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DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 457

Common Crop Insurance Regulations; Sugarcane Crop Insurance Provisions

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule; correction.

SUMMARY: This document contains corrections to the final rule, Common Crop Insurance Regulations; Sugarcane Crop Insurance Provisions that the Federal Crop Insurance Corporation published in the **Federal Register** on Friday, July 12, 2002 (67 FR 46093–46096).

EFFECTIVE DATE: August 14, 2002.

FOR FURTHER INFORMATION CONTACT: Arden Routh, Risk Management Specialist, Product Development Division, Federal Crop Insurance Corporation, United States Department of Agriculture, 6501 Beacon Drive, Kansas City, MO, 64133, telephone (816) 926–7730.

SUPPLEMENTARY INFORMATION: On page 46093, in the first column, under Summary, the year 2003 should read 2004, and on page 46095, in the second column, under Section 457.116, Sugarcane crop insurance provisions, introductory text, the year 2003 should read 2004. These changes are needed because the final rule was published after the contract change date for the 2003 crop year.

Signed in Washington DC, on August 7, 2002.

Ross J. Davidson, Jr.,

Administrator, Federal Crop Insurance Corporation.

[FR Doc. 02–20522 Filed 8–13–02; 8:45 am]

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DEPARTMENT OF ENERGY

10 CFR Part 852

RIN 1901–AA90

Guidelines for Physician Panel Determinations on Worker Requests for Assistance in Filing for State Workers' Compensation Benefits

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is today publishing a final rule providing procedures to implement Part D of the Energy Employees Occupational Illness Compensation Program Act of 2000 under which a DOE contractor employee or an employee's estate or survivor can seek assistance from the DOE Office of Worker Advocacy (Program Office) in filing a claim with the appropriate State workers' compensation system based on an illness or death that arose out of exposure to a toxic substance during the course of employment at a DOE facility. These procedures deal with how: (1) An individual may submit an application to the Program Office for review and assistance; (2) the Program Office determines whether to submit an application to a Physician Panel; (3) a Physician Panel determines whether the illness or death of a DOE contractor employee arose out of and in the course of employment by a DOE contractor and through exposure to a toxic substance at a DOE facility; (4) the Program Office processes a determination by a Physician Panel; and (5) appeals may be undertaken.

EFFECTIVE DATE: September 13, 2002.

FOR FURTHER INFORMATION CONTACT: Ms. Loretta Young, telephone: 202–586–2819; fax: 202–586–0956; e-mail: *loretta.young@eh.doe.gov;* address: Office of Advocacy, EH–8, U.S. Department of Energy, 1000 Independence Avenue, Washington, DC 20585.

SUPPLEMENTARY INFORMATION:

I. Introduction

Part A of the Energy Employees Occupational Illness Compensation Program Act of 2000 (''the Act'') (42 U.S.C. 7384, *et seq.*) establishes a program for compensating covered DOE and DOE contractor employees, as well as covered employees of certain private companies that did work for DOE and its predecessor agencies, including work involved in nuclear weapons production (Part A program). Covered workers with certain illnesses, including chronic beryllium disease, radiation-induced cancers, and silicosis, may be eligible for specified Federal benefits under the Part A program. Executive Order 13179 (65 FR 77487, December 7, 2000) assigns the Department of Labor (DOL) primary responsibility for that program. Workers with illnesses eligible for compensation under the Part A program, as well as workers with illnesses not eligible for the Part A program, may also apply to their respective State workers' compensation systems if they wish to receive benefits not provided by the Federal compensation system, notably lost wages and benefits for permanent partial disability.

Part D of the Act (42 U.S.C. 7385) authorizes the Secretary of Energy to enter into an agreement with each State to provide assistance to a DOE contractor employee in filing a claim under that State's workers' compensation system for an illness caused by exposure to a toxic substance at a DOE facility (''State Agreement''). An applicant can submit an application to the Program Office at DOE for assistance in filing a claim with that State's workers' compensation system. If the application comes within the terms and conditions of the relevant State Agreement and contains reasonable evidence that the illness or death of a covered worker may be related to employment at a DOE facility, then DOE must submit the application to a Physician Panel established under the

Act to determine the validity of the applicant's claim that the illness or death arose out of exposure to a toxic substance during the course of employment at a DOE facility. Section 3661(d) of Part D of the Act provides that a Physician Panel must make its determination ''under guidelines established by the Secretary [of Energy], by regulation.'' If a Physician Panel makes a positive determination and the Program Office accepts it, then the Program Office must assist the applicant in filing a claim with the relevant State's workers' compensation system. In addition, DOE may not contest the applicant's workers' compensation claim or any award made to settle the claim to the extent such claim or award is based on the same health condition that was the subject of a positive determination by a Physician Panel. And, to the extent permitted by law, DOE may direct a DOE contractor not to contest such a claim or award. Furthermore, if the DOE contractor employer contests the claim or award, the costs of contesting the claim or award are not allowable costs under a DOE contract.

Part D operates to ensure that DOE will assist, and not hinder, the processing of an applicant's claim under a State workers' compensation system if the claim is based on the same health condition that was the subject of a positive determination by a Physician Panel. DOE will not contest and DOE will direct its contractors not to contest such a claim. Part D, however, does not federalize State workers' compensation standards, or affect the normal operation of State workers' compensation systems other than the limits Part D places on the extent to which DOE and DOE contractors can contest certain claims. Part D does not expand or contract the scope of any State workers' compensation system, and does not change the rights, obligations, conditions, and compensation amounts for a claimant under any such system. Thus, significant variations will continue to exist among State workers' compensation systems with respect to matters such as benefit levels, length of coverage, and the types and computation of medical costs, lost wages and disabilities eligible for compensation. Moreover, neither Part D nor DOE's rules implementing Part D will make a worker eligible for compensation under a State workers' compensation system if the worker is not otherwise eligible. However, use contract administration to encourage DOE contractors to pay workers' compensation claims against which they might have technical defenses not going to the question of whether a contractor employee's illness arose out of employment at DOE. DOE will seek to carry out this statutory mandate faithfully.

DOE published a notice of proposed rulemaking (NOPR) under Part D on September 7, 2001, 66 FR 46742. DOE received numerous comments on the NOPR during the comment period, and continued to receive comments after the close of the comment period from various Members of Congress and their staffs, as well as other commenters.

II. Discussion of Rule

A. What Is The Purpose of This Rule?

The rule establishes procedures for implementing Part D of the Act. Section 852.1(a) of the final rule provides that these procedures address how: (1) An individual may obtain and submit an application to the Program Office for review and assistance; (2) the Program Office determines whether to submit an application to a Physician Panel; (3) a Physician Panel determines whether the illness or death of a DOE contractor employee arose out of and in the course of employment by a DOE contractor and through exposure to a toxic substance at a DOE facility; (4) the Program Office processes a determination by a Physician Panel; and (5) appeals may be undertaken.

B. What Is the Scope of This Rule?

Section 852.1(b) makes clear that the procedures only cover applications that meet three criteria. First, the application must be filed by or on behalf of a DOE contractor employee, or a deceased employee's estate or survivor. Second, the application must be based on the illness or death of DOE contractor employee that may have been caused by exposure to a toxic substance. Third, the application must be based on an illness or death that may have been related to employment at a DOE facility.

Consistent with the statutory emphasis on State Agreements as a precondition for action under Part D of the Act, section 852.1(c) provides that all DOE actions under the Part D program must be pursuant to a relevant State Agreement and consistent with its terms and conditions.

C. What Definitions Are Used in This Rule?

The rule contains definitions of ''Act'', ''Applicant'', ''DOE'', ''DOE contractor employee'', ''DOE facility'', ''Physician Panel'', ''Program Office'', ''State Agreement'', and ''Toxic Substance''.

D. What Is the Act?

The Act is the Energy Employees Occupational Illness Compensation Program Act of 2000 (42 U.S.C. 7384, *et seq.*)

E. Who Is an Applicant?

An applicant is an individual seeking assistance from the Program Office in filing a claim with the relevant State workers' compensation system, including but not limited to a living DOE contractor employee, the estate of a deceased DOE contractor employee, or any survivor of a deceased DOE contractor employee who is eligible to apply for a death benefit or a survivor's benefit under the State workers' compensation system for which the applicant is seeking assistance in filing a claim.

Proposed section 852.2 had defined an applicant as a DOE contractor employee or the employee's estate seeking assistance from the Program Office in filing a claim with the relevant State workers' compensation system. In the final rule, the definition has been extended to survivors because State workers' compensation systems generally provide income benefits to specific survivors, notably spouses and dependent children of deceased workers. The final rule permits such individuals to apply to DOE for assistance in filing for State workers' compensation benefits, based upon the illness or death of the deceased DOE contractor employee.

F. Who Is a DOE Contractor Employee?

Section 852.2 defines a DOE contractor employee to be an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months, or an individual who is or was employed at a DOE facility by either an entity that contracted with DOE to provide management and operating, management and integration, or environmental remediation at the facility, or a contractor or subcontractor that provided services, including construction and maintenance, at the facility. This definition repeats the language used to define a DOE contractor employee in section 3621(11) of the Act and is the same as the definition in the NOPR that referenced the definition found in section 3621(11) of the Act. DOE believes incorporating the actual statutory language into the rule will make the rule more understandable and easier to use.

The term ''DOE contractor employee'' does not include all employees eligible for the Part A program. It does not

include atomic weapons or beryllium vendor employees who were not employed by a DOE contractor at a DOE facility. In addition, it does not include Federal employees.

A commenter stated that the definition of a DOE contractor employee needs to include subcontractor employees. DOE agrees that subcontractor employees are covered by Part D of the Act, but no change in the rule is necessary to confirm this coverage. The definition of a DOE contractor employee clearly includes an individual who is or was employed at a DOE facility by a subcontractor that provided services at that facility.

G. What Is a DOE Facility?

As with the definition of DOE contractor employee, section 852.2 of this final rule defines ''DOE facility'' by repeating the definition found in section 3621(12) of the Act, rather than merely cross-referencing the statutory definition as the proposed rule did. This is a nonsubstantive change to the proposed rule, and is made only for the purposes of clarity in the text of the final rule. ''DOE facility'' thus is defined as any building, structure, or premise, including the grounds upon which such building, structure, or premise is located in which operations are, or have been, conducted by, or on behalf of, DOE and with regard to which DOE has or had a proprietary interest; or entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. Further, this definition specifically excludes facilities covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. 7158 note), pertaining to the Naval Nuclear Propulsion Program. DOE has published a list of facilities it considers to be DOE facilities for purposes of the Act. (66 FR 4003, January 17, 2001; revised 66 FR 31218, June 11, 2001).

H. What Are Physician Panels?

Physician Panels are appointed by the Secretary of Health and Human Services (HHS) in response to requests by DOE pursuant to Part D of the Act. Physician Panels provide DOE with impartial and independent determinations as to whether the illness or death of a DOE contractor employee arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility. Physician Panels may be asked to review new applications that have not undergone prior Physician Panel review, or to reexamine applications that have already undergone Physician Panel review.

I. What Is the Program Office?

The Program Office is the DOE Office of Worker Advocacy or any other DOE office subsequently designated by the Secretary of Energy.

J. What Is a State Agreement?

Section 852.2 defines ''State Agreement'' as an agreement negotiated between DOE and a State that sets forth the terms and conditions for dealing with an application for assistance under Part D of the Act in filing a claim with the State's workers' compensation system. The existence of a State Agreement with a particular State is necessary before the Program Office can refer to a Physician Panel a claim by an applicant who will file his/her worker's compensation claim in that State. Part D is clear that any action by DOE must be in accordance with the terms and conditions of the relevant State agreement.

K. What Is a Toxic Substance?

Section 852.2 defines ''toxic substance'' as ''any material that has the potential to cause illness or death because of its radioactive, chemical, or biological nature.'' This definition is the same as that proposed in the NOPR. DOE believes that this definition is consistent with the intent of Part D of the Act and will permit DOE to assist claimants with claims based on illnesses or deaths that arose from exposure to toxic substances to the extent such claims are recognized by a State workers' compensation system.

There were a number of comments on the NOPR definition of ''toxic substance.'' Many commenters supported the NOPR definition, though others suggested modifications to the definition. One commenter suggested that noise should be included as a toxic substance. DOE understands that noise can cause harm to workers in certain situations. However, the dictionary defines ''toxic'' as ''of, relating to, or caused by a poison or toxin.'' DOE does not believe that noise operates to poison people because it does not injure by chemical action. Hence, it does not fit comfortably within the ordinary meaning of ''toxic substance.'' Neither the text of Part D nor its legislative history suggests otherwise.

Another commenter suggested that only chemicals be considered toxic substances for the purpose of the rule. However, radioactive or biologically harmful substances are commonly described as being ''toxic,'' and these substances fit comfortably within the ordinary meaning of ''toxic substance.'' Given the content of the legislation, DOE does not believe it would be consistent with the general thrust of the Act to limit ''toxic substances'' to chemicals and to exclude other substances, or to define the term solely by reference to the chemical properties of a substance and to ignore radioactive or biological properties.

L. How Does an Individual Obtain and Submit an Application for Review and Assistance?

Section 852.3 describes how an individual obtains and submits an application for review and assistance. An application can be obtained in person from the Program Office, from any Resource Center, and from any DOE-sponsored Former Worker Program project. A Resource Center is a publicly accessible office administered jointly by DOE and DOL for the purpose of assisting an individual in applying for assistance or benefits under the programs established under the Act. There are currently ten Resource Centers located throughout the United States. There are presently approximately one dozen Former Worker Program projects throughout the United States. These pilot projects currently offer screening examinations for the detection of occupational illnesses for individuals formerly employed at some DOE facilities. The Program Office's current mailing address, phone number and web site, at time of publication of this final rule are included in this section. Any future changes in this contact information will be published in the **Federal Register** and noted on the Program Office's web site.

A commenter suggested that applications should also be obtainable in person from any DOE Operations or Area Offices, or from an employer who is currently a DOE contractor. Other commenters requested that section 852.3 include the Program Office's mailing address and web site. DOE finds that it would be logistically difficult for the Program Office to assure that complete application packages would be available at all times from all of the many DOE contractor facilities and DOE Operations and Area Offices. DOE believes that the nationwide network of Resource Centers, coupled with the availability of applications through mail or telephone requests to the Program Office, or in a printable format, from the Program Office's web site, provide adequate accessibility to application materials. The program has and will continue to be publicized so that potential applicants are aware of the

program and how to apply. In the final rule, section 852.3 has been revised to include the Program Office's current phone number and mailing address for requesting an application, as well as the web site from which application forms can be printed.

Section 852.3 also describes how an application is submitted. An application can be submitted in person to the Program Office, to any Resource Center, or to any DOE-sponsored Former Worker Program, where staff will be available to answer questions and assist the individual in filling out the application. An application can also be submitted by mail to the Program Office.

Section 852.4 describes the information and materials that the individual must submit as a part of the application for Physician Panel review, additional discretionary information and materials that the applicant may choose to submit, and the essential information that must be included in records released by a third party or submitted by the applicant in support of an application.

Section 852.4 specifies that the individual must complete and sign any application forms required by the Program Office. The application forms request basic information about the applicant and the worker upon whose illness or death the application is based.

In order to assure that the Program Office has reasonable evidence to determine whether an individual meets the eligibility criteria for Physician Panel review, and that the Physician Panel has sufficient information to make a causation determination on an application, section 852.4 requires the applicant to provide:

(a) the name and address of any licensed physician who is the source of a diagnosis based upon documented medical information that the employee has or had an illness and that the illness may have been related to exposure to a toxic substance while the employee was employed at a DOE facility and, to the extent practicable, a copy of the diagnosis and a summary of the information upon which the diagnosis is based; and

(b) a signed medical release, authorizing non-DOE sources of medical information to provide the Program Office with any diagnosis, medical opinion and medical records documenting the diagnosis or opinion relevant to whether the employee has or had an illness and whether the illness arose from exposure to a toxic substance while the employee was employed at a DOE facility.

The requirement that the applicant submit the information identified in section 852.4 is intended to satisfy the statutory provision that an applicant must supply the Program Office with reasonable evidence that the statutory threshold is met for referral to a Physician Panel. Among other things, and even though an applicant is not required to supply a physician's diagnosis as part of an application, applicants who wish to rely on such a diagnosis to support their applications should identify the diagnosing physician and submit a copy of the diagnosis. DOE encourages the submission of diagnoses where possible because they will enable the Program Office and Physician Panels to do their work more quickly, efficiently and reliably.

Part D neither directs DOE to provide nor bars DOE from providing assistance to an applicant in obtaining a medical diagnosis or developing other medical evidence to support the applicant's application before a decision is made whether to refer it to a Physician Panel. However, and while Part D makes clear that the applicant bears primary responsibility for submitting sufficient information to support his/her application and meet the requirements of section 852.6 of the final rule, DOE will assist applicants as it is able. Specifically, DOE may be able to provide certain types of information as discussed below in connection with section 852.6.

Section 852.4 of the final rule also permits the applicant to submit to the Program Office any other information or materials providing evidence that the employee has or had an illness that arose from exposure to a toxic substance during the course of employment at a DOE facility.

The applicant must sign an affidavit attesting to the authenticity and completeness of any information or materials submitted to the Program Office, or provide the Program Office with other evidence of authenticity of submitted materials, such as certification of submitted copies of originals.

To the extent practicable and appropriate, the records submitted by the worker or released by a third party must also include an occupational history obtained by a physician, an occupational health professional, or a DOE-sponsored Former Worker Program. DOE does not intend that a worker should incur financial or other hardship in having such a history taken, but instead requests that any such occupational history already in a worker's medical records be submitted to the Program Office by the applicant. If the worker's records do not already include such a history, then DOE requests that the worker have such a history obtained and have this history released to the Program Office, if the worker can readily have such a history obtained from a Former Worker Program or other source without incurring undue hardship. If such an occupational history is not reasonably available by these means, and is deemed by the Program Office to be needed for the fair adjudication of the claim, then the Program Office must assist the applicant in obtaining this history, if it can be obtained from the worker upon whom the application is based.

In section 852.4(d) of the NOPR, there was a provision for submission of an ''employment history'' as a part of the application. In the final rule, the requirement for submission of an ''employment history'' appears in section 852.4(a)(4), and the term ''employment history'' is changed to ''occupational history'' because the latter is in more general usage in the occupational health field. The other changes in this section were made to assure that an adequate occupational history is available for Physician Panel review.

Omitted from the final rule is section 852.4(c) of the NOPR which would have required an applicant to sign a release of information permitting the Program Office to obtain any records under the control of DOE and relevant to the application. Under the Privacy Act of 1974, as it pertains to DOE records system ''DOE–10 Worker Advocacy Records'' (66 FR 27307), such a release is not required for DOE to obtain records controlled by DOE for legitimate purposes related to this program.

M. What Information May an Employer Submit in Response to an Application Submitted to a Physician Panel?

New section 852.5 requires the Program Office to notify an employer when the Program Office has determined that an application by or on behalf of a current or former employee of that DOE contractor meets the requirements of section 852.4. After receiving this notification, the employer has 15 working days to provide the Program Office with any information deemed by the employer to be relevant to the application. The employer must sign an affidavit attesting to the authenticity and completeness of any information or materials submitted to the Program Office for this purpose, or provide the Program Office with other evidence of authenticity of submitted materials, such as certification of submitted copies of originals. DOE will provide the Physician Panel with

materials submitted by an employer for use in making its determination.

Two commenters expressed the opinion that the contractor has the right to be notified that a claim has been filed, and be given the opportunity to provide information relevant to the application, including information that might rebut the claim. Others noted that the employer may be the only source of certain relevant information, including information relating to the issue of causation, and noted that, under the proposed rule, the employer would not be able to present evidence to a Physician Panel or to present evidence to contest a determination by a Physician Panel in a State workers' compensation proceeding. Both commenters felt that the employer should be afforded the opportunity to provide the Program Office with evidence relevant to the application. DOE agrees with these commenters and has added this new section 852.5 to provide employers with notice and the opportunity to submit relevant information before the Program Office makes a determination whether to submit an application to a Physician Panel.

N. How Does the Program Office Decide Which Applications To Submit to a Physician Panel?

As proposed in the NOPR, section 852.6 (proposed as section 852.5) would have required DOE to apply eligibility criteria contained in the relevant State workers' compensation statutes and used by the relevant State in determining the validity of a workers' compensation claim. The criteria would have been specified in the State Agreement with the State in which the claim would be filed, as specified in proposed section 852.6. In the NOPR, DOE solicited comments on whether these State criteria should be applied by the Program Office, or alternatively, by State officials on a reimbursable basis. DOE also requested comments as to whether the use of a screening mechanism is consistent with the statutory framework and whether the use of applicable State criteria or uniform Federal criteria better achieves the statutory objectives.

Commenters generally opposed the application of State specific criteria during the screening of applications and urged that the Program Office submit to the Physician Panel those applications that meet the minimum statutory criteria identified in the Act. Commenters also expressed the concern that application of State specific criteria at this stage would erect barriers to claims that should be presented to the Physician Panel. Still other commenters urged the establishment of a uniform Federal standard for eligibility and causality.

Some States commented that they would not be willing to screen applications on a reimbursable basis. Several States also questioned whether DOE would be able to screen applications on the basis of whether an application presented a compensable claim under a State workers compensation system.

After considering the comments, DOE has decided that the eligibility criteria for referral of a claim to a Physician Panel should be based on the criteria specifically set forth in the Act, and should focus on whether the applicant provides reasonable evidence of an illness or death that may have been caused by exposure to a toxic substance during the course of employment at a DOE facility. Thus, section 852.6(a)(1) and section 852.6(a)(3) of the final rule track the language in Part D. Section 852.6(a)(2) further requires that an applicant submit reasonable evidence that the employee's illness or death ''may have been caused by exposure to a toxic substance.'' While this requirement does not appear in section 7385o(b)(2) of the statute, it reflects part of the determination that Part D requires a Physicians Panel to make if the panel is to render a determination in an applicant's favor. DOE believes that it is only logical for the applicant to be required to submit, and for the Program Office only to refer to Physician Panels applications in which the applicant has submitted, reasonable evidence in support of the determination the Physician Panel is being asked to make.

Consistent with the general tenor of the comments, today's final regulations provide that applications which satisfy these minimum criteria should be submitted to a Physician Panel for review. It is the role of the Physician Panel to determine if the applicant can satisfy the medical criteria for causation specified in these final regulations. Non-medical criteria, such as statutes of limitations, should not be used by the Program Office to screen applications, or by the Physician Panels to make medical causation determinations.

DOE is aware that by excluding non-medical criteria from the screening process, it may submit to a Physician Panel an application by an applicant whose State workers' compensation claim might be barred by non-medical criteria (such as the applicable statute of limitations). A Physician Panel could in turn make a causation determination in favor of an applicant, and the Program Office could accept such a determination even though there might be various medical or non-medical impediments to the applicant's State workers' compensation claim as will be discussed below. Part D is designed to remove obstacles to recovery of this type when it can do so through contract administration tools. These results do not impose a Federal standard on a State workers' compensation system. States will continue to have the ability to administer their workers' compensation systems in accordance with applicable State law. DOE's action merely would constitute a decision by DOE not to raise defenses to a workers' compensation claim by an applicant who has received a favorable Physician Panel determination.

Section 852.6 identifies the criteria the Program Office uses to determine whether to submit an application to a Physician Panel. An application must contain reasonable evidence allowing the Program Office to make an initial determination that the following three conditions are met. First, the application was filed by or on behalf of a DOE contractor employee or the employee's estate or survivor. Second, the illness or death of the DOE contractor employee may have been caused by exposure to a toxic substance. Third, the illness or death may have been related to employment at a DOE facility. The Program Office must refer to a Physician Panel any application that provides reasonable evidence meeting each of these criteria. Applicants with a medical diagnosis to support their applications should submit that diagnosis and supporting medical documentation because such information likely will constitute the strongest evidence in support of an applicant's causation argument. Applicants who do not submit a diagnosis by a licensed physician will have a more difficult time meeting the section 852.6 standard. However, the regulations do not require that a medical diagnosis be submitted before an application meets the applicable standard, and as section 852.4 makes clear, applicants are free to submit whatever information they have that they believe supports their application.

O. What Provisions Does a State Agreement Contain?

Proposed section 852.6 in the NOPR identified three elements to be included in a State Agreement: a provision that the State would identify the applicable criteria used to determine the validity of a workers' compensation claim under State workers' compensation law and describe how these criteria are applied in a State workers' compensation

proceeding; a provision that only those applications that could satisfy the identified applicable criteria would be submitted to a Physician Panel; and a provision that the Program Office would provide assistance only to those applicants that satisfy the applicable criteria.

DOE intends the State Agreement to be the understanding between DOE and a State as to the terms and conditions for dealing with an application for DOE assistance in filing a workers' compensation claim. State Agreements are not intended to alter State criteria.

As noted in the discussion of section 852.6, a number of commenters objected to the concept of the Program Office using State criteria to screen applicants for assistance prior to submission of an application to a Physician Panel. As a result, that section has been revised to eliminate consideration of State criteria at that point in the screening process. Similarly, several commenters objected to inclusion in the State Agreements of State criteria for determining causation and other medical eligibility issues. Some commenters stated that State Agreements should contain Federal standards to be applied in determining eligibility and causality. As will be discussed below, DOE believes that it is consistent with the statutory requirement and structure of the program under Part D for the Physician Panels to use a uniform federal standard for determining causation rather than the specific causation requirements of the workers' compensation system for the State in which an applicant will file his/her claim.

DOE also solicited comments as to what other provisions should be included in State Agreements. Commenters argued that the State Agreements should include a provision for reimbursement or indemnification to contractors or insurance carriers for claims accepted under Part D. DOE has determined that such provisions should not be placed in the State Agreements. Rather, section 852.19 of the final rule provides for reimbursement of contractors for additional workers' compensation costs incurred as a result of workers' compensation awards on claims based on the same health condition that was the subject of a positive Physician Panel determination. However, the Act does not authorize DOE to reimburse or indemnify insurers; nor does it authorize the appropriation of funds to do so. Therefore, neither the final regulations nor the State Agreements provide for reimbursement or indemnification of insurers.

Commenters also expressed concern for the precedential effect of a Physician Panel finding of medical causation. A positive finding by a Physician Panel is not binding on a State worker's compensation system or any person other than DOE and, if so directed by DOE, a DOE contractor. The effect of a positive Physician Panel determination is to obligate DOE to assist the applicant in the State worker's compensation proceeding. It does not prevent anyone other than DOE or a DOE contractor so directed by DOE from contesting causation or any other issue.

One commenter observed that Part D of the Act is permissive, not required, and that the Secretary has the option to decide not to negotiate State Agreements with States. While the commenter is correct that the program under Part D is discretionary and dependent on the negotiation of State Agreements, DOE believes Congress did not enact Part D in the expectation that DOE would make it a dead letter by refraining from attempting to negotiate any State Agreements. DOE therefore has determined that it should seek to negotiate agreements with the States as anticipated by this Part. Of course, implementation of the program under this Part with respect to any particular State or state workers' compensation program will depend on the successful negotiation of a State Agreement between DOE and the relevant State.

One commenter expressed concern that there are jurisdictions without a State agency to enter into such an agreement. DOE finds that all jurisdictions have a workers' compensation administrative agency with which DOE believes it can work.

As revised, section 852.7 provides for four standard provisions in State Agreements. First, the State Agreement must include a provision that an application will be submitted to a Physician Panel only if it contains reasonable evidence, including appropriate medical documentation, that (1) the worker who is the subject of the application is or was a DOE contractor employee, (2) the worker has, had or died of an illness that may have been caused by exposure to a toxic substance, and (3) the exposure occurred during the course of employment at a DOE facility.

Second, a State Agreement must include a provision that requires a Physician Panel to apply the standard of causation set forth in section 852.8 of DOE's regulations when making determinations of medical causation.

Third, a State Agreement must include a statement that the Program Office provides assistance only to an applicant who receives a positive determination from a Physician Panel.

Fourth, a State Agreement must include a statement that a positive determination by a Physician Panel has no effect on the normal operation of a State workers' compensation system. However, as provided elsewhere in this rule, the determination will prevent DOE from contesting a State workers' compensation claim or award with regard to the health condition that was the subject of the Physician Panel determination. It also will result in DOE's direction to the relevant DOE contractor not to contest such claims or awards. State processes concerning issues such as benefit level determinations, disability determinations such as permanent partial disability (PPD), and apportionment, will proceed according to routine State workers' compensation system operation.

P. What Guidelines Does a Physician Panel Use To Determine Whether an Illness or Death Arose Out of and in the Course of Employment by a DOE Contractor and Exposure to a Toxic Substance at a DOE Facility?

Section 852.8 provides that a Physician Panel determines whether an illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility based whether it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the worker's employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the worker's illness or death.

In proposed section 852.7 of the NOPR, a common federal causation standard and burden of proof were specified, namely, that it is more likely than not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor caused the illness or death. DOE solicited and received a number of comments on the appropriate burden of proof and causation standard to be applied by the Physician Panels. Some commenters expressed support for an ''as likely as not,'' or a ''more likely than not'' standard. Other commenters supported a standard of ''any contributing factor'' or ''a substantial contributing factor.'' Still other commenters suggested a standard of ''significant factor in aggravating, contributing to or causing illness, disability or death,'' and other commenters supported State-specific causation standards.

DOE has decided, for several reasons, that Physician Panels should not use standards of the individual States with regard to medical causality or burden of proof determinations, and that instead, the regulations should require Physician Panels to use the single uniform federal standard for burden of proof and medical causality set forth in section 852.8. First, while Part D certainly is susceptible of more than one interpretation on this point, DOE believes the best interpretation of the statutory text is that DOE should adopt a uniform federal standard. Nowhere does the statute indicate that Physician Panels should apply State standards for burden of proof or causation; indeed, 42 USC § 7385o(d)(3) speaks in terms that seem to call for a single federal standard (i.e., the panels shall determine ''whether the illness or death that is the subject of the application arose out of and in the course of employment by the Department of Energy and exposure to a toxic substance at a Department of Energy facility'').

Second, DOE believes it will better effectuate the purpose and policy of Part D for the Physician Panels to apply a uniform federal standard. In DOE's view, the primary purposes of Part D are for DOE to assist deserving applicants in applying for and obtaining State workers' compensation benefits, to ease the administrative burden on applicants when applying for State workers' compensation benefits, and to enable some applicants to gain benefits that they might not receive under normal operation of the State systems by requiring DOE and its contractors not to contest certain State workers' compensation claims, using contract administration tools to encourage outcomes of this type. These purposes can be better fulfilled through a uniform federal causation standard for the Physician Panels. If the Physician Panels were required to use State standards of causation and burden of proof, applicants potentially would be forced to endure the administrative burden at the Physician Panel stage that Part D in fact wishes to relieve applicants from bearing at the State worker compensation proceeding stage.

Third, DOE believes that application of a single federal standard by the Physician Panels will make administration of the Part D program much more equitable and efficient. A requirement that Physician Panels (as well as the Program Office in reviewing Physician Panel determinations) use State-specific causation and burden of proof standards would require that the panels and Program Office become intimately familiar with the laws of numerous different States, and likely would lead to inconsistencies in how State law is interpreted and applied by the States, the Program Office and the Physician Panels. Such inconsistencies could, in turn, lead to inequitable results and wasteful controversy and litigation. A single federal standard will be easier for the Program Office and the Physician Panels to administer and will allow DOE to treat equally similarly situated applicants in different States.

Fourth, DOE believes a uniform federal causation standard allows DOE to promote the purposes of Part D by setting the standard at a level that fairly interprets the statutory command while also attempting to assist the largest possible number of deserving applicants. The use of State-specific causation standards would prevent DOE from furthering the statutory purposes in this manner. Such a result would be particularly inequitable and would not be a sound policy choice or interpretation of Part D, simply because Part D quite clearly does not compel the Program Office or Physician Panels to use State-specific causation standards.

As to the federal standard to be adopted and promulgated in section 852.8, DOE has decided that a Physician Panel must render a causation determination in the applicant's favor if the panel determines that it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue. DOE intends that, as used in this context, the word ''significant'' should have its normal dictionary definition and meaning—that is, ''meaningful'' and/or ''important.''

DOE believes that the standard set forth in section 852.8 fairly interprets the text of Part D. It also represents a policy decision by DOE to aggressively pursue the purposes of Part D by setting the causation standard at a level that is below the level of proof that applicants might be required to demonstrate to obtain workers' compensation benefits in some States.

DOE has decided to adopt the ''significant factor'' causation standard rather than the ''more likely than not'' standard proposed in the NOPR because the ''more likely than not'' standard is too high and could result in deserving applicants being denied the assistance Part D was intended to afford. On the other hand, DOE rejects extremely lenient standards (such as ''any contributing factor'') because such standards do not constitute a fair interpretation of the statutory language (*i.e.*, that the illness or death ''arose out of and in the course of'' employment at a DOE facility and exposure to a toxic substance).

DOE recognizes that the causation standard in section 852.8, and the causation standard applied by DOL for certain benefits determinations under other compensation programs established by the Act, are different. DOE further recognizes that this difference in causation standards may contribute to some applicants who file applications in both the DOE and DOL programs receiving inconsistent causation determinations from the two agencies. However, DOE determined that nothing in the Act required that the same causation standard be used for both the program administered by DOL and the Part D program administered by DOE. Indeed, the Act itself sets forth different causation standards for the different programs.

Furthermore, and as noted above, DOE intends to aggressively pursue the purposes of Part D. DOE believes as a policy matter that this objective can best be accomplished through DOE's adoption of the ''significant factor'' causation standard set forth in section 852.8 even thought it may differ from the standards that DOL is required by law to apply.

In addition, regardless what standard DOE adopts, it is extremely unlikely that all applicants would receive identical causation determinations from both the DOL and DOE programs. The statutory language for the two agencies' programs is different, the two programs focus on entirely different benefit mechanisms (i.e., DOE's program under Part D focuses on assisting applicants obtain State workers' compensation benefits while the program administered by DOL focuses on direct federal payments to applicants), the programs are administered by two different federal agencies, and the Act requires that independent Physician Panels make the causation determinations for the applications submitted to DOE under the Part D program. DOE believes that rather than adopting a causation standard set forth in another part of the Act in a vain attempt to assure consistency in outcomes between the DOE and DOL programs, it should adopt the ''significant factor'' causation standard set forth in section 852.8. This standard is similar to the causation tests applied by many State workers' compensation programs and is appropriate for all the other reasons explained above. In short, DOE believes that the standard it has adopted is appropriate and properly carries out the intent of Part D, and that DOE should

not adopt a causation standard that attempts to mandate the same result for all applicants from both the DOE and DOL programs when perfect consistency in outcomes is extremely unlikely regardless of the causation standard DOE adopts.

Section 852.8 further specifies that Physician Panels should use the ''at least as likely as not'' burden of proof when determining whether exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue. The NOPR stated that a panel would make its determination based on ''whether there is sufficient information to support'' the applicant's requested finding; that language implied that panels should use a preponderance of the evidence burden of proof. The final rule adopted by DOE is more favorable to applicants in that it requires that they meet only an ''at least as likely as not'' burden of proof.

The standard adopted today in section 852.8 is, DOE believes, very favorable to applicants while at the same time being consistent with the statutory language and good policy. DOE believes this standard will result in its being able to assist the largest number of deserving claimants consistent with the structure and statutory text of Part D.

Q. What Materials Must a Physician Panel Review Prior to Making a Determination?

Section 852.9 (proposed as section 852.8) stipulates that the Physician Panel must review all records relating to the application that are provided by the Program Office. Such records may include medical records, employment records, exposure records, an occupational history, workers' compensation records, pertinent medical literature or reports, and any other records or evidence pertaining to the applicant's request for assistance, including additional discretionary information submitted by the applicant or the employer. For a deceased worker, such records may include a Medical Examiner's or Coroner's report or a death certificate. For an applicant who has also submitted a claim to DOL under the Act, such records may include any available information submitted as a part of such a claim or developed by DOL or HHS in the course of processing such a claim, including estimates of an applicant's cumulative radiation dose and the calculated probability that the employee's illness or death was caused by that radiation dose.

Proposed section 852.8 had stated that each Physician Panel should review all such records prior to making a determination. A commenter expressed an opinion that a Physician Panel must be required to review all relevant information, both supportive and non-supportive, and render a determination based on all of the information. DOE agrees that a fair and accurate adjudication of a claim is predicated on a Physician Panel reviewing all available information presented to it, and has accordingly changed ''should'' to ''must'' in section 852.9.

Several commenters asked questions or made suggestions as to what role DOE should have in assisting the applicant in gathering information in support of an application, including a suggestion that an independent medical examination might help expedite the Physician Panel review by focusing on information relevant to determining compensability under State law. Commenters expressed the opinion that DOE should pay for the development of medical evidence in support of an application, and suggested that DOE should use the Former Worker Medical Surveillance Program to accelerate and enhance implementation of Part D.

Part D does not authorize DOE to create a new program of examination and testing for applicants, nor does it authorize appropriations for this purpose. DOE believes that the Program Office's role is to assist an applicant in obtaining and assembling existing information relevant to a claim, including employment, exposure and medical information under the control of DOE and its contractors, information provided by the applicant, and information from outside sources whose transmittal to DOE has been authorized by the applicant.

However, where it is able, DOE will assist applicants by providing to them and to the Physician Panel relevant information in DOE's control. DOE's Former Worker Medical Surveillance Program currently consists of pilot projects run by consortia of universities, unions and occupational health experts funded through cooperative agreements with DOE for the purpose of providing former DOE contractor employees with medical surveillance examinations directed at detecting potential work-related disorders. The Former Worker Medical Surveillance Program is distinct from the program authorized by Part D of the Act and administered by the Program Office. The Program Office intends to utilize information generated by the Former Worker Program projects in the following manner. First, the Program Office will utilize the projects' hazard surveys of DOE sites (know as ''Phase I/Needs Assessments'') as sources of occupational exposure information for use by the Physician Panels. Second, if an applicant has previously received a medical surveillance examination through a Former Worker Program project, the Program Office will ask the applicant to sign a release so that the Program Office can obtain the results of this examination.

A commenter stated that in assisting the applicants seeking compensation from their State's workers compensation systems, DOE should make use of state-of-the-art analytical techniques to determine amounts of radionuclide body burdens that the applicants may have. As stated above, DOE is not funding further medical examinations of applicants under this program. However, HHS will be conducting radiation dose reconstructions for those applicants who have submitted a claim for cancer to DOL under Part A of EEOICPA and whose claim is not for compensation under provisions governing compensation for members of the Special Exposure Cohort. These dose reconstructions will evaluate and make use of existing information from DOE and other sources, including claimants, relevant to estimating the radiation doses incurred by cancer claimants in the performance of duty for DOE and it contractors. HHS will report the methods and results of these dose reconstructions to claimants, DOL and DOE. DOE intends to provide copies of these reports to the Physician Panels for radiation-related claims. In these cases, the applicant may also want to provide the Physician Panel with the probability of causation determination established by DOL based on the NIOSH dose reconstruction.

R. How May a Physician Panel Obtain Additional Information or a Consultation That It Needs To Make a Determination?

A Physician Panel may, on occasion, need additional information or consultations to make its determination. For expediency, documentation of evidence, maintenance of confidentiality, and records control, section 852.10 (proposed as section 852.9) requires the Physician Panel to make all requests for additional information through the Program Office. The panel may request an interview with the applicant, if the panel believes that only the applicant can supply the necessary information. Based upon the experiences of similar physician panels, including the Expert Panel of the

Fernald II Workers' Settlement Fund,[1] it is anticipated that such a request will be unusual, but may be necessary in rare cases in order to obtain essential information. The panel can also request that the applicant provide additional medical information. The Physician Panel may request consultation with specialists in fields relevant to its deliberations, if needed, as provided for in section 3661(d)(4) of the Act, or refer to relevant medical and scientific literature. The Program Office will maintain a roster of available specialists for this purpose.

New section 852.10(c) was added in the final regulations in order to codify within the rule a requirement of section 3661(d)(4) of the Act. Section 3661(d)(4) requires that, at the request of a Physician Panel, DOE or a DOE contractor who employed the DOE contractor employee must provide additional information relevant to the panel's deliberations. Under new section 852.10(c), a Physician Panel may also request additional information under the control of DOE or its contractors. It is anticipated that these will be important sources of information in many cases.

One commenter expressed an opinion that a duty to produce the historical exposure records should be placed on the contractor, instead of placing it wholly on the Program Office. DOE notes that section 3661(d)(4) of the Act (42 U.S.C. 7385o(d)(4)) implicitly places this obligation on both DOE and on the DOE contractor. Section 852.10(c) permits a Physician Panel to request relevant information in control of DOE or its contractors. DOE intends that all relevant information should be provided to a Physician Panel whether in possession of DOE or its contractor, to the extent permitted by law.

A commenter stated that requiring applicants to interview before a Physician Panel may result in a financial burden and physical hardship on applicants and stated that alternative methods of obtaining information should be explored. This commenter asked who will pay for any travel associated with an applicant's interview, if a panel requests such an interview. This commenter also asked whether a specialist will be paid, when consultation with a specialist is required, and what the rate of pay for specialists will be.

DOE recognizes the hardships for the applicant associated with an interview, and anticipates that such an interview will only be required in those unusual instances when essential information is not available from any other source. When an interview with the applicant is required, the Program Office will strive to arrange such an interview at a time and place convenient to the applicant and consider alternatives (e.g., telephone interviews) to face to face meetings. As discussed previously, the applicant is responsible for developing the medical information upon which the applicant bases its claim, and therefore DOE is not responsible for paying for the development of new medical information. However, to the extent the Physician Panel requests a consultation with a specialist to discuss medical information already in its possession, DOE will pay the costs associated with this consultation.

S. How Is a Physician Panel To Carry Out Its Deliberations and Arrive at a Determination?

After each member of a Physician Panel reviews the information submitted to the panel, the panel members will discuss an application and arrive at a determination. Because it is anticipated that Physician Panels will be spread out geographically, section 852.11 (proposed as section 852.10) permits teleconferencing. This system has worked well for prior Physician Panels, such as the Expert Panel of the Fernald II Workers' Settlement Fund.[2]

In the NOPR, DOE proposed that the panel members be required to reach a ''common'' determination. The NOPR did not explain what might happen if such a common or unanimous determination could not be reached. Some commenters objected to the requirement for panel unanimity, apparently on the ground that this could result in a single panel member defeating the will of the majority to make a causation determination in an applicant's favor.

DOE has decided that a panel determination should require only a majority of the panel members approving that determination, and thus DOE had modified the text of section 852.11 accordingly. This approach will promote the purposes of the statute by enabling more deserving employees to receive favorable panel determinations. This approach also will promote efficient administration of the program by eliminating the problems that otherwise might arise with respect to a non-unanimous panel. Furthermore, allowing panel determinations to be based on a majority rather than a unanimous decision by the panel members better accommodates the inherent uncertainty of some medical and medical causation decisions, and ensures that applicants will receive a fair determination even in situations where, for whatever reason, the determination is not unanimous.

T. How Must a Physician Panel Issue Its Determination?

In order to ensure that a Physician Panel has made its determination based upon the relevant evidence and that it has provided the basis for its determination, section 852.12 (proposed as section 852.11) requires the Physician Panel to identify the materials it has reviewed in making its determination, and express the determination and its basis in a series of findings that logically links the evidence reviewed to the conclusions drawn.

DOE anticipates that some covered workers who have applied for benefits under the DOL program will also apply for assistance from the Program Office in filing a claim with a State workers' compensation system. However, filing a claim under the DOL program is not a requirement for the DOE program. In addition, and as explained above, some applicants who submit applications in both the DOE and DOL programs may receive different causation determinations from the two agencies. For example, under the DOL program, a member of a Special Exposure Cohort, as defined in section 3621(14) of the Act (42 U.S.C. 7384l(14)), who has a specified cancer could establish entitlement to benefits for a specified cancer without showing that the disease is the result of exposure to a toxic substance because the statute dispenses with that requirement for Special Exposure Cohort members in the DOL program. A Physician Panel, however, can make a positive determination only if sufficient evidence is provided to meet the standard as specified in section 852.8. As to non-Special Cohort members in the DOL program, factual findings made by DOL, including findings based on dose reconstructions performed by HHS regarding the likelihood that cancer was caused by occupational exposure to radiation, while relevant to a panel's assessment, are not binding on a Physician Panel. A

[1] The Fernald II Workers' Settlement Fund was established to settle a class action lawsuit by the employees of National Lead of Ohio (NLO), which operated the Feed Materials Production Center (Fernald) DOE facility from 1951 to 1985. A component of this settlement fund is an Expert Panel Review to determine the work relatedness of an illness claimed by an NLO employee as resulting from exposure to radioactive material or other toxins. The Expert Panel consists of three Occupational/Environmental Health physicians who have the option of interviewing a claimant, but rarely need such an interview to make a determination, relying in most cases on existing written records.

[2] Ibid.

Physician Panel would be expected to explain the extent to which it based its determination on the findings of any agency in its report to the Program Office.

Proposed section 852.11(c)(4) in the NOPR required a Physician Panel, if explicitly requested by the Program Office, to provide the Program Office with a finding as to whether a specific criterion in a State Agreement has been satisfied. Three commenters asserted that Physician Panels should not be called upon to interpret State law. Another stated that State workers' compensation systems recognize and accept physicians' findings as to causality, and do not rely on physicians to make findings as to compensability.

DOE agrees that the role of the Physician Panel is to make a determination as to the relationship between a claimed illness and exposures to a toxic substance at a DOE facility. Accordingly, the Physician Panel will not be required to provide a specific interpretation of a non-medical provision of a State workers' compensation system. However, if a State Agreement provides for a Physician Panel to make a determination concerning a medical issue in addition to causation and specifies the medical criteria to be applied, then panels will make such determinations in appropriate cases. For example, a State Agreement could set forth the State criteria for determining the extent of disability or impairment and provide for the Physician Panels to make determinations on these medical issues. However, the panel determinations with respect to such issues will not affect whether a ''positive'' or ''favorable'' determination is rendered for an applicant with all its attendant consequences under this program. Whether a positive or favorable determination is rendered is to be based solely on the standard and criteria set forth in section 852.8.

U. When Must a Physician Panel Issue Its Determination?

Section 852.13 (proposed as section 852.12) requires a Physician Panel to submit its determination to the Program Office within 30 working days of receiving the application materials, unless granted an extension by the Program Office, which then sets the new deadline. New section 852.13(b) further stipulates that, when a Physician Panel requests additional information or a consultation necessary to the panel's deliberations, the deadline for panel determination is extended to 15 working days after receipt of the requested information or the consultant's recommendations.

A commenter stated that the rule should define the ''applicant's material'' and describe the Physician Panel's obligation if the ''applicant's material'' is deemed incomplete or otherwise inadequate for consideration.

Because section 852.4 allows some discretion on the part of the applicant and the employer as to what materials are submitted, and because there will be a wide variation in the type and amount of information available from other sources, it is not possible to define precisely what the application materials will consist of, beyond the materials that the applicant is required to submit, as outlined in section 852.4. In those instances where the Physician Panel deems the application materials to be insufficient, the Physician Panel's obligations are defined in section 852.10, which requires the Physician Panel to request any additional information needed. New section 852.13 further requires a Physician Panel to issue a determination in a timely fashion after receiving additional requested information or a consultation with a specialist.

V. What Precautions Must Each Physician Panel Member and Each Specialist Take in Order To Keep an Applicant's Personal and Medical Information Confidential?

Because records for review by the Physician Panels and by medical specialists consulted at the request of these panels contain confidential, personal, and medical information, section 852.14 (proposed as section 852.13) is included to provide safeguards that Physician Panels and specialists must follow to preserve the confidentiality of this information. Physician Panel members and specialists are required to comply with all provisions of the Privacy Act of 1974 applicable to worker advocacy records, including maintaining paper records in locked cabinets and desks. Release of information to a third party is also barred, unless such release is authorized by the applicant.

W. What Actions Must a Physician Panel Member Take if a Member of the Panel Has a Potential Conflict of Interest in Relation to a Specific Application Submitted to the Panel?

In order to ensure objectivity and fairness, section 852.15 (proposed as section 852.14) requires each panel member to report to the Program Office any real or perceived conflict of interest with regard to a particular application to the Program Office, and to cease reviewing the application pending instruction by the Program Office. The Program Office will then take appropriate actions to remedy the situation, which generally will mean referring the application to a different Physician Panel. At least two Physician Panels will be designated to review applications submitted by employees of each DOE facility.

A commenter suggested that the proposed section 852.14 did not go far enough in addressing potential conflicts of interest, and called for public disclosure of potential conflicts of interest. It is DOE's position that, in addition to the reporting requirements of section 852.15, adequate safeguards have been taken to avoid potential conflicts of interest because, among other things, the selection of Physician Panel members will be performed by HHS independently of DOE.

X. When May the Program Office Ask a Physician Panel To Reexamine an Application That Has Undergone Prior Physician Panel Review?

Section 852.16 (proposed as section 852.15) provides that the Program Office may refer a case for reexamination to the same panel or to a different panel, after the original panel has made a determination if: there is significant evidence contrary to the panel determination; the Program Office obtains new information the consideration of which would be reasonably likely to result in a different determination; the Program Office becomes aware of a real or potential conflict of interest on the part of a member of the original panel in relation to the application under review; or reexamination is necessary to ensure consistency among panels.

Several commenters felt that the Program Office's review powers were too broad in the NOPR. DOE agrees that a Physician Panel determination should be accorded deference and DOE generally anticipates accepting a Physician Panel determination in favor of an applicant. The statute does, however, specifically contemplate review and discretion by the Program Office in determining whether to accept such a determination, in that the statute specifies that the Program Office shall accept such a finding unless there is ''significant evidence to the contrary.'' In the final rule, the discretion of the Program Office to ask a Physician Panel to reexamine an application has been delineated to balance these competing considerations.

Y. Must the Program Office Accept the Determination of a Physician Panel?

Unless a reexamination is requested pursuant to section 852.16, section 852.17 (proposed as section 852.16) requires the Program Office to accept a Physician Panel's determination, except where the Program Office determines there is significant evidence contrary to the panel determination. The Program Office must notify the applicant and the employer, in a timely fashion, of its acceptance or rejection of a Physician Panel determination.

Proposed section 852.16 required only the prompt notification of the applicant of a determination. In the final rule, notification is extended to the relevant DOE contractor employers because of the potential impact of the Program Office's determination on those parties.

Z. Is There an Appeals Process?

Section 852.18 (proposed as section 852.17) provides that an applicant may request DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office not to accept a Physician Panel determination in favor of an applicant. An applicant may not, however, appeal to OHA a Program Office decision to submit an application for reexamination pursuant to section 852.16.

An applicant must file a notice of appeal with OHA on or before 30 days from the date of a letter from the Program Office notifying the applicant of a decision appealable under this section. OHA will consider appeals in accordance with its procedures set forth in 10 CFR Part 1003. A decision by OHA constitutes DOE's final determination with respect to an application.

A commenter agreed that an applicant should have a right to appeal a determination not to submit the application to the Physician Panel, but expressed concern about the independence of OHA. OHA is an office within DOE. However, apart from being within the same agency, it is administratively and functionally independent of the Program Office. Although a decision by OHA constitutes DOE's final determination with respect to an application, it is not the final remedy for an applicant. Regardless of DOE's final determination on a claim, an applicant may still file a claim with the applicable State workers' compensation program.

AA. What Is the Effect of the Acceptance by the Program Office of a Determination by a Physician Panel in Favor of an Applicant?

Section 852.19 (proposed as section 852.18) sets forth the effect of acceptance by the Program Office of a determination by a Physician Panel in an applicant's favor. In the event the Program Office accepts such a determination by a Physician Panel, the Program Office must assist the applicant in filing a claim with the relevant State's workers' compensation system and cannot contest the claim or any award made regarding the health condition that was the subject of the Physician Panel determination in the applicant's favor.

There were many comments regarding proposed section 852.18. Commenters expressed concerns about what actions DOE will take in order to ensure that claims based upon positive Physician Panel determination will not be contested by its contractors. Section 852.19 requires the Program Office to advise the cognizant Secretarial Officer to recommend to the relevant Contracting Officer that, to the extent permitted by law, the DOE contractor be directed not to contest the claim or award. Furthermore, any cost of contesting the claim or award is not an allowable cost under a DOE contract.

All workers' compensation costs incurred as a result of an award on a claim based on the health condition that was the subject of a Physician Panel determination in favor of an applicant are allowable, reimbursable contract costs to the fullest extent permitted under a contract. This final provision of section 852.19 was added in final rulemaking in order to ensure that a DOE contractor who incurs additional workers' compensation award costs as a result of the rule is able to recover such costs from DOE.

Part D only provides that DOE may direct its contractors not to contest a determination by a Physician Panel. It neither affects nor authorizes DOE to give directives to persons who are not DOE contractors. Thus, it will not affect persons who have no privity of contract with DOE, such as insurers. Likewise, it will not affect persons who lease DOE facilities for commercial purposes. While leases may be considered contracts, they typically have no provisions that would permit DOE to direct a lessee not to contest a workers' compensation claim or that would require DOE to reimburse the lessee for a workers' compensation claim. In addition, DOE may direct its contractors not to contest a determination by a Physician Panel only to the extent permitted by law. Thus, DOE cannot direct a contractor to take action that would violate the contractor's obligations under a State workers' compensation system or other legal obligations such as a contractual obligation to an insurer.

Part D further provides that, in the case of a Physician Panel determination in an applicant's favor that has been accepted by the Program Office, DOE must assist an applicant in filing a claim under the appropriate State workers' compensation system. DOE notes that there is nothing in Part D of the Act requiring an applicant to file a claim after the Program Office accepts a positive Physician Panel determination. The applicant is responsible for evaluating the merits of filing a claim. If an applicant elects to seek relief under a State workers' compensation Program, Part D places an obligation upon DOE to assist the applicant in filing a claim. This assistance will include the provision of the determination and other information developed by a Physician Panel. It will not include representation or other such assistance after the filing of a claim with a State workers' compensation system.

A commenter stated that even when causation has been established, there is still a disability determination that needs to be made under the State workers' compensation system. DOE believes that all such determinations should be made in the normal course of the operation of State workers' compensation statutes and administrative procedures. A commenter was concerned that costs associated with a disability determination would not be allowable. DOE has concluded that the disallowance of costs associated with contesting a claim that has been the subject of a Physician Panel determination in an applicant's favor pertains to all costs of supporting arguments or activities with the intent or effect of delaying or defeating a claimant's ability to recover State workers' compensation benefits for the health condition for which the applicant has received a final favorable Physician Panel determination. This obviously applies not only to ''contesting'' claims before the relevant State workers'' compensation authority, but also to ''contesting'' such claims on appeal or in any other administrative or judicial forum. Subsequent employer costs are allowable to the extent that, and if consistent with the contractor's contract with DOE, under the applicable State workers' compensation statutes, it is customary for the employer to take an

active role in settling issues related to the claim, such as the extent of injury, allocation of liability among multiple employers, or calculation of actual benefits, but only to the extent such activities do not have the intent or effect of delaying or defeating a claimant's ability to recover workers' compensation benefits. If a State Agreement provides for a Physician Panel to determine a State-specific medical issue such as the degree of disability or impairment, DOE may direct a contractor not to contest that determination in a State proceeding and may not reimburse costs incurred in contesting such a determination.

A commenter noted that this program will result in increased workers' compensation premiums to its contractors, and that additional workers' compensation claims will affect a contractor's State experience rating as a result of its workers' compensation experience. To the extent premium increases do occur or experience ratings are adversely affected, those effects are the necessary results of the Program established by Congress under Part D.

BB. General Comments on the NOPR

A number of workers, former workers, their survivors and representatives had general comments on the NOPR without specific reference to a particular section. A number of commenters stated that the affected workers had endured exposure to many hazards, and deserved a program of real assistance. Two commenters noted the patriotism of these workers. A number of commenters felt that the rule, as proposed, was not assisting sick workers, as intended by the Act.

In this notice of final rulemaking, DOE has carefully considered the major issues emerging from the comments on the NOPR, and believes that the final rule has addressed those issues. DOE believes that the final rule goes as far as the Act authorizes DOE to go in providing assistance.

A commenter expressed concern about the status of applications for Physician Panel review already received under this Act. The commenter wanted to know if these filings are null and void, pending negotiation of the State Agreements. DOE will retain and act on these filings when the administrative machinery is in place to process them. Under the Act, the promulgation of this rule is the necessary first step in that endeavor. The establishment of State Agreements can now begin. That in turn will allow DOE to begin processing these claims.

A commenter asked for clarification on how DOE will respond to cases where State has already considered and denied a workers' compensation claim for the same or related health condition that will be the basis for the applicants claim under the Part D program. The Program Office will process these claims in the same manner as other claims. It must be noted, however, that the Act does not change the normal operation of any State workers' compensation system, and does not create any new grounds for re-opening any decision already rendered under State law.

III. Regulatory Review and Procedural Requirements

A. Review Under Executive Order 12866

Today's regulatory action has been determined to be ''a significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be 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. The rule would provide guidelines for the operation and determinations of Physician Panels established to provide expert opinion to DOE on the cause of a worker's illness or death. It would not impose costs or burdens on any small business or other small entity. DOE, therefore, certifies that the rule will not have a significant economic impact on a substantial number of small entities.

C. Review Under the Paperwork Reduction Act

The rule provides that an individual may submit an application for review and assistance to the Program Office that contains information relating to the individual's employment by a DOE contractor, the nature of the illness or death, and the relationship between the illness or death and the individual's employment at a DOE facility. The application is required for DOE to determine whether reasonable evidence exists for submitting the individual's application to a Physician Panel.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection has been reviewed and assigned a control number by OMB. DOE submitted the proposed collection of information in the rule to OMB, simultaneously with the publication of the NOPR for review and approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* OMB has approved the collection of information in the rule and assigned it control number 1910.

D. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of the rule falls into a class of actions that would not individually or cumulatively have a significant impact on the human environment, as determined by DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, the rule deals only with Physician Panel procedures, and, therefore, is covered under the Categorical Exclusion for rulemakings that are strictly procedural in paragraph A6 of Appendix A to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999), imposes certain requirements on Agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have ''federalism implications.'' Policies that have federalism implications are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.'' On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined today's rule and has determined that it does not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. The scope of the rule is limited to defining how a Physician Panel established under the Act will determine whether the illness

or death that is the subject of an application for assistance in filing a claim under a State's workers' compensation system arose out of and in the course of employment by DOE and exposure to a toxic substance at a DOE facility. Referral of an application to a Physician Panel can occur only by agreement with the applicable State. The rule would leave to the State the determination of benefits. Thus, the rule would not preempt State workers' compensation law. No further action is required by Executive Order 13132.

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

G. Review Under the Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal Agency to prepare a written assessment of the effects of any Federal mandate in a proposed or final rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million in any single year. The Act also requires a Federal Agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a proposed ''significant intergovernmental mandate,'' and it requires an Agency to develop a plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirement that might significantly or uniquely affect small governments. The rule published today does not contain any Federal mandate, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal Agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. The rulemaking would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has not prepared a Family Policymaking Assessment.

I. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to the promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA, as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits energy supply, distribution, and use.

Today's rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

J. Congressional Notification

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

List of Subjects in 10 CFR Part 852

Administrative practice and procedure, Government contracts, Hazardous substances, Workers' compensation.

Issued in Washington, DC, on August 7, 2002.

Beverly A. Cook,

Assistant Secretary for Environment, Safety and Health.

For the reasons stated in the preamble, DOE hereby amends Chapter III of title 10 of the Code of Federal Regulations by adding part 852 to read as follows:

PART 852—GUIDELINES FOR PHYSICIAN PANEL DETERMINATIONS ON WORKER REQUESTS FOR ASSISTANCE IN FILING FOR STATE WORKERS' COMPENSATION BENEFITS

Sec.

Authority: 42 U.S.C. 7384, *et seq.*; 42 U.S.C. 2201 and 7101, *et seq.*; 50 U.S.C. 2401 *et seq.*

§ 852.1 What is the purpose and scope of this part?

(a) This part implements Part D of the Act by establishing the procedures under which:

(1) An individual may obtain and submit an application to the Program Office for review and assistance;

(2) The Program Office processes and submits eligible applications to a Physician Panel;

(3) Physician Panels determine whether the illness or death of a DOE contractor employee arose out of and in the course of employment by a DOE contractor and through exposure to a toxic substance at a DOE facility;

(4) The Program Office processes a determination by a Physician Panel; and,

(5) Appeals may be undertaken.

(b) This part covers applications filed by or on behalf of a DOE contractor employee, or a deceased employee's estate or survivor, with respect to an illness or death of a DOE contractor employee that may have been caused by exposure to a toxic substance during the course of employment at a DOE facility.

(c) All actions under this part must be pursuant to the relevant State Agreement and consistent with its terms and conditions.

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

Act means the Energy Employees Occupational Illness Compensation Program Act of 2000, 42 U.S.C. 7384 *et seq.*

Applicant means an individual seeking assistance from the Program Office in filing a claim with the relevant State workers' compensation system, including but not limited to, a living DOE contractor employee, the estate of a deceased DOE contractor employee, or any survivor of a deceased DOE contractor employee who is eligible to apply for a death benefit or a survivor's benefit under the State workers' compensation system for which the applicant is seeking assistance in filing a claim.

DOE means the U.S. Department of Energy, and its predecessor agencies, including the Manhattan Engineering District, the Atomic Energy Commission, and the Energy Research and Development Administration.

DOE contractor employee means any of the following:

(a) An individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months.

(b) An individual who is or was employed at a DOE facility by

(i) An entity that contracted with DOE to provide management and operation, management and integration, or environmental remediation at the facility; or

(ii) A contractor or subcontractor that provided services, including construction and maintenance, at the facility.

DOE facility means any building, structure or premise, including the grounds upon which such building, structure, or premise is located:

(a) In which operations are, or have been, conducted by, or on behalf of DOE (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. 7158 note), pertaining to the Naval Nuclear Propulsion Program); and

(b) With regard to which DOE has or had

(i) A proprietary interest; or

(ii) Entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services.

Physician panel means a group of three physicians appointed by the Secretary of Health and Human Services, pursuant to Part D of the Act, to evaluate potential claims of DOE contractor employees under the appropriate State workers' compensation system.

Program office means the Office of Worker Advocacy within DOE's Office of Environment, Safety and Health, or any other DOE office subsequently assigned to perform the functions of the Secretary of Energy under Part D of the Act.

State agreement means an agreement negotiated between DOE and a State that sets forth the terms and conditions for dealing with an application for assistance under Part D of the Act in filing a claim with the State's workers' compensation system.

Toxic substance means any material that has the potential to cause illness or death because of its radioactive, chemical, or biological nature.

§ 852.3 How does an individual obtain and submit an application for review and assistance?

(a) An individual obtains an application for review and assistance:

(1) In person from the Program Office, from any of the Resources Centers listed in Appendix A to this section, or from any DOE-sponsored Former Worker Program project;

(2) Through a written request mailed to Assistant Secretary, Office of Environment, Safety and Health, Office of Worker Advocacy, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585. or to any other address that DOE may subsequently publish by notice in the **Federal Register**;

(3) Through telephone request to 1–877–447–9756 or to any other telephone number that DOE may subsequently publish by notice in the **Federal Register**; or

(4) In printable format, from the Program Office's Web site at *http://tis.eh.doe.gov/advocacy/* or from any other Web site that DOE may subsequently publish by notice in the **Federal Register**.

(b) An individual submits an application for review and assistance—

(1) In person to the Program Office, to any Resource Center, or to any DOE-sponsored Former Worker Program project.

(2) By mail to the Program Office at the address identified in paragraph (a)(2) of this section, or to any other address that DOE may subsequently publish by notice in the **Federal Register**.

§ 852.4 What information and materials does an individual submit as a part of the application for review and assistance?

(a) As a part of the application for review and assistance, an individual must submit, in writing:

(1) Any application forms required by the Program Office.

(2) The name and address of any licensed physician who is the source of a diagnosis based upon documented medical information that the employee has or had an illness and that the illness may have resulted from exposure to a toxic substance while the employee was employed at a DOE facility and, to the extent practicable, a copy of the diagnosis and a summary of the information upon which the diagnosis is based.

(3) A signed medical release, authorizing non-DOE sources of medical information to provide the Program Office with any diagnosis, medical opinion and medical records documenting the diagnosis or opinion

that the employee has or had an illness and that the illness may have resulted from exposure to a toxic substance while the employee was employed at a DOE facility.

(4) To the extent practicable and appropriate, an occupational history obtained by a physician, an occupational health professional, or a DOE-sponsored Former Worker Program. (If such an occupational history is not reasonably available and is deemed by the Program Office to be needed for the fair adjudication of the claim, then the Program Office will assist the applicant in obtaining this history.)

(5) Any other information or materials deemed by the Program Office to be necessary to provide reasonable evidence that the employee has or had an illness that may have arisen from exposure to a toxic substance while employed at a DOE facility.

(b) The applicant may also submit directly to the Program Office any other information or materials providing evidence that the employee has or had an illness that may have resulted from exposure to a toxic substance during the course of employment at a DOE facility.

(c) The applicant must sign an affidavit attesting to the authenticity and completeness of any information or materials submitted to the Program Office, or provide the Program Office with other evidence of authenticity of submitted materials, such as certification of submitted copies of originals.

§ 852.5 What information and materials may an employer submit in response to a submission of an application to a Physician Panel?

(a) Upon receipt of an application and the Program Office's determination that the application meets the requirements of § 852.4, the Program Office must notify each of the applicant's relevant DOE contractor employers in writing of:

(1) The existence of the application;

(2) The name of the employee;

(3) The diagnosis claimed; and

(4) The likely date of onset or date of diagnosis, if known.

(b) The employer has 15 working days from receipt of this notification to submit to the Program Office any information deemed by the employer to be relevant to either the Program Office's determination of whether to refer an application to a Physician Panel, or to adjudication of the application by a Physician Panel.

(c) The employer must sign an affidavit attesting to the authenticity and completeness of any information provided to the Program Office under this section, or provide the Program Office with other evidence of authenticity of submitted materials, such as certification of submitted copies of originals.

§ 852.6 Which applications are submitted to a Physician Panel?

(a) The Program Office must submit an application and any information submitted under § 852.5 of this part to a Physician Panel if there is reasonable evidence to make an initial determination that:

(1) The application was filed by or on behalf of a DOE contractor employee or a deceased DOE contractor employee's estate or survivor;

(2) The illness or death of the DOE contractor employee may have been caused by exposure to a toxic substance; and,

(3) The illness or death of the DOE contractor employee may have been related to employment at a DOE facility.

(b) The Program Office must promptly notify the applicant in writing of an initial determination under this section.

§ 852.7 What provisions are set forth in State Agreements?

DOE may not execute a State Agreement that does not contain the following provisions:

(a) A statement that an application is submitted to a Physician Panel only if the application satisfies the criteria in § 852.6 of this part:

(1) The application was filed by or on behalf of a DOE contractor employee or a deceased DOE contractor employee's estate or survivor;

(2) The illness or death of the DOE contractor employee may have been caused by exposure to a toxic substance; and

(3) The illness or death of the DOE contractor employee may have been related to employment at a DOE facility.

(b) An agreement that a Physician Panel must apply the standards set forth in § 852.8 of this part when making a determination that an illness or death arose from exposure to a toxic substance during the course of employment at a DOE facility;

(c) An agreement that the Program Office must provide assistance to only those applicants with a positive determination from the Physician Panel; and

(d) An agreement that a positive determination by the Physician Panel has no effect on the scope of State workers' compensation proceedings, the conditions for compensation, or the rights and obligations of the participants in the proceeding; provided that consistent with Part D of the Act such a determination will prevent DOE and may prevent a DOE contractor from contesting an applicant's workers' compensation claim.

§ 852.8 How does a Physician Panel determine whether an illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility?

A Physician Panel must determine whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility on the basis of whether it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue.

§ 852.9 What materials must a Physician Panel review prior to making a determination?

The Physician Panel must review all records relating to the application that are provided by the Program Office, including but not limited to:

(a) Medical records;

(b) Employment records;

(c) Exposure records;

(d) Occupational history;

(e) Workers' compensation records;

(f) Medical literature or reports;

(g) Any other records or evidence pertaining to the applicant's request for assistance;

(h) A medical examiner's report, coroner's report, or death certificate for any application submitted by an estate or survivor of a deceased worker; and

(i) Information submitted as a part of such a claim or developed by the Department of Labor (DOL) or by the Department of Health and Human Services (HHS) in the course of processing a claim for the applicant, including, where applicable, estimates of an applicant's cumulative radiation dose and the calculated probability that this dose was responsible for a cancer that is the subject of the claim, for any application submitted by an applicant also applying to DOL for benefits available under the Act.

§ 852.10 How may a Physician Panel obtain additional information or a consultation that it needs to make a determination?

If, after reviewing all materials provided by the Program Office, a Physician Panel finds that it needs additional information or consultation with a specialist in order to make a determination, it must request this information or consultation through the Program Office. A Physician Panel may request:

(a) A recorded interview under oath with the applicant, by an individual designated by the Program Office, if the Physician Panel believes only the applicant can provide the necessary information.

(b) That the applicant provide additional medical information;

(c) Additional relevant information under the control of DOE or its contractors;

(d) Consultation with designated specialists in fields relevant to its deliberations;

(e) Specific articles or reports, or assistance searching the medical or scientific literature; or

(f) Other needed information or materials.

§ 852.11 How is a Physician Panel to carry out its deliberations and arrive at a determination?

(a) Each panel member reviews all materials relating to the application.

(b) All panel members meet in conference, in person, or by teleconference in order to discuss the application and arrive at a determination agreed to by a majority of the members of the Physician Panel.

§ 852.12 How must a Physician Panel issue its determination?

A Physician Panel must submit its determination under § 852.8 and the findings that provide the basis for its determination to the Program Office. The determination and the findings must be in writing and signed by all panel members. The findings must include:

(a) Each illness or cause of death that is the subject of the application.

(b) For each illness or cause of death listed under paragraph (a) of this section:

(1) Diagnosis;

(2) Approximate date of onset;

(3) Date of death, if applicable;

(4) Whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility;

(5) The basis for the determination under paragraph (b)(4) of this section;

(6) A determination concerning any other medical issue identified in the relevant State Agreement; and

(7) The basis for the determination under paragraph (b)(6) of this section.

(c) The Physician Panel must provide the Program Office with:

(1) Any evidence to the contrary of the panel's determination, and why the panel finds this evidence is not persuasive.

(2) A listing of information and materials reviewed by the panel in making its determination, including:

(i) Information and materials provided by the Program Office; and,

(ii) Information and materials obtained by the panel, including consultations with specialists, scientific articles, and the record of any interview with an applicant.

(3) Any other information the panel concludes that the Program Office should have in order to understand the panel's deliberations and determination.

§ 852.13 When must a Physician Panel issue its determination?

(a) A Physician Panel must submit its determination and findings to the Program Office within 30 working days of the time that panel members have received the complete application for review from the Program Office.

(b) The Program Office may extend the deadline for a panel determination under the following circumstances:

(1) The Physician Panel indicates to the Program Office that it needs additional information or a consultation in order to carry out its deliberations, as provided for in § 852.10. In this case, the panel's determination is due 15 working days after receipt of the additional information (or notice from the Program Office that the requested information is unavailable), or 15 working days after receiving the consultant's recommendations, whichever is applicable; or

(2) The Physician Panel has requested and the Program Office has granted an extension.

(c) If an extension is granted pursuant to section 852.13(b)(2), the Program Office will specify the new deadline.

§ 852.14 What precautions must each Physician Panel member and each specialist take in order to keep an applicant's personal and medical information confidential?

In order to maintain the confidentiality of an applicant's personal and medical information, each Physician Panel member and each specialist consulted at the request of a Physician Panel must take the following precautions:

(a) Maintain the confidentiality of applicant records, keep them in a secure, locked location, and, upon completion of panel deliberations, follow the instructions of the Program Office with regard to the disposal or temporary retention of these records;

(b) Conduct all case reviews and conferences in private, in such a fashion as to prevent the disclosure of personal applicant information to any individual who has not been authorized to access this information;

(c) Release no information to a third party, unless authorized to do so in writing by the applicant; and

(d) Adhere to the provisions of the Privacy Act of 1974 regarding Worker Advocacy Records.

§ 852.15 What actions must a Physician Panel member take if that member has a potential conflict of interest in relation to a specific application?

(a) If a panel member has a past or present relationship with an applicant, an applicant's employer, or an interested third party that may affect the panel member's ability to objectively review the application, or that may create the appearance of a conflict of interest, then that panel member must immediately:

(1) Cease review of the application; and

(2) Notify the Program Office and await further instruction from the Office.

(b) The Program Office must then take such action as is necessary to assure an objective review of the application.

§ 852.16 When may the Program Office ask a Physician Panel to reexamine an application that has undergone prior Physician Panel review?

The Program Office may direct the original Physician Panel or a different Physician Panel to reexamine an application that has undergone prior Physician Panel review if:

(a) There is significant evidence contrary to the panel determination;

(b) The Program Office obtains new information the consideration of which would be reasonably likely to result in a different determination;

(c) The Program Office becomes aware of a real or potential conflict of interest of a member of the original panel in relation to the application under review; or

(d) Reexamination is necessary to ensure consistency among panels.

§ 852.17 Must the Program Office accept the determination of a Physician Panel?

(a) Subject to the ability of the Program Office to direct a reexamination pursuant to § 852.16, the Program Office must accept the determination by the Physician Panel unless the Program Office determines there is significant evidence contrary to the panel determination.

(b) The Program Office must promptly notify an applicant and the relevant DOE contractor(s) of its acceptance or rejection of a determination by a Physician Panel.

§ 852.18 Is there an appeals process?

(a) An applicant may request DOE's Office of Hearings and Appeals (OHA) to review:

(1) A decision by the Program Office not to submit an application to a Physician Panel;

(2) A negative determination by a Physician Panel that is accepted by the Program Office; and

(3) A final decision by the Program Office not to accept a determination in the applicant's favor by a Physician Panel.

(b) An applicant must file a notice of appeal with OHA on or before 30 days from the date of a letter from the Program Office notifying the applicant of a determination appealable under this section.

(c) An appeal under this section is subject to the procedures of OHA in 10 CFR Part 1003.

(d) A decision by OHA constitutes DOE's final determination with respect to an application.

§ 852.19 What is the effect of the acceptance by the Program Office of a determination by a Physician Panel in favor of an applicant?

In the event the Program Office accepts a determination by a Physician Panel in favor of an applicant:

(a) The Program Office must assist the applicant in filing a claim with the relevant State's workers' compensation system by providing the determination and other information provided to the Program Office by a Physician Panel pursuant to§ 852.12 of this part;

(b) The Program Office may not contest the determination;

(c) The Program Office must advise the cognizant DOE Secretarial Officer to recommend to the Contracting Officer (CO) for a DOE contractor that, to the extent permitted by law, the CO direct the contractor not to contest an applicant's workers' compensation claim or award in any administrative or judicial forum with respect to the same health condition for which the applicant received a favorable final Physician Panel determination;

(d) Any costs of contesting a claim or award identified in paragraph (c) of this section—that is, any costs of supporting arguments or activities with the intent or effect of delaying or defeating such a claim or award—are not allowable costs under a DOE contract; and,

(e) All workers' compensation costs incurred as a result of a workers' compensation award on a claim based on the same health condition that was the subject of a positive Physician Panel determination are allowable, reimbursable contract costs to the full extent permitted under the DOE contractor's contract with DOE.

[FR Doc. 02–20459 Filed 8–13–02; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. CE172, Special Condition 23–125–SC]

Special Conditions; GROB–WERKE, Burkhurt Grob e.k., Unternehmensbereich Luft-und Raumfahrt, Model G120A Airplane; Protection of Systems From High Intensity Radiated Fields (HIRF): Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; correction.

SUMMARY: The FAA published a document in the **Federal Register** on February 5, 2002, concerning final special conditions on the GROB–WERKE, Burkhurt Grob e.k., Unternehmensbereich Luft-und Raumfahrt, Model G120A airplane. There was an inadvertent error in the special condition number in the document. This document contains a correction to the special condition number for the final special conditions.

DATES: The effective date of these corrected special conditions is January 29, 2002.

FOR FURTHER INFORMATION CONTACT: Ervin Dvorak, Aerospace Engineer, Standards Office (ACE–110), Small Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone (816) 329–4123.

SUPPLEMENTARY INFORMATION:

Need for Correction

The FAA published a document on February 5, 2002 (67 FR 5196) that issued final special conditions. In the document heading, a special condition number appears that had already been issued for another set of special conditions with a different docket number. This document corrects that error.

Correction of Publication

Accordingly, the special condition number, which appears in the heading of Docket No. CE172, is revised from 23–110–SC to 23–125–SC.

Issued in Kansas City, Missouri on July 25, 2002.

James E. Jackson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–20628 Filed 8–13–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. CE170, Special Condition 23–124–SC]

Special Conditions; Byerly Aviation, Twin Commander Models 690, 690A, 690B, 690C, 690D, 695, 695A, and 695B; Protection of Systems From High Intensity Radiated Fields (HIRF): Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; correction.

SUMMARY: The FAA published a document in the **Federal Register** on October 5, 2001, concerning final special conditions on the Byerly Aviation Twin Commander Models 690, 690A, 690B, 690C, 690D, 695, 695A, and 695B airplane. There was an inadvertent error in the special condition number in the document. This document contains a correction to the special condition number for the final special conditions.

DATES: The effective date of these corrected special conditions is September 17, 2001.

FOR FURTHER INFORMATION CONTACT: Ervin Dvorak, Aerospace Engineer, Standards Office (ACE–110), Small Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone (816) 329–4123.

SUPPLEMENTARY INFORMATION:

Need for Correction

The FAA published a document on October 5, 2001 (66 FR 50819) that issued final special conditions. In the document heading, a special condition number appears that had already been issued for another set of special conditions with a different docket number. This document corrects that error.

Correction of Publication

Accordingly, the special condition number, which appears in the heading of Docket No. CE170, is revised from 23–109–SC to 23–124–SC.