fact that removal does not affect the employee's pay or benefits are incentives for both the individual's employer and PAP officials to resolve the issues as quickly as possible.

Two commenters argued that an individual removed from nuclear explosive duties should be given a copy of the evaluation prepared by the PAP certifying official. The proposed section 711.12(d) already would require that the operations office manager prepare a written decision that includes the reasons and factual basis for the decision. DOE has revised the rule to clarify that the individual shall be given a copy of the operations office manager's reasons and factual support. Further, DOE has revised the rule to provide that an individual removed from nuclear explosive duties is entitled to a copy of the PAP certifying official's evaluation, unless the operations office manager determines that the release of that document or portions thereof, may be withheld under an exemption of the Privacy Act or the Freedom of Information Act.

Two commenters objected to proposed sections 711.12(g) and (h) because those provisions would require an individual who receives an initial decision from the operations office manager to choose either reconsideration by the operations office manager or a certification review hearing. In the commenters' view, an employee who chooses reconsideration is unfairly penalized by loss of the right to have a certification review hearing. DOE has not changed the rule in response to these comments because allowing individuals to request both reconsideration by the operations office

manager and a certification review hearing could unduly prolong the resolution of PAP certification issues.

The request for reconsideration provided in section 711.12(g)(2) and the certification review hearing under section 711.14 are dissimilar processes. The request for reconsideration procedure gives the individual an opportunity to provide to the operations office manager relevant information and statements on the matters in question. An individual may feel this opportunity is all that is needed, or may choose this informal process in order to obtain a quick administrative decision that, if unfavorable, could be challenged in a court proceeding. The certification hearing process, on the other hand, allows the individual to submit evidence on the relevant matters through presentation of witness testimony and cross-examination. Some individuals may decide that this option, although more costly, will be most effective in protecting their interests. An adverse decision resulting from either procedure may be appealed to the Assistant Secretary for Defense Programs and, ultimately, to a court. DOE believes the procedures established in the final rule adequately protect individual rights and, therefore, the final rule does not allow an individual to request both reconsideration and a certification review hearing.

A commenter objected to proposed section 711.14(c)(3), which permits the certification review hearing officer to receive and consider certain classified information that may be adverse to an individual without permitting the individual to cross-examine the source of the statement or information. These procedures, which are narrowly limited, originate in Executive Order No. 10865, "Safeguarding Classified Information Within Industry," reprinted as a note to 50 U.S.C. 435. They were included in the Personnel Assurance Program chapter of DOE Order No. 5610.11, "Nuclear Explosive Safety," and similar provisions are included in 10 CFR part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." DOE has retained section 711.14(c)(3) in the final rule because these exceptions to cross-examination are longstanding and necessary to protect the national security.

The same commenter objected to proposed section 711.15, which deals with the hearing officer's report and recommendation, because it does not make the hearing officer's submission binding on the operations office manager. The commenter argues that this process violates due process and

fundamental fairness. DOE has not changed the final rule to make the hearing officer's report and recommendation binding on the operations office manager under section 711.12(h). It is DOE's view that an evidentiary hearing presided over by an independent hearing officer, followed by an opportunity to appeal the operations office manager's decision to the Assistant Secretary for Defense Programs, constitutes a fair administrative process for resolving issues related to PAP certification.

### *B. Subpart B: Medical Assessments for PAP Certification/Recertification*

DOE received no public comments on proposed sections 711.20—711.34, which cover the general applicability, purpose and scope of subpart B, definitions, and responsibilities and authorities of PAP officials. DOE has, after further consideration, made a number of minor changes to these sections. These changes include moving the definitions from section 711.22 to section 711.3; adding "physical" to the list in section 711.21; and deleting the requirement to participate as a member of the hostage negotiation team from section 711.31(c)(6).

DOE proposed in section 711.40 general medical standards that must be met by individuals certified in the PAP. Proposed section 711.40 (a)—(f) lists conditions or behavior that may, depending on the results of a medical assessment, disqualify an individual from performing nuclear explosive duties. One commenter pointed out that inclusion of the word "past" in proposed section 711.40(c), referring to use of illegal drugs, conflicts with the 5-year rule established by section 711.5. DOE agrees with this comment and has revised section 711.40(c) accordingly.

DOE received one comment on proposed section 711.41, which would establish requirements applicable to the PAP medical assessment process. The commenter stated that proposed section 711.41(d), which would require use of a generally accepted, self-reporting psychological inventory tool every third year in recertification medical assessments, would be inconsistent with the 2-year cycle for medical assessments for protective force personnel under 10 CFR part 1046. DOE plans to propose amendments to part 1046 in the near future, and expects that any inconsistency created by adoption of a 3-year cycle in this final rule will be eliminated by that rulemaking. All personnel who currently meet the 2-year psychological testing requirements of part 1046, as it currently exists, will

meet the psychological testing requirements of this rule.

DOE proposed in section 711.42 requirements for detecting and acting with regard to positive indications of drug abuse. DOE received a comment on proposed section 711.42(d), which would provide that an individual whose certification has been revoked may be reinstated in the PAP if the person successfully completes a SOMD-approved drug rehabilitation program and is subject to SOMD-directed unannounced tests for illegal drugs and counseling for 3 years. The commenter stated that such random drug testing may not be allowed by local collective bargaining agreements. DOE has not changed section 711.42 because the restrictions on random drug testing at DOE sites in 10 CFR part 707 do not apply to the situation covered in this section of the rule. Under today's rule, an individual whose PAP certification is revoked may be reinstated in the PAP if he or she accepts the conditions of the SOMD-approved drug rehabilitation program. Section 711.42(d) establishes unannounced drug testing as a component of such a program and, in order to take advantage of the rehabilitation opportunity, the individual must agree to the testing.

DOE received comments on proposed section 711.44 concerning medical assessment for alcohol use disorder. DOE proposed provisions that would prohibit alcohol consumption by PAP individuals within the 8-hour period immediately preceding nuclear explosive duties, and bar an individual from performing nuclear explosive duties for a minimum of 24 hours if a confirmatory breath alcohol test (BAT) result is at or above 0.02 percent alcohol concentration. These provisions are consistent with regulations promulgated by certain operating agencies of the Department of Transportation (DOT) to implement the Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, Title V. See, e.g., the Federal Highway Administration's requirements in 49 CFR 382.505(b).

Commenters representing security guards stated that they have no objection to the prohibition on alcohol consumption during the 8-hour period preceding scheduled work. However, they strongly oppose enforcing the rule against employees who are required by their employer to report to work without advance notice. According to these commenters, the 8-hour "no drinking" rule, coupled with the prohibition on working for 24 hours if the BAT exceeds 0.02 percent, would impair the ability of employers to meet staffing requirements. The President of the

Independent Guard Association of Nevada testified in a public hearing on the rule that, according to the medical department of a DOE prime contractor, a 225-pound person who stops drinking at 7:00 p.m. after having consumed three beers earlier on the same day could have an alcohol concentration of 0.02 percent at 6:00 a.m. the following day. Thus, if that person were forced to report for work early the second day, he or she would be taken off the work schedule for 24 hours even though the individual was not impaired. Transcript of Las Vegas Hearing, page 8 (testimony of Michael Cleghorn). Written comments suggested that employees could easily avoid unscheduled overtime work by drinking intentionally. This, they stated, would cause severe problems for employers because downsizing of protective forces limits their ability to find replacements.

DOE agrees with the commenters that it would be inappropriate to enforce an 8-hour "no drinking" rule against employees who are called up for unscheduled work. Therefore, the final rule is revised to limit its application to scheduled work. DOE will rely on breath alcohol testing under revised section 711.44(c) to ensure that employees required to report for unscheduled work do not exceed permissible alcohol concentration levels.

DOE does not agree with commenters that the 0.02 percent alcohol concentration standard is too rigid and not indicative of possible impairment. On February 15, 1994, DOT operating agencies promulgated alcohol testing regulations for the aviation, motor carrier, rail, transit, and pipeline transportation industries. The common preamble that DOT published for those rules discusses research and recommendations regarding the effects of blood alcohol that have been produced by expert bodies, including the National Highway Transportation Safety Administration, the National Transportation Safety Board, the National Academy of Sciences, and the Transportation Research Board. Common Rule, Final Rules on Limitation of Alcohol Use by Transportation Workers, 59 FR 7302, 7318-19 (Feb. 15, 1994). DOT concluded from this body of knowledge that while impairment of performance of safety-sensitive functions was clearly increased above 0.04 percent alcohol concentration, there was evidence of some impairment at levels as low as 0.02, the lowest level that can be reliably measured. Alcohol affects individuals differently and some individuals are impaired by any blood

alcohol. DOT, based on this evidence, adopted a standard that requires removal of an employee from a safety-sensitive position at any alcohol concentration of 0.02 percent or greater. The job tasks performed by individuals assigned nuclear explosive duties, including protective force personnel, are just as safety-sensitive as jobs performed by workers in the transportation industries. Therefore, DOE retains the 0.02 standard in the final rule.

In the final rule, DOE responds to the commenters' staffing concerns by providing more flexibility for dealing with employees who report for unscheduled work and test above 0.02 percent alcohol concentration. As proposed, section 711.44(e) would provide that an individual whose confirmatory BAT result is at or above 0.02 percent shall not be allowed to perform nuclear explosive duties for a minimum of 24 hours. In the final rule, DOE has renumbered proposed section 711.44(e) as section 711.44(f) and revised it to provide that in the case of unscheduled work, an employee whose test result is at or above 0.02 percent will be given the opportunity—but will not be required—to take another test when it is expected that the BAT would produce a result below the 0.02 percent alcohol concentration level. The employee then will be permitted to perform nuclear explosive duties if a result below 0.02 percent is obtained. DOE believes this approach will alleviate the problem envisioned by the commenters.

One commenter sought guidance on the identity and qualifications of persons who conduct breath alcohol testing of PAP individuals. The final rule specifies that alcohol tests are to be administered by a certified technician using an evidential-grade breath analysis device that conforms to National Highway Traffic Safety Administration model specifications for devices approved for use at the 0.02/0.04 percent concentration levels. DOE received comments recommending greater restrictions on the persons who conduct alcohol testing, but the commenter did not provide any evidence or factual support that would warrant additional restrictions.

In the final rule, DOE has added a new section 711.44(g) to clarify that PAP individuals whose jobs require commercial drivers licenses continue to be subject to DOT regulations on misuse of alcohol. They are subject to sanctions in regulations promulgated by the Federal Highway Administration, but DOE will take disciplinary action against such employees under its own authority.

Proposed section 711.45 sets forth requirements that apply to maintenance of medical records. DOE received comments from the U.S. Equal Employment Opportunity Commission (EEOC) on this section. At the request of the EEOC, DOE has revised proposed section 711.45(a) to clarify the long standing DOE practice that medical records must be kept separate from other personnel records. DOE also has added language to section 711.45(b), which was recommended by EEOC, to refer to the possible application to DOE contractors of the Americans with Disabilities Act and section 503 of the Rehabilitation Act, including the confidentiality provisions in the Department of Labor's implementing regulations. In addition, section 711.45(c)(3) provides that psychological records must be kept separate from other medical records.

### III. Procedural Issues and Regulatory Review

#### A. Review Under Executive Order 12866

Today's regulatory action has been determined not to be a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993). Accordingly, this rulemaking has not been reviewed by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

#### B. Review Under Executive Order 12612

Executive Order 12612, "Federalism," 52 FR 41685 (October 30, 1987) requires that regulations, rules, legislation, and other policy actions be reviewed for any substantial direct effect on States, on the relationship between the National Government and the States, or in the distribution of power and responsibilities among various levels of government. If there are substantial effects, then the Executive Order requires the preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing policy action. The Department has analyzed this rulemaking in accordance with the principles and criteria contained in Executive Order 12612, and has determined there are no federalism implications that would warrant the preparation of a federalism assessment. The rule published today will apply to DOE and DOE contractor personnel employed at defense nuclear facilities. It will not have a substantial direct effect on States, the relationship between the States and Federal Government, or the distribution of power and

responsibilities among various levels of government.

#### C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601-612, requires preparation of an initial regulatory flexibility analysis for every rule which by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. Today's rule will affect a total of approximately 3,300 DOE and DOE contractor employees working at Government-owned or leased facilities. Only a small number of the employees work for a small entity. In addition, the DOE is formalizing a program that has been in place at DOE nuclear explosive facilities for over 30 years, so the economic impact of this proposed rule would be negligible. DOE certified in the notice of proposed rulemaking that the rule would not, if promulgated, have a significant economic impact on a substantial number of small entities. Public comment on this issue was invited, but none was received. DOE affirms its certification that the rule will not have a significant economic impact on a substantial number of small entities.

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

The final rule codifies and amends the PAP program, which has been in existence pursuant to DOE directives for approximately 30 years, and it relates to personnel qualifications that will have no impact on the environment. Categorical exclusions in the Department's regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq., apply to this rulemaking. The applicable categorical exclusions are A1 and A5 in Appendix A to Subpart D, 10 CFR part 1021. The Department has therefore determined that neither an environmental assessment nor an environmental impact statement is required for this rulemaking.

#### E. Review Under the Paperwork Reduction Act

This rule does not contain a collection of information that requires the approval of the 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 1320.3(h)(1).

#### F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, Civil Justice Reform, 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. 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

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531 et seq., requires a federal agency to perform a detailed assessment of the costs and benefits of any rule imposing a federal mandate with costs to state, local or tribal governments, or to the private sector, of \$100 million or more. This final rule codifies existing procedures and standards that relate to certification of DOE personnel and DOE contractor personnel for nuclear explosive duties at DOE facilities. The rule does not impose a federal mandate requiring preparation of an assessment under the Unfunded Mandate Reform Act of 1995.

#### H. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress promulgation of this final 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 in 10 CFR Part 711**

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

Issued in Washington, DC on August 31, 1998.

**Victor H. Reis,**

*Assistant Secretary for Defense Programs.*

For the reasons set forth in the preamble, Chapter III of title 10 of the Code of Federal Regulations is amended by adding new Part 711 to read as set forth below:

**PART 711—PERSONNEL ASSURANCE PROGRAM (PAP)****Subpart A—PAP Certification/Recertification, Temporary Removal/Reinstatement, and Revocation of PAP Certification****SEC.**

- 711.1 Purpose.
- 711.2 Applicability.
- 711.3 Definitions.
- 711.4 General.
- 711.5 General requirements.
- 711.6 PAP certification process.
- 711.7 Maintenance of PAP personnel list.
- 711.8 PAP training requirements.
- 711.9 Supervisor reporting.
- 711.10 Individual reporting.
- 711.11 Immediate removal from nuclear explosive duties.
- 711.12 Action following removal from duties.
- 711.13 Appointment of a certification review hearing officer and legal counsel.
- 711.14 Certification review hearing.
- 711.15 Hearing officer's report and recommendation.
- 711.16 Appeal of the operations office manager's final decision.

**Subpart B—Medical Assessments for PAP Certification/Recertification General Provisions**

- 711.20 Applicability.
- 711.21 Purpose and scope.

**Responsibilities and Authorities**

- 711.30 Designated physician.
- 711.31 Designated psychologist.
- 711.32 Site Occupational Medical Director (SOMD).
- 711.33 Director, Office of Occupational Medicine and Medical Surveillance.
- 711.34 Operations office managers; Director, Transportation Safeguards Division.

**Medical Assessment Process and Standards**

- 711.40 Medical standards for certification.
- 711.41 Medical assessment process.
- 711.42 Medical assessment for drug abuse.
- 711.43 Evaluation of hallucinogen use.
- 711.44 Medical assessment for alcohol use disorder.
- 711.45 Maintenance of medical records.

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

**Subpart A—PAP Certification/Recertification, Temporary Removal/Reinstatement, and Revocation of PAP Certification****§ 711.1 Purpose.**

The purpose of this part is to establish a Personnel Assurance Program (PAP) in DOE. The PAP is a human reliability program designed to ensure that individuals assigned to nuclear explosive duties do not have emotional, mental, or physical incapacities that could result in a threat to nuclear explosive safety. The PAP establishes the requirements and responsibilities for screening, selecting, and continuously evaluating employees assigned to or being considered for assignment to nuclear explosive duties.

**§ 711.2 Applicability.**

(a) This part applies to DOE Headquarters and field elements and DOE contractors that manage, oversee, or conduct nuclear explosive operations and associated activities, and to DOE and DOE contractor employees assigned to nuclear explosive duties.

(b) This part does not apply to responses to unplanned events (e.g., Accident Response Group activities), which are addressed in DOE 5530-Series Orders and DOE Order 151.1, "Comprehensive Emergency Management System."

**§ 711.3 Definitions.**

The following definitions are used in this part:

**Access** means proximity to a nuclear explosive that affords a person the opportunity to tamper with it or to cause it to detonate.

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

**Certification** means the formal action the PAP certifying official takes which permits an individual to be placed in the PAP and perform PAP duties. This action is taken once it has been determined an individual meets the requirements for certification under this part.

**Contractor** means the contractor and subcontractors at all tiers.

**Designated physician** means a licensed doctor of medicine or osteopathy who has been nominated by the SOMD and, with the concurrence of the Director, Office of Occupational Medicine and Medical Surveillance, approved by the operations office

manager, to provide professional expertise in the area of occupational medicine as it relates to the PAP.

**Designated psychologist** means a licensed Ph.D. or Psy.D. clinical psychologist who has been nominated by the SOMD and, with the concurrence of the Director, Office of Occupational Medicine and Medical Surveillance, approved by the operations office manager, to provide professional expertise in the area of psychological assessment as it relates to the PAP.

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

**Director, Office of Occupational Medicine and Medical Surveillance**, means the chief occupational medical officer of the DOE with responsibility for policy and quality assurance for DOE occupational medical programs.

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

**Flashback** means a transient, spontaneous, and often unpredictable recurrence of aspects of a person's use of a hallucinogen that involves dramatic alteration of emotional state, perception, sensation, and behavior.

**Hallucinogen** means any hallucinogenic drug or substance that has the potential to cause flashbacks.

**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 drug" does not apply to the use of a controlled substance in accordance with the terms of a valid prescription, or other uses authorized by Federal law.

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

**Job task analysis** means a statement outlining the essential functions of a job and the potential exposures and hazards of an individual's specific job.

**Medical assessment** means an evaluation of a PAP individual's present health status and health risk factors by means of: (1) a medical history review; (2) the job task analysis; (3) a physical examination; (4) appropriate laboratory tests and measurements; and (5) appropriate psychological and psychiatric evaluations.

**Medical Review Officer (MRO)** means a licensed doctor of medicine or osteopathy who has knowledge of illegal drug use and other substance abuse disorders and has appropriate medical training to interpret drug test results.



The MRO may also be the designated physician and/or SOMD.

**Nuclear explosive** means an assembly containing fissionable and/or fusionable materials and main charge high explosive parts or propellants capable of producing a nuclear detonation (e.g., a nuclear weapon or test device).

**Nuclear explosive area** means any area that contains a nuclear explosive or collocated pit and main charge high explosive parts.

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

**Occupational medical program** means a DOE program that: (1) assists in the maintenance, monitoring, protection, and promotion of employee health through the skills of occupational medicine, psychology, and nursing; and (2) maintains a close interface with allied health disciplines, including industrial hygiene, health physics, and safety.

**Operations office manager** means the manager of a DOE operations office.

**PAP certifying official or certifying official** means the operations office manager or the manager's designee who certifies, recertifies, or reviews the circumstances of an individual's removal from nuclear explosive duties.

**PAP individual** means an individual being considered for assignment or assigned to perform nuclear explosive duties.

**PAP official** means any DOE employee who is involved in the PAP as a manager or supervisor or involved in the certification/recertification process.

**Recertification** means the formal action the PAP certifying official takes annually, not to exceed 12 months, which permits an individual to remain in the PAP and perform PAP duties. This action is taken once it has been determined an individual still meets the requirements of this part.

**Reinstatement** means the action the PAP certifying official takes once it has been determined an individual who has been temporarily removed from the PAP meets the certification requirements of this part and can be returned to the PAP and PAP duties.

**Semi-structured interview** means an interview by a designated psychologist who has the latitude to vary the focus and content of the questions depending upon the interviewee's responses.

**Site Occupational Medical Director/SOMD** means the physician responsible for the overall direction and operation of the site occupational medical program.

#### § 711.4 General.

(a) PAP certification is required of each individual assigned to nuclear explosive duties in addition to any other job qualification requirements that may apply.

(b) Nothing in this part shall be construed as prohibiting contractors from establishing stricter employment standards for employees who are nominated to DOE for certification or recertification in the PAP.

(c) The failure of an individual to be certified or recertified in the PAP shall not, in itself, reflect on the individual's suitability for assignment to other duties or, in itself, be a cause for loss of pay or other benefits or other changes in employment status.

(d) Personnel management actions based on consideration of technical competence and other job qualification requirements shall be considered only if they are based on behavior that also affects an individual's suitability for the PAP.

(e) Except for the functions in § 711.12 (d), (e) and (h), an operations office manager may delegate PAP functions to a deputy manager, assistant manager, division director, and/or area office manager.

#### § 711.5 General requirements.

(a) Each PAP individual shall be certified in the PAP before being assigned to nuclear explosive duties and shall be recertified annually, not to exceed 12 months between recertifications.

(b) To be certified or recertified in the PAP, an individual shall:

(1) Have an active DOE Q access authorization based upon a background investigation;

(2) Sign an acknowledgment and agreement to participate in the PAP on a form provided by DOE;

(3) Be interviewed and briefed on the importance of the nuclear explosive duty assignment and PAP objectives and requirements.

(4) Successfully complete an annual medical assessment for certification and recertification in accordance with Subpart B of this part;

(5) Not have used any hallucinogen in the preceding 5 years and shall not have experienced a flashback resulting from the use of any hallucinogen more than 5 years before applying for certification or recertification;

(6) If a DOE employee, be tested for illegal drugs at least once each calendar year in an unannounced and unpredictable manner under DOE Order 3792.3, "Drug-Free Federal Workplace Testing Implementation Program," and be subject to testing for cause or

reasonable suspicion or after an accident or an unsafe practice involving the individual and;

(7) If a DOE contractor employee, be tested for illegal drugs at least once each calendar year in an unannounced and unpredictable manner under 10 CFR part 707, "Workplace Substance Abuse Programs at DOE Sites," and be subject to testing for cause or reasonable suspicion or after an accident or an unsafe practice involving the individual.

(c) If an individual in the PAP refuses to submit a urine sample for illegal drug testing or attempts deception by substitution, adulteration, or other means, DOE immediately shall remove the individual from nuclear explosive duties.

(d) An individual will be denied PAP certification, or shall have his or her certification revoked, immediately, if use of an illegal drug is confirmed through drug testing, as provided in § 711.42 of Subpart B.

(e) An individual whose PAP certification is revoked for the use of illegal drugs will be considered for reinstatement in the PAP if the individual successfully completes an SOMD approved drug rehabilitation program, as provided in § 711.42 of Subpart B and a PAP position is available for which the individual is qualified.

(f) If an individual chooses not to participate in the PAP, he or she shall sign a refusal of consent form provided by DOE.

#### § 711.6 PAP certification process.

(a) The PAP certifying official shall determine each PAP individual's suitability for certification or recertification in the PAP and review the circumstances concerning an individual's removal from nuclear explosive duties and possible reinstatement.

(b) Operations office managers who exercise jurisdiction over PAP certification shall issue instructions for implementing the PAP. At a minimum, the instructions shall provide for:

(1) Conducting a supervisory interview of each PAP individual, during which the supervisor shall determine the individual's willingness to accept the requirements and conditions of the PAP;

(2) Ensuring that each PAP individual undergoes a medical assessment under subpart B of this part;

(3) Ensuring that the personnel security file (PSF) of each PAP individual is reviewed by a DOE employee trained to identify PAP



concerns before the individual is certified or recertified;

(4) Ensuring that other available personnel data or information about each PAP individual is reviewed by an employee trained to identify PAP concerns before the individual is certified or recertified;

(5) Allowing the exchange of information about a PAP individual among responsible DOE officials during the certification, recertification, or certification review process. Any mental or behavioral issues which could impact an individual's ability to perform PAP duties may be provided to the SOMD, designated physician, and/or designated psychologist who have been previously identified for receipt of this information by the operations office manager or designee. In rare instances when information from an employee's PSF may be relevant, such information may be shared only with prior written approval of the manager or his/her designee. The Director, Office of Security Affairs, must be notified of the manager's decision to share PSF information, as well as the specific information provided and a brief summary of the circumstances. This notice should be provided as soon as practicable. Contractor medical personnel will not be allowed to view the PSF. Contractor medical personnel must not share any information obtained from the PSF with anyone who is not a DOE PAP official;

(6) Requesting certification or recertification of a contractor employee when the contractor has determined, on the basis of all available information, that the individual is suitable for the PAP. The contractor requesting certification or recertification shall, in writing, assure the PAP certifying official that all PAP certification requirements have been met;

(7) Addressing any requirement not met during the certification/recertification process, and requiring a contractor to provide any additional personal data or information in its possession that may have a bearing on the certification/recertification of an individual;

(8) Documenting certification and recertification of each PAP individual on a form provided by DOE;

(9) Developing a mechanism for co-workers, supervisors, and managers to communicate concerns about a PAP individual's suitability for nuclear explosive duties;

(10) Ensuring that PAP concerns are reported to an appropriate official, as specified in §§ 711.9 and 711.10, for timely resolution;

(11) Providing that the processing of a request for certification or recertification of an individual is terminated if the individual is no longer being considered for assignment to nuclear explosive duties or is no longer assigned to such duties. If, subsequently, the individual is considered for assignment to nuclear explosive duties, the certification or recertification process must be completely redone; and

(12) Using recertification to return an individual whose certification has exceeded 12 months, and thus expired, to the PAP, once it has been determined an individual still meets the requirements of this part.

#### **§ 711.7 Maintenance of PAP personnel list.**

Operations office managers who exercise jurisdiction over PAP certification and recertification shall establish procedures for developing and maintaining a current list of DOE and contractor personnel certified in the PAP. The list is to be used for program administration and is not an authorization for personnel to perform nuclear explosive duties. The list shall be promptly updated and verified on a quarterly basis under the supervision of the operations office manager.

#### **§ 711.8 PAP training requirements.**

(a) Operations office managers shall ensure that each individual who is assigned to nuclear explosive duties receives special training in PAP objectives, policies, and requirements.

(b) Operations office managers shall ensure that DOE and contractor supervisory personnel and PAP certifying officials receive training that includes:

(1) A detailed explanation of nuclear explosive duties and nuclear explosive safety;

(2) Instruction on PAP objectives, policies, and requirements;

(3) Instruction on the early identification of behavior that may indicate a degradation in reliability or judgment; and

(4) Special emphasis on the importance of timely reporting of any PAP concern to appropriate personnel.

(c) Operations office managers shall ensure that medical personnel who perform medical assessments receive, before performing PAP responsibilities, training that includes:

(1) A detailed explanation of nuclear explosive duties and nuclear explosive safety;

(2) Instruction on PAP objectives, policies, and requirements;

(3) An orientation on nuclear explosive duties and the work

environment applicable to that of the PAP employee;

(4) Annual professional training on current issues and concerns relative to psychological assessment; and

(5) Special emphasis on the importance of timely reporting of any PAP concern to appropriate personnel.

(d) Operations office managers shall establish and maintain a system for documenting the training received by PAP-certified individuals, supervisors of PAP personnel, and medical personnel with PAP-related duties.

#### **§ 711.9 Supervisor reporting.**

(a) Supervisors shall document and report to a PAP official and the SOMD, if appropriate, any observed or reported behavior or condition of an individual that causes the supervisor to have a reasonable belief that the individual's ability to perform assigned tasks in a safe and reliable manner may be impaired.

(b) Behavior and conditions that could indicate unsuitability for the PAP include, but are not limited to, the following:

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

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

(3) Indications of deceitful or delinquent behavior;

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

(5) Suicidal tendencies or attempted suicide;

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

(7) Alcohol use disorder;

(8) Recurring financial irresponsibility;

(9) Irresponsibility in performing assigned duties;

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

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

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

#### **§ 711.10 Individual reporting.**

(a) An individual in the PAP shall report any observed or reported behavior or condition of another PAP individual that could indicate the individual's unsuitability for nuclear explosive duties, including the behaviors and conditions listed in

§ 711.9, to a supervisor, the SOMD, or other PAP official.

(b) An individual in the PAP shall report any behavior or condition, including any behavior or condition listed in § 711.9, that may affect his or her own suitability for nuclear explosive duties to a supervisor, the SOMD, or other PAP official.

**§ 711.11 Immediate removal from nuclear explosive duties.**

(a) A supervisor who has a reasonable belief that an individual in the PAP is not suitable for nuclear explosive duties shall immediately remove that individual from those duties pending a determination of the individual's suitability. The supervisor shall, at a minimum:

(1) Require the individual to stop performing nuclear explosive duties;

(2) Take action to ensure the individual is denied access to nuclear explosive areas; and

(3) Notify the individual, in writing, the reason for these actions.

(b) A supervisor who removes an individual from nuclear explosive duties shall notify the PAP certifying official of the action and the reasons that led to the removal of the individual from nuclear explosive duties as soon as possible, and shall forward this information, in writing, to the PAP certifying official within 24 hours from the time the individual is removed from duties.

(c) Immediate removal of an individual from nuclear explosive duties is an interim, precautionary action and does not constitute a determination that the individual is not fit for nuclear explosive duties. Removal from nuclear explosive duties shall not, in itself, be cause for loss of pay or other benefits or other changes in employment status.

**§ 711.12 Action following removal from duties.**

(a) *Temporary removal.* If a PAP certifying official receives a supervisor's written notice of the immediate removal of an individual from nuclear explosive duties, the certifying official shall direct the removal of the individual from PAP duties pending an evaluation and determination regarding the individual's suitability for nuclear explosive duties. The applicable DOE personnel security office shall be notified if removal is based on a security concern.

(b) *Evaluation.* The PAP certifying official shall conduct an evaluation of the circumstances or information that led the supervisor to remove the individual from nuclear explosive duties. The PAP certifying official shall

prepare a written report of the evaluation that includes the certifying official's determination regarding the individual's suitability for continuing PAP certification.

(c) *PAP certifying official's action.* (1) If the PAP certifying official determines that an individual who has been removed temporarily from nuclear explosive duties continues to meet the requirements for certification in the PAP, the certifying official shall:

(i) Notify the operations office manager of the determination; and

(ii) Notify the individual's supervisor of the determination and direct that the individual be allowed to return to nuclear explosive duties.

(2) If the PAP certifying official determines that an individual who has been temporarily removed from PAP duties does not meet the requirements for certification, the certifying official shall refer the matter to the operations office manager for action. The certifying official shall submit the evaluation report to the operations office manager and a recommendation that the individual's PAP certification be revoked.

(d) *Operations office manager's initial decision.* After receipt of a PAP certifying official's evaluation report and recommendation for revoking an individual's PAP certification, the operations office manager shall take one of the following actions:

(1) Direct that the individual be reinstated in the PAP and, in writing, explain the reasons and factual basis for the action;

(2) Direct the revocation of the individual's PAP certification and, in writing, explain the reasons and factual basis for the decision; or

(3) Direct continuation of the temporary removal pending completion of specified actions (e.g., medical assessment, security evaluation, treatment) to resolve the concerns about the individual's suitability for the PAP.

(e) In the event of a revocation, pursuant to § 711.12(d)(2), or suspension pursuant to § 711.12(d)(3), the operations office manager shall provide the individual a copy of the PAP certifying official's evaluation report. The manager may withhold such report, or portions thereof, to the extent that he/she determines that the report, or portions thereof, may be exempt from access by the individual under the Privacy Act or the Freedom of Information Act.

(f) *Reinstatement after completion of specified actions.* An individual directed by the operations office manager to take specified actions to resolve PAP concerns shall be

reevaluated by the certifying official after those actions have been completed. After considering the PAP certifying official's evaluation report and recommendation, the operations office manager shall direct either:

(1) Reinstatement of the individual in the PAP; or

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

(g) *Notification of operations office manager's initial decision.* The operations office manager shall send by certified mail, return receipt requested, a written decision, including rationale, to an individual who is denied certification or recertification. The operations office manager's decision shall be accompanied by notification to the individual, in writing, of the procedures in paragraph (g) of this section and §§ 711.14—711.16 pertaining to reconsideration or a hearing on the operation office manager's decision.

(h) *Request for reconsideration or certification review hearing.* An individual who receives notification of an operation office manager's decision to deny or revoke his or her PAP certification may choose one of the following options:

(1) Take no action;

(2) Submit a written request to the operations office manager for reconsideration of the decision to deny or revoke certification. The request shall include the individual's response to any information that gave rise to a concern about the individual's suitability for nuclear explosive duties. The statement shall be signed under oath or affirmation before a notary public, and must be sent by certified mail to the operations office manager within 20 working days after the individual received notice of the operations office manager's decision; or

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

(i) *Operations office manager's decision after reconsideration or hearing.* (1) If an individual requests reconsideration by the operations office manager but not a certification review hearing, the operations office manager shall, within 20 working days after receipt of the individual's request, send by certified mail, return receipt requested, to the individual a final decision as to suitability based upon the individual's response and other relevant

information available to the operations office manager.

(2) If an individual requests a certification review hearing, the operations office manager shall decide the matter after receipt of the certification review hearing officer's report and recommendation, as provided in § 711.15. The operations office manager shall, within 20 working days after receiving the hearing officer's report and recommendation, send by certified mail, return receipt requested, the operations office manager's final decision to the individual, accompanied by a copy of the hearing officer's report and recommendation, and the transcript of the certification review proceedings.

**§ 711.13 Appointment of a certification review hearing officer and legal counsel.**

(a) After receiving an individual's request for a certification review hearing, the operations office manager shall promptly appoint a certification review hearing officer. The hearing officer shall:

(1) Be a DOE attorney or a hearing official from the DOE Office of Hearings and Appeals and have a DOE Q access authorization; and

(2) Have no prior involvement in the matter or be directly supervised by any person who is involved in the matter.

(b) The operations office manager shall also appoint a DOE attorney as counsel for DOE, who shall assist the hearing officer by:

(1) Obtaining evidence;

(2) Arranging for the appearance of witnesses;

(3) Examining and cross-examining witnesses; and

(4) Notifying the individual in writing, at least 7 working days in advance of the hearing, of the scheduled place, date, and hour where the hearing will take place.

**§ 711.14 Certification review hearing.**

(a) The certification review hearing officer shall conduct the proceedings in an orderly and impartial manner to protect the interests of both the Government and the individual.

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

(c) In conducting the proceedings, the certification review hearing officer shall:

(1) Receive all information relating to the individual's fitness for PAP

certification through witnesses or documentation;

(2) Ensure that the individual is permitted to offer information in his or her behalf; to call, examine, and except as provided in paragraph (c)(3) of this section, cross-examine witnesses and other persons who have made written or oral statements, and to present and examine documentary evidence;

(3) Have the option to receive and consider oral or written statements adverse to the individual without affording the individual the opportunity to cross-examine the person making the statement in either of the following circumstances:

(i) The substance of the statement was contained in the individual's personnel security file and the head of the Federal agency supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government, and that the disclosure of that person's identity would substantially harm the national security; or

(ii) The substance of the statement was contained in the individual's personnel security file and the Assistant Secretary for Defense Programs or designee for that particular purpose has determined, after considering information furnished by the investigative agency concerning the reliability of the person and the accuracy of the statement, that —

(A) The statement appears to be reliable and material;

(B) Failure of the hearing officer to receive and consider such statement would substantially harm the national security; and

(C) The person who furnished the information cannot appear to testify due to death or severe illness, or due to some other good cause as determined only by the Assistant Secretary for Defense Programs;

(4) Ensure that if the procedures in paragraph (c)(3) of this section are used, the individual is given a description of the information, which shall be as comprehensive and detailed as the national security permits. In addition, if a statement is received under paragraph (c)(3)(ii) of this section, the identity of the person making the statement and the information to be considered shall be made available to the individual. The hearing officer shall give appropriate consideration to the fact that the individual did not have an opportunity to cross-examine such person;

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

(6) Request that the Assistant Secretary for Defense Programs issue subpoenas for witnesses to attend the hearing or for the production of specific documents or other physical evidence; and

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

**§ 711.15 Hearing officer's report and recommendation.**

Not later than 30 working days after the conclusion of the hearing, the certification review hearing officer shall forward written findings, a supporting statement of reasons, and recommendation regarding the individual's suitability for certification or recertification in the PAP to the operations office manager. The hearing officer's report and recommendation shall be accompanied by a copy of the record of the proceedings.

**§ 711.16 Appeal of the operations office manager's final decision.**

(a) An individual who has been denied PAP certification or recertification, or whose certification has been revoked, may appeal the operations office manager's decision to the Assistant Secretary for Defense Programs. The appeal must be sent to the Assistant Secretary for Defense Programs, by certified mail, no later than 20 working days after the individual receives the operations office manager's decision.

(b) An individual who appeals an operations office manager's decision to the Assistant Secretary for Defense Programs must submit the appeal and a written supporting statement to the Assistant Secretary for Defense Programs through the operations office manager and the Deputy Assistant Secretary for Military Application and Stockpile Management. The individual must also submit:

(1) A copy of the operations office manager's final decision and any related documentation; and

(2) If a certification review hearing was conducted, a copy of the hearing officer's report and recommendation and the record of the proceedings.

(c) Within 20 working days of the receipt of an individual's appeal and supporting documents, the Assistant Secretary for Defense Programs shall review all of the information and issue a written decision in the matter. The decision of the Assistant Secretary for Defense Programs shall be final for DOE.

(d) If an individual does not appeal to the Assistant Secretary for Defense Programs within the time specified in paragraph (a) of this section, the

operations office manager's decision shall be the final decision.

## **Subpart B—Medical Assessments for PAP Certification and Recertification**

### **General Provisions**

#### **§ 711.20 Applicability.**

The purpose of this subpart is to establish standards and procedures for conducting medical assessments of DOE and DOE contractor employees in the PAP.

#### **§ 711.21 Purpose and scope.**

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

(a) Identify the presence of any mental, emotional, physical, or behavioral characteristics or conditions that present or are likely to present an unacceptable impairment in judgment, reliability, or fitness of an individual to perform nuclear explosive duties safely and reliably;

(b) Facilitate the early diagnosis and treatment of disease or impairment and to foster accommodation and rehabilitation of a disabled individual with the intent of returning the individual to assigned nuclear explosive duties;

(c) Determine what functions an employee may be able to perform and to facilitate the proper placement of employees; and (d) Provide for continuing monitoring of the health status of employees in order to facilitate early detection and correction of adverse health effects, trends, or patterns.

### **Responsibilities and Authorities**

#### **§ 711.30 Designated physician.**

(a) The designated physician shall be qualified to provide professional expertise in the area of occupational medicine as it relates to the PAP. The designated physician may serve in other capacities, including Medical Review Officer.

(b) The designated physician shall:

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

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

(3) Have met the applicable PAP training requirements; and (4) Be eligible for DOE access authorization.

(c) The designated physician shall be responsible for the medical assessments of PAP individuals, including determining which components of the medical assessments may be performed by other qualified personnel. Although

a portion of the assessment may be performed by another physician, physician's assistant, or nurse practitioner, the designated physician remains responsible for:

(1) Supervising the evaluation process;

(2) Interpreting the results of evaluations;

(3) Documenting medical conditions that may disqualify an individual from the PAP;

(4) Providing medical assessment information to the designated psychologist to assist in determining psychological fitness;

(5) Determining, in conjunction with DOE, if appropriate, the location and date of the next required medical assessment, thereby establishing the period of certification; and (6) Signing a recommendation as to the medical fitness of an individual for certification or recertification.

(d) The designated physician shall immediately report to the SOMD any of the following about himself or herself:

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

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

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

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

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

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

#### **§ 711.31 Designated psychologist.**

(a) The designated psychologist shall report to the SOMD and shall determine the psychological fitness of an individual to participate in the PAP. The results of this evaluation shall be provided only to the designated physician or the SOMD.

(b) The designated psychologist shall:

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

(2) Have accumulated a minimum of 3 years postdoctoral clinical experience with a major emphasis in psychological assessment;

(3) Have a valid, unrestricted state license to practice clinical psychology

in the state where PAP medical assessments occur;

(4) Have met the applicable PAP training requirements; and

(5) Be eligible for DOE access authorization.

(c) The designated psychologist shall be responsible for the performance of all psychological evaluations of PAP individuals, and otherwise as directed by the SOMD. In addition, the designated psychologist shall:

(1) Designate which components of the psychological evaluation may be performed by other qualified personnel;

(2) Upon request of management, assess the psychological fitness of personnel for PAP duties in specific work settings and recommend referrals as indicated;

(3) Conduct and coordinate educational and training seminars, workshops, and meetings to enhance PAP individual and supervisor awareness of mental health issues;

(4) Establish personal workplace contact with supervisors and workers to help them identify psychologically distressed PAP individuals; and

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

(d) The designated psychologist shall immediately report to the SOMD any of the following about himself or herself:

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

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

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

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

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

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

#### **§ 711.32 Site Occupational Medical Director (SOMD).**

(a) The SOMD shall nominate a physician to serve as the designated physician and a clinical psychologist to serve as the designated psychologist. The nominations shall be sent through the operations office to the Director, Office of Occupational Medicine and Medical Surveillance. Each nomination shall describe the nominee's relevant

training, experience, and licensure, and shall include a curriculum vitae and a copy of the nominee's current state or district license.

(b) The SOMD shall submit a renomination report biennially through the operations office manager to the Director, Office of Occupational Medicine and Medical Surveillance. This report shall be submitted at least 60 days before the second anniversary of the initial designation or of the last redesignation, whichever applies. The report shall include:

(1) A statement evaluating the performance of the designated physician and designated psychologist during the previous designation period;

(2) A summary of all PAP-relevant training, including postgraduate education, that the designated physician and designated psychologist has completed since the last designation; and

(3) A copy of the valid, unrestricted state or district license of the designated physician and designated psychologist.

(c) The SOMD shall submit, annually, to the Director, Office of Occupational Medicine and Medical Surveillance, through the operations office manager, a written report summarizing PAP medical activity during the previous year. The SOMD shall comply with any DOE directives specifying the form or contents of the annual report.

(d) The SOMD shall investigate any reports of problems regarding a designated physician or designated psychologist, and the SOMD may suspend either official from PAP-related duties. If the SOMD suspends either official, the SOMD shall notify the Director, Office of Occupational Medicine and Medical Surveillance and the operations office manager, and provide supporting documentation and reasons for the action.

**§ 711.33 Director, Office of Occupational Medicine and Medical Surveillance.**

The Director, Office of Occupational Medicine and Medical Surveillance, shall:

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

(b) Review the qualifications of designated physicians and designated psychologists, and concur or nonconcur in their designations by sending a statement to the responsible program office and the operations office, with an informational copy to the SOMD;

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

(d) Concur or nonconcur with the medical bases of decisions rendered on appeals of PAP certification decisions.

**§ 711.34 Operations office managers; Director, Transportation Safeguards Division.**

Operations office managers and the Director, Transportation Safeguards Division, shall approve, upon the nomination of the SOMD and concurrence of the Director, Office of Occupational Medicine and Medical Surveillance, physicians and psychologists to serve as designated physicians and designated psychologists.

**Medical Assessment Process and Standards**

**§ 711.40 Medical standards for certification.**

To be certified in the PAP, an individual shall be free of any mental, emotional, or physical condition or behavioral characteristics or conditions that present or are likely to present an unacceptable impairment in judgement, reliability, or fitness of an individual to perform nuclear explosive duties safely and reliably. The designated physician, with the assistance of the designated psychologist, shall determine the existence or nature of any of the following:

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

(b) Mental disorders or behavioral problems, including substance use disorders, as defined in the Diagnostic and Statistical Manual of Mental Disorders;

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

(d) Alcohol use disorder;

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

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

**§ 711.41 Medical assessment process.**

(a) The designated physician, under the supervision of the SOMD, shall be responsible for the medical assessment of PAP individuals. In carrying out this responsibility, the designated physician or the SOMD shall integrate the medical

evaluations, available drug testing results, psychological evaluations, any psychiatric evaluations, and any other relevant information to determine an individual's overall medical qualification for assigned duties.

(b) Employers shall provide a job task analysis or detailed statement of duties for each PAP individual to both the designated physician and the designated psychologist before each medical assessment and psychological evaluation. PAP medical assessments and psychological evaluations shall not be performed if a job task analysis or detailed statement of duties has not been provided.

(c) The designated physician shall consider a PAP individual's fitness for nuclear explosive duties at the time of each medical contact, including:

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

(2) Intermediate evaluations, including job transfer evaluations, evaluations upon self-referral, and referral by management;

(3) Routine medical contacts, including routine return-to-work evaluations and occupational and nonoccupational health counseling sessions; and

(4) A review of current, legal drug use.

(d) Psychological evaluations shall be conducted:

(1) For initial certification. This psychological evaluation consists of a generally accepted, self-reporting psychological inventory tool approved by the Director, Office of Occupational Medicine and Medical Surveillance, and a semi-structured interview.

(2) For recertification. This psychological evaluation consists of a semi-structured interview.

(3) Every third year. The medical assessment for recertification shall include a generally accepted self-reporting psychological inventory tool approved by the Director, Office of Occupational Medicine and Medical Surveillance.

(4) Additional psychological or psychiatric evaluations may be required by the SOMD when needed to resolve PAP concerns.

(e) Following absences requiring return-to-work evaluations under applicable DOE directives, the designated physician, with assistance from the designated psychologist, shall determine whether a psychological evaluation is necessary.

(f)(1) Except as provided in paragraph (f)(2) of this section, the designated physician shall forward the completed medical assessment of a PAP individual

to the SOMD, who shall send a recommendation based on the assessment simultaneously to the individual's PAP administrative organization and to the PAP certifying official.

(2) If the designated physician determines that a currently certified individual no longer meets the PAP standards, the designated physician shall immediately, orally, inform the PAP certifying official and the PAP individual's administrative organization, following up in writing as appropriate.

(g) Only the designated physician, subject to informing the SOMD, shall make a medical recommendation for return to work and work accommodations for PAP individuals.

(h) The following documentation is required for routine use in the PAP after treatment of an individual for any disqualifying condition:

(1) A summary of the diagnosis, treatment, current status, and prognosis to be furnished to the designated physician;

(2) The medical opinion of the designated physician advising the individual's supervisor on whether the individual is able to return to work in either a PAP or non-PAP capacity; and

(3) Any periodic monitoring plan approved by the designated physician, the designated psychologist, and the SOMD, that is used to evaluate the reliability of the employee.

#### **§ 711.42 Medical assessment for drug abuse.**

(a) Except as otherwise provided by this section, a medical assessment for illegal drug use by DOE employees shall be conducted under DOE Order 3792.3, "Drug-Free Federal Workplace Testing Implementation Program," or any successor order issued by DOE.

(b) Except as otherwise provided by this section, a medical assessment for illegal drug use by DOE contractor employees shall be conducted under 10 CFR part 707, "Workplace Substance Abuse Programs at DOE Sites."

(c) In each case of drug abuse, the SOMD, in consultation with the designated psychologist, shall evaluate the individual for evidence of psychological impairment and make a recommendation to the PAP certifying official as to the individual's reliability.

(d) If an individual successfully completes an SOMD-approved drug rehabilitation program, DOE may reinstate the individual in the PAP based on the SOMD's follow-up evaluation and recommendation. The individual reinstated will be subject to SOMD-directed unannounced tests for

illegal drugs and relevant counseling for 3 years.

#### **§ 711.43 Evaluation for hallucinogen use.**

If DOE determines that a PAP individual has used any hallucinogen, the individual shall not be eligible for certification or recertification unless:

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

(b) A medical evaluation, including a psychological test, is performed to determine that the individual is reliable; and

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

#### **§ 711.44 Medical assessment for alcohol use disorder.**

(a) If alcohol abuse is suspected, an individual shall be examined for evidence of alcohol use disorder. If the examination produces evidence of alcohol use disorder, additional evaluation shall be conducted, which may include psychological evaluation.

(b) Alcohol consumption is prohibited within an 8-hour period preceding scheduled work and during the performance of nuclear explosive duties.

(c) Individuals in the PAP, including individuals who report for unscheduled work, may be tested for cause or reasonable suspicion of alcohol use or after an accident or an unsafe practice involving the individual.

(d) DOE shall implement or require the contractor to implement procedures that will ensure that persons called in to perform unscheduled work are fit to perform the tasks assigned.

(e) Tests for alcohol must be administered by a certified Breath Alcohol Technician using an evidential-grade breath analysis device approved for use at the 0.02/0.04 cut-off levels that conforms to the Department of Transportation's (DOT) National Highway Traffic Safety Administration (NHTSA) model specifications (58 FR 48705, September 17, 1993), and the most recent "Conforming Products List" issued by NHTSA which are available from the Office of Traffic Safety Programs, Washington, DC.

(f) An individual whose confirmatory breath alcohol test result is at or above an alcohol concentration of 0.02 percent shall not be allowed to perform nuclear explosive duties until the individual's alcohol concentration is below 0.02 percent using an evidential-grade breath analysis device described in section 711.44(e).

(g) Individuals subject to alcohol testing under DOT regulations shall be subject to the sanctions promulgated by

the Federal Highway Administration rule. Appropriate disciplinary action will be taken under DOE's authority.

(h) Individuals refusing to submit to a breath alcohol test shall be immediately removed from nuclear explosive duties.

(i) The SOMD, in conjunction with the designated psychologist, shall evaluate each case of alcohol use disorder for evidence of psychological impairment and provide the PAP certifying official a recommendation as to the individual's reliability.

(j) After successfully completing an SOMD-approved alcohol treatment program, DOE may reinstate an individual in the PAP based on the SOMD's follow-up evaluation and recommendation.

#### **§ 711.45 Maintenance of medical records.**

(a) Medical records produced or used in the PAP certification process shall be collected and maintained on separate forms and in separate medical files, and be treated as a confidential medical record.

(b) The medical records of PAP individuals shall be maintained in accordance with the Privacy Act, 5 U.S.C. 552a and DOE implementing regulations in 10 CFR Part 1008; the Department of Labor's regulations on access to employee exposure and medical records, 29 CFR 1910.1020; and applicable DOE directives. DOE contractors also may be subject to § 503 of the Rehabilitation Act, 29 U.S.C. 793, and its implementing rules, including confidentiality provisions at 29 CFR 60-741.23(d).

(c) The psychological record of a PAP individual shall be considered a component of the medical record. The psychological record shall:

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

(2) Be stored in a secure location in the custody of the designated psychologist;

(3) Be kept separate from other medical record documents, with access limited to the SOMD, the designated physician, the designated psychologist, or other persons who are authorized by law or regulation to have access; and

(4) Be retained indefinitely.

(d) The records of alcohol and drug testing shall be maintained in accordance with 42 CFR part 2, "Confidentiality of Alcohol and Drug Abuse Patient Records," and 10 CFR

part 707, "Workplace Substance Abuse  
Programs at DOE Sites."

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