public display or intended for use in research facilities (7 U.S.C. 2131). The commenter added that it is not clear how USDA has authority if the noninvasive research does not involve animals or activities that are in interstate or foreign commerce or does not substantially affect such commerce or its free flow as provided in the AWA (7 U.S.C. 2131).

The purpose of defining the term *field study* in our regulations is to exclude from the regulations those activities that meet the definition. Thus, if a study is conducted on free-living wild animals in their natural habitat and the study does not involve an invasive procedure, does not harm the animals under study, and does not materially alter the behavior of the animals under study, then that activity is not regulated.

The AWA defines *animal* as any live or dead dog, cat, nonhuman primate, guinea pig, hamster, rabbit, or such other warm-blooded animal as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet. This definition does not exclude animals in the wild. If a research facility conducts a study on animals in the wild that does not meet the criteria for a field study, then that activity would be regulated. The AWA defines *research facility* as any school (except an elementary or secondary school), institution, organization, or person that uses or intends to use live animals in research, tests, or experiments and that: (1) Purchases or transports live animals in commerce; or (2) receives funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of carrying out research, tests, or experiments. * * *''

One commenter stated that researchers appear to be circumventing the AWA by claiming that trap tests performed on wildlife are field studies. Trapping, including the testing of traps, is not regulated by the AWA.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, with the changes discussed in this document.

Executive Order 12866 and Regulatory Flexibility Act

This final rule has been reviewed under Executive Order 12866. The rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

This final rule will clarify that a *field study* cannot include an invasive procedure, harm the animals under study, or materially alter the behavior of the animals under study.

We have always intended that field studies not include any invasive procedures, harm the animals under study, or materially alter the behavior of the animals under study. This rule makes no substantive changes to the definition. By clarifying the definition of *field study,* this final rule will help ensure that studies that should be covered under the Animal Welfare regulations are covered.

The only entities that will be affected by this rule will be entities that perform studies conducted on free-living wild animals in their natural habitat. We estimate that at least 50 entities may be affected by this final rule. These entities may be considered small and large entities by Small Business Administration standards, but this final rule will only affect a small portion of the entities' activities. As we are not proposing a substantive change in the definition, the effect on these entities will not be significant.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. This rule would not preempt any State and local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. The Act does not provide administrative procedures which must be exhausted prior to a judicial challenge to the provisions of this rule.

Paperwork Reduction Act

This proposed rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 9 CFR Part 1

Animal welfare, Pets, Reporting and recordkeeping requirements, Research.

Accordingly, we are amending 9 CFR part 1 as follows:

PART 1—DEFINITION OF TERMS

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

Authority: 7 U.S.C. 2131–2159; 7 CFR 2.22, 2.80, and 371.2(g).

2. In § 1.1, the definition of *field study* is revised to read as follows:

§ 1.1 Definitions.

* * * * *

Field study means a study conducted on free-living wild animals in their natural habitat. However, this term excludes any study that involves an invasive procedure, harms, or materially alters the behavior of an animal under study.

* * * * *

Done in Washington, DC, this 3rd day of February 2000.

Richard L. Dunkle,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 00–2922 Filed 2–8–00; 8:45 am]

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DEPARTMENT OF ENERGY

10 CFR Part 708

RIN 1901–AA78

Criteria and Procedures for DOE Contractor Employee Protection Program

AGENCY: Office of Hearings and Appeals, Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) adopts, with minor changes, an interim final rule published on March 15, 1999, to amend the DOE contractor employee protection program (''whistleblower'') regulations.

EFFECTIVE DATE: This final rule is effective on March 10, 2000.

FOR FURTHER INFORMATION CONTACT: Roger Klurfeld, Assistant Director, or Thomas O. Mann, Deputy Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Ave., SW, Washington, DC 20585–0107; telephone: 202–426–1449; e-mail: roger.klurfeld@hq.doe.gov, thomas.mann@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

On March 15, 1999, DOE published an interim final rule in the **Federal Register** (64 FR 12862) that comprehensively revised the regulations for the DOE contractor employee protection program, which are codified

at 10 CFR part 708. DOE became aware during the comment period on the interim final rule that three provisions in the original Part 708 had been inadvertently omitted from the interim final rule. DOE published an amendment to the interim final rule on July 12, 1999 (64 FR 37396) to correct the omission.

DOE provided a 60-day public comment period for the interim final rule published on March 15, 1999. DOE did not invite public comments on the July 12, 1999, amendment to the interim final rule because those changes were procedural and DOE determined that no purpose would be served by inviting comments.

Section 3164 of the National Defense Authorization Act for Fiscal Year 2000 directs DOE to establish a whistleblower protection program for covered individuals (DOE and DOE contractor employees engaged in the defense activities of the Department) who disclose to certain Governmental (including certain Congressional) personnel ''classified or other information'' that they reasonably believe provides evidence of violations of law, gross mismanagement, a gross waste of funds or abuse of authority, or a false statement to Congress on an issue of material fact. DOE is aware of the new statutory requirement, and we are working separately on the implementation of the program mandated in section 3164. We are evaluating its effect, if any, on the DOE contractor employee protection program regulations.

II. Summary and Response to Comments on the Interim Final Rule

DOE received written comments from five interested organizations and individuals on the interim final amendments to the DOE contractor employee protection program regulations. This section of the Supplementary Information summarizes the issues raised in the comments and gives DOE's response, as follows:

Comment: Three different commenters expressed concern about the definition of the term ''contractor'' in § 708.2, which was changed in the interim final rule to extend protection to certain employees who do not work at DOE sites. Under the old rule, an employee eligible for protection under this rule must have been employed by a contractor performing work on sites that DOE owns or leases. The new language covers employees of contractors performing work ''directly related to activities'' at DOE-owned or DOE-leased sites, even if the contractor is located, or the work is performed, off-site. Two of the comments express the concern that the phrase directly related to activities does not draw a bright line between those employees who will now be protected by these regulations and those who will not, and that the definition of contractor will be difficult to apply. The third comment challenges the decision to expand the scope of coverage, arguing that off-site coverage will be ''difficult to manage,'' will drive away potential bidders for DOE contracts, thus raising the costs of procurement, and is unnecessary because ''other laws adequately protect employees of commercial entities.''

Response: We have decided that this language should remain unchanged from the interim final rule. As with any rule, determining who is and who is not covered by Part 708 will sometimes require interpretation. Even the previous formulation, though it appeared to present more of a bright line distinction, was subject to interpretation. *See C. Lawrence Cornett,* 26 CCH Fed. Energy Guidelines ¶87,504 (1996); *META, Inc.,* 26 CCH Fed. Energy Guidelines ¶87,501 (1996) (these cases are also available on the Office of Hearings and Appeals Internet web site, http://www.oha.doe.gov). More important, the definition of contractor in the interim final rule will cover the employees we intend to protect, *i.e.* those performing work that promotes the mission of the Department of Energy. Clearly, some interpretation through case law will be needed as we face some particular factual circumstances, but we believe that the rule is adequately clear as it applies to most cases.

To furnish additional guidance to the DOE contractor community, without considering any specific case, examples of contractor employees we intend to cover by this rule include contractor employees engaged in defense-related industrial activities that are central to the DOE's mission, such as workers processing or transporting nuclear materials, or workers involved in the preparation of environmental assessments of proposed actions involving radioactive waste or mixed waste, wherever they work, on-site or off-site. By contrast, part 708 is not intended to cover contractor employees delivering office supplies or servicing vending machines, regardless of where they are located, because their work is ancillary to, rather than central to DOE's mission. In addition, this rule is meant to cover employees who work on the Department's mission under the terms of a procurement ''contract,'' but not employees who work under the terms of a ''grant'' or a ''cooperative agreement,'' as those terms are defined in the Federal Grant and Cooperative Agreement Act, 31 U.S.C. 6301 *et seq.*, or under the terms of a ''cooperative research and development agreement'' (CRADA), as that term is defined by the Stevenson-Wydler Technology Innovation Act, 15 U.S.C. 3710a(d)(1).

Comment: One commenter maintains that DOE has created a ''camouflaged loophole'' by the interim final rule's use of the word ''retaliation,'' instead of ''discrimination,'' to define actions prohibited by contractors against employees who engaged in conduct protected by part 708. According to this commenter, retaliation ''is a legal term of art requiring animus or hostility,'' so that a claim of retaliation can be defeated by a showing that the contractor officials had no ''hard feelings'' against a whistleblower.

Response: A reading of the definition of retaliation in § 708.2 shows that this commenter has misinterpreted the significance of the interim final rule's use of a different generic term to describe the types of conduct prohibited by this rule. The term was changed as part of DOE's effort to rewrite Part 708 in ''plain language.'' The kinds of conduct prohibited by the definition of retaliation in the interim final rule are the same as those previously prohibited in the definition of discrimination under the old rule. Moreover, the term retaliation more precisely describes the nature of the conduct prohibited under Part 708, and avoids possible confusion with ''discrimination'' as that term is used in Title VII of the Civil Rights Act of 1964 and other Federal anti-discrimination statutes, as EEO violations are not covered by the DOE contractor employee protection program.

Court decisions under the Whistleblower Protection Act of 1989, Pub. L. 101–12, 103 Stat. 16 (1989) (codified as amended in scattered sections of 5 U.S.C.), do consider ''the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision'' to take action against a Federal employee covered by that whistleblower protection program as one of several factors to determine whether an employer has met its burden of proving by clear and convincing evidence that it would have taken the same action absent the protected conduct. *Cadell* v. *Dep't of Justice,* 66 M.S.P.R. 347, 351 (1995), aff'd 96 F.3d 1367, 1370 (Fed. Cir. 1996); *Sanders* v. *Dep't of the Army,* 64 M.S.P.R. 136 (1994), aff'd 50 F.3d 22 (Fed. Cir. 1995). Evidence of an employer's motive is therefore relevant in a whistleblower

case, but contrary to the commenter's assertion, evidence of a benign motive in and of itself will not meet the contractor's burden under Part 708.

Comment: Also concerning the definition of retaliation in ? 708.2, this same commenter asserted that the use of the phrase ''action with respect to the employee's compensation, terms, conditions or privileges of employment'' in that provision does not include common forms of harassment such as retaliatory investigations, removal of support staff, removal from a case or assignment, or tampering with (denying, suspending or revoking) a security clearance. The commenter also asserts that the rule should be changed to explicitly cover psychiatric examinations, and security clearances, as well as ''any other significant change in duties, responsibilities or working conditions.''

Response: The other types of adverse actions mentioned in the comment are generally meant to be covered by the broad definition of retaliation used in § 708.2. The definition enumerates examples of prohibited employment practices, but the list does not purport to be exclusive. For example, OHA decisions have recognized that the removal of the complainant from one job assignment and his reassignment to another job constituted retaliation, even though removal from an assignment is not specifically mentioned in § 708.2. *Ronald Sorri,* 23 CCH Fed. Energy Guidelines ¶87,503 at 89,010 (1993). It is not necessary to rewrite the definition of retaliation in order to give DOE the necessary flexibility to carry out the policy objectives of Part 708.

Actions taken regarding ''security clearances,'' *i.e.,* resolving questions about the eligibility of an individual for DOE access authorization, are governed by another regulation, 10 CFR part 710, subpart A. The preamble to the interim final rule explains that the resolution of national security concerns about an employee's eligibility for a DOE security clearance under part 710 takes precedence over individual retaliation claims under part 708. See 64 FR 12862 at 12867. However, the preamble recognizes that retaliation ''could include actions by a contractor that cause the questioning, suspension, or termination of a security clearance,'' and that ''with respect to consequences beyond the eligibility determination, Part 708 may apply.'' With regard to psychiatric examinations, psychiatric evaluations can be a proper tool to resolve questions of an individual's eligibility for a security clearance under § 710.8(h).

Comment: The same commenter also contends that ''the audience for protected activity is too limited'' under § 708.5. According to this commenter, the interim final rule ''only protects communications directly to recipients such as an official at the Department of Energy, a member of Congress and other governmental agencies with oversight responsibility at a DOE facility.'' The comment urges that the language of the rule and the preamble should specify that it will be interpreted consistently with the case law for employee protection statutes administered by the Department of Labor, such as amendments to the Energy Reorganization Act of 1992 (ERA), codified in 42 U.S.C. 5851, the provision that protects employees of Nuclear Regulatory Commission (NRC) licensees. The commenter claims that Department of Labor and the Federal courts have consistently interpreted those statutes to mean that employees are also protected for disclosures to the media and citizen associations, which are ''frequently the breeding ground for investigations and/or enforcement actions by the relevant regulatory agency.''

Response: As first proposed in 1990, part 708 only would have covered disclosures to DOE (55 FR 9326). Comments were received that advocated expanding the coverage to encompass disclosures to citizen groups, the media, state and Federal regulatory officials, and members of Congress. The final 1992 version of part 708 extended the coverage beyond DOE, to include in-house disclosures to the complainant's employer, higher tier contractors, and to Congress, but went no further (57 FR 7535). In explaining why we chose to limit coverage to those parties, DOE noted that a fundamental purpose of this rule is to encourage DOE contractor employees to feel free to disclose to the DOE information about health and safety problems or mismanagement at DOE facilities so that DOE can take corrective action. The Department reasoned that disclosures to other parties would not foster that objective. Additionally, DOE believed that ''extension of this rule to employees making disclosures to other parties could unduly complicate these procedures with evidentiary problems respecting whether a disclosure had actually been made.'' (57 FR 7535). We believe that reasoning is still sound. Nevertheless, the interim final rule expanded the coverage to include disclosures made to other government officials, such as those from other Federal or state agencies who have responsibility for oversight of activities on DOE-owned or -leased sites. This reflects the fact that some DOE sites are now subject to regulatory oversight by other agencies. But there is still no compelling reason to expand the coverage of this rule to include disclosures to citizen groups or the media. The Federal courts have granted protection under 42 U.S.C. 5851 to employees who made disclosures to parties other than their employers or to the Federal government to a very limited extent. *See Stone & Webster Engineering Corp.* v. *Herman,* 115 F.3d 1568 (11th Cir., 1997). In *Stone & Webster,* the U.S. Court of Appeals affirmed the Secretary of Labor's determination that a nuclear power plant worker was acting in furtherance of safety compliance when, after speaking to his employer about his safety concerns, he spoke to his co-workers about those same concerns, and thus communication to those workers was protected by the ERA. According to the holding in that case, which does not control proceedings under part 708, disclosures to outside parties must be closely related to the ''regular channels'' of protected activity in order to be protected under 42 U.S.C. 5851.

Comment: In the same vein, this commenter contends that the scope of protected activity in § 708.5(a) is unclear because ''it is possible that employee would be denied relief merely for doing his/her job.'' The commenter argues that this result ''would cancel protection for employees whose jobs require them to take risks of whistleblowers—auditors, inspectors and investigators who make a record of violations that are too politically hot to handle. . . .'' The commenter conjectures that the protection of the rule is only available to employees who make protected disclosures ''after hours,'' outside of their regular duty assignments.

Response: The rule clearly protects employees such as safety and quality inspectors whose job it is to make disclosures about violations of rules and dangers to employees and public health and safety. The commenter has misinterpreted the plain language of § 708.5(a), which contains nothing that would exclude disclosures that are routinely made in the course of an employee's work assignment.

Comment: The same commenter expressed concern over the requirement of § 708.5(a)(1) that an employee's disclosure must concern a ''substantial'' violation of law in order to be protected. This commenter correctly notes that both the Federal whistleblower protection statutes and the case law

have used an objective standard to determine whether activities are protected. According to this commenter, the insertion of this term 'introduces an unprecedented, subjective wild-card'' that would present an unduly burdensome test for a worker seeking whistleblower protection.

Response: The imposition of this requirement in § 708.5(a)(1) would not result in the adoption of a subjective test that a whistleblower would have to pass to qualify for protection. As noted in the preamble to the interim final rule, ''substantial violation of law'' is the same standard that is used in the Section 6006 of the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. 103–355, codified in 41 U.S.C. 265, and implemented by the regulation found at 48 CFR part 3, Subpart 3.9, ''Whistleblower Protection for Contractor Employees.'' The interim final rule emulated the standard in the FASA because it represents a balanced approach designed to ensure that minor, insubstantial issues do not waste limited resources, so whistleblower protection is available to those workers who legitimately need it.

Comment: The same commenter expressed concern about the phrase ''in good faith'' that appears in §§ 708.5(a) and 708.6(a), claiming it could impose a ''motives test'' that ''allows an employee's intentions to be put on trial as a precondition to using the rule.'' This commenter correctly notes that the inclusion of a good faith test in those provisions is inconsistent with the Whistleblower Protection Act, which uses the standard that the employee must ''reasonably believe'' the matters they are disclosing are among the types of concerns enumerated in the Act.

Response: The commenter's views on the ''good faith'' test have considerable merit. DOE did not intend to place the employee's state of mind into issue. We think the ''reasonable belief'' standard is sufficient, in and of itself. None of the other federal whistleblower protection statutes contains a similar ''good faith'' requirement. Accordingly, the final rule omits this phrase in order to conform to the current state of the Federal law on whistleblower protection.

Comment: The same commenter noted that under § 708.13, employees are now required to ''exhaust all applicable grievance-arbitration procedures'' before being eligible to file a whistleblower complaint with DOE under part 708. According to the commenter, this disadvantages employees because ''grievance systems cannot order mandatory relief and are run by the same institution that will be an adverse party in any future litigation.'' The commenter fears that this ''forces the whistleblower to preview his or her case to the defendant, before even filing it with the DOE,'' and that the employer will have an advance opportunity to ''perfect pretexts or defenses,'' ''destroy evidence'' and learn the identity of witnesses to ''pressure'' them. The commenter states that it ''regularly advises employees to bypass any system of protection that requires them first to tell their side of the dispute to the defendant.''

Response: The requirement to exhaust all applicable grievance-arbitration procedures reflects DOE's commitment to solving problems at the earliest possible stage. We want the employee and the contractor to share information about alleged reprisals for protected conduct as quickly as possible, so that little problems do not escalate into big ones. We hope that by dealing with the concerns sooner rather than later and by using existing grievance-arbitration procedures, the parties will resolve the problem and the employee will not need to file a complaint under part 708. That is why the new rule requires employees to use grievance-arbitration processes before filing a complaint under part 708. DOE has worked to change the culture across the Department's nationwide complex to sensitize its contractors against reprisal, and we believe this effort has been reasonably successful. We know of few recent cases involving the circumstances alluded to by the commenter.

In addition, under the National Labor Relations Act, a recognized labor organization serves as the exclusive representative for collective bargaining purposes of the employees in the recognized bargaining unit. Successful collective bargaining results in a collective bargaining agreement between the labor organization and the employer concerning the terms and conditions of employment of the employees in the bargaining unit. The collective bargaining agreement usually includes the establishment of an employee grievance arbitration procedure and describes how it will operate. A grievance arbitration procedure represents a continuation of the collective bargaining process, which the National Labor Relations Act protects. An employer, even an employer who has allegedly retaliated against a whistleblower, ignores the bargained-for grievance procedure at its peril. The National Labor Relations Board, which is responsible for the enforcement of the provisions of the National Labor Relations Act, does not permit an employer to bypass dealing with the union in such a manner. Thus, the provisions of § 708.13 requiring exhaustion of all applicable grievance arbitration procedures prior to filing a complaint with DOE under part 708 is a recognition of the importance of the collective bargaining process in maintaining effective labor-management relations at DOE's facilities.

Comment: The same commenter noted its approval of § 708.20, which encourages the parties to use mediation as an alternative dispute resolution tool, but contends that the rule should also require mandatory arbitration if mediation does not work.

Response: We decline to adopt this suggestion. If allegations of reprisal cannot be resolved informally by mediation, the OHA hearing should be the next step in the process.

Comment: The same commenter has reiterated the argument it raised twice before (in response to the 1996 Notice of Inquiry and again in response to the 1998 Notice of Proposed Rulemaking) that discovery must be mandatory, instead of being subject to the discretion of the hearing officer. Discovery is authorized in § 708.28(b) of the interim final rule, which states that the hearing officer ''may order discovery at the request of a party.''

Response: OHA hearing officers generally leave discovery to the parties to work out between themselves. It is usually unnecessary for the hearing officer to become involved in the process. However, to make certain the discovery process cannot be abused in the ways described in the comment, it is important for the hearing officer to have the authority to rule on contested discovery issues if they arise. We therefore decline to adopt the commenter's suggestion.

Comment: Another comment maintains that the scope of relief permitted under part 708 is ''unclear'' because § 708.36(a) does not specifically authorize ''personal and/or institutional discipline for violating anti-retaliation provisions.'' This commenter maintains that without the power to punish ''bureaucratic bullies'' who commit acts of retaliation, the rule cannot deter harassment.

Response: As noted in the preamble to the interim final rule, 64 FR 12867, the restitutionary remedies authorized under § 708.36 are intended to correct unwarranted employment actions, by restoring employees to the position they would have occupied but for the retaliation. They are not designed to punish the persons who are found to have committed acts of retaliation. Other remedies are available in different forums for employees who are seeking more than the abatement of the

retaliatory practices and basic restitution. We therefore decline to adopt the approach suggested by the commenter.

Comment: One comment seeks clarification that the decision of an arbitrator will not be disturbed in cases in which a claim of retaliation, already the subject of arbitration, is also eligible for review under this rule. The interim final rule addresses this concern in § 708.4(c)(3), which provides that an employee may not file a complaint under these regulations if it is based on the same facts for which the employee has chosen to pursue a remedy through final and binding grievance-arbitration procedures or other state or other applicable law, except as provided by § 708.15(a).

Response: Section 708.15(a)(3) answers this question. An employee may file a complaint under part 708 after submitting the same facts to arbitration after he or she has ''exhausted grievance-arbitration procedures pursuant to § 708.13, and issues related to alleged retaliation for conduct protected under § 708.5 remain.'' Whether retaliation issues remain is a question that depends on the facts in each case.

Comment: This comment also requests clarification of the kinds of claims precluded, in § 708.4(e), from coverage under these regulations because they deal with ''terms or conditions of employment'' within the meaning of the National Labor Relations Act.

Response: As noted in the preamble to the interim final rule, 64 FR 12868, ''terms and conditions of employment'' are subject to review under part 708 when the complaint alleges that they have been changed in retaliation for a protected disclosure. Part 708 is not otherwise intended to intrude into the domain traditionally covered by the National Labor Relations Act.

Comment: The same comment points out a perceived discrepancy between paragraphs (a) and (b) of § 708.15. Paragraph (a) provides that a complaint may not be filed if a remedy under the same facts was sought ''under State or other applicable law, including final and binding grievance-arbitration procedures, unless'' one of the exceptions from the binding election of remedies described in the ensuing subsections of § 708.15 is met. Paragraph (b) states, ''Pursuing a remedy other than final and binding grievance-arbitration procedures does not prevent you from filing a complaint under this part.'' The comment asks whether remedies listed in paragraph (a), other than the grievance-arbitration procedures, i.e., remedies under ''State or other applicable law,'' also fall within the exception under paragraph (b).

Response: The comment reads paragraph (b) to mean that as long as an employee does not pursue final and binding grievance-arbitration procedures, a remedy sought under State and other applicable law does not bar a complaint under these regulations. This is not what we intended. Rather, paragraph (b) means that seeking a remedy through an informal procedure that is non-binding and non-final, such as a contractor's internal employee concerns program, will not bar the filing of complaints under part 708. Paragraph (b) thus describes one of the limited conditions under which an employee who has first sought another remedy will still have recourse to part 708. Paragraph (c) of § 708.15 makes it clear that electing to pursue a formal legal remedy ''under State or other applicable law'' does bar a complaint under part 708.

Comment: Finally, the same comment perceives a discrepancy between paragraphs (e) and (f) of § 708.22, which state that an individual being interviewed has the right to representation and that representatives of parties to the complaint are not entitled to be present at interviews.

Response: We do not find a discrepancy. While representatives of parties to the complaint (e.g., their attorneys) do not have a right to be present during a witness interview, they may attend at the request of the person being interviewed. Thus, a contractor's counsel may be present, but only if requested by the subject of the interview. It is for the interview subject to choose whether he or she wishes to speak to the investigator with no one else present, or with a representative present. The comment also seeks clarification whether this section applies to the procedures of the DOE's Employee Concerns Program. The provisions of § 708.22 apply to the investigation, hearing and appeal procedures in subpart C; they do not apply to informal resolution procedures undertaken by DOE offices, which are described in subpart B.

Finally, we are correcting a typographical error in § 708.15(d), which in the interim final rule refers to § 708.17(c)(2) when it should refer to § 708.17(c)(3), and we are adding the following new section at the end of the final rule to restore an important policy statement in the original 1992 version of part 708 that was inadvertently omitted from the interim final rule:

Section 708.40 Does This Rule Impose an Affirmative Duty on DOE Contractors Not To Retaliate?

Yes. DOE contractors may not retaliate against any employee because the employee (or any person acting at the request of the employee) has taken an action listed in sections 708.5(a)–(c).

DOE never meant to imply that contractors do not have an affirmative duty not to retaliate against employees who take protected actions. This new § 708.40 is restating what has always been a part of the rule (see old § 708.5, ''Prohibition against reprisals''), and thus it does not require notice and comment.

III. Regulatory and Procedural Requirements

A. Review Under Executive Order 12866

Today's regulatory action has been determined not to be ''a significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Accordingly, this action was not 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 Executive Order 12988

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

determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

C. 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 proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. Because DOE is not required by the Administrative Procedure Act (5 U.S.C. 553) or any other law to propose the rule for public comment, DOE did not prepare a regulatory flexibility analysis for this rule.

D. Review Under the Paperwork Reduction Act

No new collection of information is imposed by this interim final rule. Accordingly, no clearance by the Office of Management and Budget is required under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

E. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this 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, this rule deals only with administrative procedures regarding retaliation protection for employees of DOE contractors and subcontractors, and, therefore, is covered under the Categorical Exclusion in paragraph A6 to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

F. Review under Executive Order 13132

Executive Order 13132 (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 examine the constitutional and statutory authority supporting any action that would limit the policy making discretion of the States and carefully assess the necessity for such actions. DOE has examined today's rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

G. Review Under the Unfunded Mandates Reform Act of 1995

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 one 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 them. This interim final rule does not contain any federal mandate, so these requirements do not apply.

H. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's final rule. 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 708

Administrative practice and procedure, Energy, Fraud, Government contracts, Occupational Safety and Health, Whistleblowing.

Issued in Washington, on February 1, 2000.

George B. Breznay,

Director, Office of Hearings and Appeals.

Accordingly, the interim rule amending 10 CFR part 708 which was published at 64 FR 12862 on March 15, 1999, and amended at 64 FR 37396 on July 12, 1999, is adopted as a final rule with the following changes:

PART 708—[AMENDED]

1. The authority citation for part 708 continues to read as follows:

Authority: 42 U.S.C. 2201(b), 2201(c), 2201(i) and 2201(p); 42 U.S.C. 5814 and 5815; 42 U.S.C. 7251, 7254, 7255, and 7256; and 5 U.S.C. Appendix 3.

2. Section 708.5(a) (introductory text) is revised to read as follows:

§ 708.5 What employee conduct is protected from retaliation by an employer?

* * * * *

(a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals—

* * * * *

3. Section 708.6(a) is revised to read as follows:

§ 708.6 What constitutes ''a reasonable fear of serious injury?''

* * * * *

(a) A reasonable person, under the circumstances that confronted the employee, would conclude there is a substantial risk of a serious accident, injury, or impairment of health or safety resulting from participation in the activity, policy, or practice; or

* * * * *

4. Section 708.15(d) is revised to read as follows:

§ 708.15 What happens if an employee files a complaint under this part and also pursues a remedy under State or other law?

* * * * *

(d) If you file a complaint under State or other applicable law after filing a complaint under this part, your complaint under this regulation will be dismissed under § 708.17(c)(3).

5. A new Section 708.40 is added as follows:

§ 708.40—Does this rule impose an affirmative duty on DOE contractors not to retaliate?

Yes. DOE contractors may not retaliate against any employee because the employee (or any person acting at the request of the employee) has taken an action listed in §§ 708.5(a)–(c).

[FR Doc. 00–2797 Filed 2–8–00; 8:45 am]

BILLING CODE 6450–01–P

FEDERAL RESERVE SYSTEM

12 CFR Part 272

[Docket No. R–1059]

Rules of Procedure

AGENCY: Federal Open Market Committee.

ACTION: Final rule; technical amendment.

SUMMARY: The Federal Open Market Committee (''the Committee'') is