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Part VI

Department of Energy

10 CFR Part 961

RIN-1901-AA18

Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste; Proposed Rule

DEPARTMENT OF ENERGY

10 CFR Part 961

RIN-1901-AA18

Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste

AGENCY: Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: On April 18, 1983, the Department of Energy (DOE) published a rule, pursuant to the Nuclear Waste Policy Act of 1982, which established the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste. The Standard Contract established, among other things, the fees and terms of payment required of the owners or generators of spent nuclear fuel and/or high-level radioactive waste for receiving disposal services. This rule was amended on September 18, 1987, in conformance with a December 6, 1985, ruling of the United States Court of Appeals for the District of Columbia that the ongoing 1.0 mill per kilowatt hour fee in the Standard Contract should be based on net rather than gross generation of electricity. On March 17, 1989, the United States Court of Appeals for the District of Columbia ruled that by use of the phrase ". . . electricity generated . . . and sold . . ." in the Nuclear Waste Policy Act of 1982, Congress intended to include in the fee basis only that electricity which is both generated and actually sold. In response to this ruling, DOE is publishing for comment conforming amendments to Articles I.13, and VIII.A.1, B.1, and Appendix G of the Standard Contract.

DATES: Written comments must be received on or before 4:30 p.m. October 9, 1990.

ADDRESS: Comments should be addressed to: Alan B. Brownstein, Office of Civilian Radioactive Waste Management, Department of Energy, 1000 Independence Avenue SW., Room GF-277, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:
Alan B. Brownstein, Office of Civilian Radioactive Waste Management, Department of Energy, 1000 Independence Avenue SW., Room GF-277, Washington, DC 20585, (202) 586-4973
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SUPPLEMENTARY INFORMATION:

I. Background

The Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq.* as amended (hereinafter referred to as either NWPA or "the Act"), provides a comprehensive framework for disposing of commercial spent nuclear fuel (SNF) and high-level radioactive waste (HLW) of domestic origin. Section 302 of the Act, 42 U.S.C. 10222, required the DOE and each owner or generator of SNF and/or HLW (hereinafter also referred to as "contract holder," "purchaser" or "plant owner") to execute, by June 30, 1983, a contract under which DOE will accept and dispose of such waste in return for the payment of fees based on the generation and sale of electricity. The fee is currently 1 mill per kilowatt hour (1M/kWh).

On April 18, 1983 (48 FR 16590), the DOE published its final rule which established the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste (Standard Contract, 48 FR 16590, codified at 10 CFR part 961). Article I.13 defined "kilowatt hours generated" as being the reactors' gross electricity generation, and Articles VIII.A.1 and B.1 used this definition as a basis for calculating the 1M/kWh fee. By its decision on December 6, 1985, the U.S. Court of Appeals for the District of Columbia held that the definition of "kilowatt hours generated" must be based on "net" generation of electricity, not "gross" generation (*Wisconsin Electric Power Co. et. al.* v. *Hodel*, 778 F.2d 1 (D.C. Cir. 1985)).

Subsequent to this ruling, on September 18, 1987, the DOE published an amended final rule (52 FR 35356) which defined "kilowatt hours generated" as "net kilowatt hours generated" (also referred to as "net electricity generated"). This term was further defined as the gross electrical output produced by a civilian nuclear power reactor, as measured at the output terminals of the turbine generator, minus the normal onsite nuclear station service loads during the time electricity is being generated. The owners of nuclear power reactors were then to pay fees to the Nuclear Waste Fund (NWF) based on "net electricity generated" rather than on "gross" electricity generation. This resulted in about a 5 percent reduction in fees collected for the NWF.

On March 17, 1989, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the Department's definition of the term "net electricity generated" does not conform to the "generated and sold" provision specified in Section 302(a)(2) of the Act (*Consolidated Edison Company of New York, Inc. et al.* v. *United States Department of Energy*, 870 F.2d 694 (D.C. Cir. 1989)). The court held that in order to meet the definition of electricity "generated and sold," the DOE is required to ". . . implement some reasonable and fair method . . ." to account for losses in the transmission and distribution of electricity in addition to deductions for normal onsite nuclear service station loads, as well as to account for other electricity not sold.

At the request of the Edison Electric Institute/Utility Nuclear Waste and Transportation Program (EEI/UWASTE), and the U.S. Council for Energy Awareness (USCEA), EEI/UWASTE and USCEA representatives met with Departmental staff on April 6, June 14, and July 27, 1989, to discuss the views of these organizations on the implementation of the court ruling. Together, EEI/UWASTE and USCEA represent more than 90 percent of the holders of the Standard Contract. In addition, at the request of Consolidated Edison Company, a meeting was held on June 29, 1989, which afforded that company's representatives an opportunity to express their views on implementing the court ruling. On September 20, 1989, EEI/UWASTE and USCEA provided to the Department, in writing, their summary views on their preferred methodological approach. The Department also acknowledges receipt of unsolicited letters from Southern Company Services and Houston Lighting and Power Company offering their views on implementing the court ruling. Copies of the communications from the above groups are available for review at the DOE Reading Room, Forrestal Building, Room 1E-190, 1000 Independence Avenue, SW., Washington, DC 20585.

The Department appreciates the cooperative spirit demonstrated by these organizations in attempting to implement a more complex fee methodology. During these meetings, the paramount objective of all parties was effectively implementing the court decision while preserving the equity and verifiability of the fee and minimizing the administrative and reporting burden on both the Department and the utilities.

II. Discussion

A. Point of Sale

The threshold issue involved in implementing the court ruling concerns the appropriate interpretation of the phrase ". . . and sold . . ." in Section 302(a)(2) of the Act. Specifically, the issue is to define, for fee calculation purposes, the point (between the generation of electricity and its delivery to the retail customer) at which the nuclear electricity is sold. For the majority of contract holders which are sole owners of a reactor and sell all their electricity directly to the retail customer, there is no question as to the point of sale, i.e., the sale to the retail customer. However, other organizational, contractual, legal, and operational considerations exist in today's electricity markets which add considerable complexity to this issue, especially when dealing with electricity sold to wholesalers for resale.

Neither the Standard Contract, the Act and its legislative history, nor previous court decisions have addressed whether the term "and sold" should be interpreted to refer to the electricity sold at the point of first sale, after the electricity leaves the busbar (which may be either to a reseller or the ultimate consumer), or whether it refers only to the electricity sold to the ultimate consumer. The Department examined whether its obligation in implementing the court decision on electricity "generated and sold" extends to sales to the ultimate consumer when other utilities, on a purchase-resale basis, intervene between the point of electricity generation and the ultimate consumer.

The Department recognizes that although sales for resale represent less than 15 percent of total sales by utilities with nuclear reactors, some utilities sell all or most of their nuclear-generated electricity to non-contract holders at the busbar or at some other intermediate point prior to ultimate sale to the consumer. While most energy losses are negligible for sales at the busbar, some sales for resale occur at subsequent connection points after experiencing additional energy losses. Another level of complexity is introduced by the fact that sales for resale, while predominantly made without regard to the generation source, are sometimes from a designated nuclear unit. In either case, the electricity initially sold for resale is subsequently resold to ultimate consumers and additional energy losses occur prior to the final sale.

To interpret the term "and sold" to refer to first sales (whether or not the electricity is resold) would mean that the marketing arrangement of a particular utility would influence the amount of electricity subject to the fee. Such a result would not provide an equitable basis for the collection of the fee and might even result in utilities seeking to alter their marketing arrangements. The Department believes that construing "and sold" to mean "sold to the ultimate consumer" is a reasonable and preferable interpretation of the statute. Given this interpretation, the Department must then address the practical consideration of how to obtain necessary loss data (including data from non-contract holders), while minimizing the administrative burden of data collection for owners/generators and fee verification by the Department. The Department proposes to define energy losses on net electricity sold for resale in a way that enables owners to adjust for these losses in a reasonable manner using an adjustment factor that represents a national average of all net electricity generated but not sold to an ultimate consumer.

B. Assumptions and Approach

Since it is impossible because of the interconnected distribution system to determine precisely the nuclear electricity that has been generated and sold on a plant-specific basis, the Department has made several simplifying assumptions. These assumptions are required to support the Department's decision to develop a reasonable calculation methodology which: (1) can be applied uniformly by each contract holder and (2) relies exclusively on existing data historically supplied to the Federal Government. The Department believes this will ease what could otherwise be a more burdensome and costly process of collecting, documenting, and maintaining itemized energy losses specifically associated with each nuclear plant, as well as controlling the Department's cost of fee verification. While the proposed approach reflects tradeoffs in precision and may not fully accommodate all unique circumstances that exist in the industry, the Department believes that the benefit of a reduced administrative burden for both utilities and the Department far outweighs the benefits of more exact results from more complicated approaches and that the approach is consistent with the U.S. Court of Appeals ruling that the Department is obligated to implement some reasonable and fair method of uniform accounting for transmission and distribution losses and other electricity which was not sold.

The Department intends to use existing data supplied to the Federal Government. These data are reported by each owner on either the "Annual Report of Major Electric Utilities, Licensees and Others," Federal Energy Regulatory Commission (FERC) Form No. 1, or the "Annual Electric Utility Report," Energy Information Administration (EIA) Form EIA-861. These owner-level data are to be used for all computations required to adjust net electricity generated as currently reported to the Department on the "Standard Remittance Advice for Payment of Fees," Form NWPA-830G, Annex A.

In order to determine the estimated amount of electricity generated and sold from a specific nuclear powerplant, it is necessary to calculate each plant owner's share of electricity sold based on: (1) electricity sold to ultimate consumers and (2) electricity sold for resale. In turn, these two components must then be adjusted to account for the amount of electricity lost or otherwise not sold.

In determining these two components, the Department proposes that each of the plant owners use individual utility-level data rather than plant-specific data. The Department believes that a utility's division of total sales between sales to ultimate consumers and sales for resale is sufficiently representative of how a specific utility's nuclear plant net generation is actually split. The variations in industry practices on sales for resale were considered when making this simplifying assumption of using utility-level data. For example, the predominant industry practice is for a utility to make short-term commitments, generally without specifying the energy source, which vary over time both by quantity and by purchaser. However, there also exist long-term contracts which specify a percentage of a nuclear powerplant's net generation to be sold for resale. While this simplifying assumption affects the calculations of individual utilities with each of these different practices, the Department believes the utility-level approach is reasonable, and that its uniformity and simplicity outweigh any benefits to be derived from creating methods to accommodate relationships that would require plant-specific data.

For the sales to ultimate consumers component, the Department proposes that each owner adjust this component by the amount of electricity not sold, to the total electricity available to be sold, as reported on the FERC Form No. 1 or Form EIA-861 submissions.

For the sales for resale component, the Department proposes that each owner adjust this component using an industry-wide average consistent with the proposed approach for sales to ultimate consumers. The Department believes that this simplification is necessary because of the complexities involving the number of reseller non-contract holders, the short-term and temporal characteristics of most sales for resale transactions, and, for most utilities, the relatively small amount that sales for resale represents of the total sales.

The Department proposes to use a national average sales for resale adjustment factor based upon electricity data collected from more than 3,000 utilities over a 3-year period. As illustrated in Table 1, using a 3-year average results in an adjustment factor of 0.940. This 3-year average term will be evaluated annually, and revised in increments of .005. For example, if the 3-year average is calculated to be 0.9374 or 0.9426, the adjustment factor would be changed to 0.935 or 0.945, respectively. Subsequent adjustments will be made by written notification from the Contracting Officer rather than through rulemaking.

TABLE 1.—NATIONAL SALES FOR RESALE ADJUSTMENT FACTOR

[In Gigawatthours]

	1986	1987	1988	Total
Energy furnished without charge	4	5	6	15
Energy used by the utility's electric department	17	17	17	50
Total energy losses	188	199	209	596
Total electricity not sold	209	221	231	661
Total electricity sold	3,273	3,361	3,510	10,145
Total electricity available for sale	3,482	3,582	3,741	10,805
Sales for resale adjustment factor	.9400	.9383	.9385	.9389

Source: Energy Information Administration, Electric Power Annual, 1988, Table 34 (revised), "Energy Account Balance of Electricity, 1986–1988," adjusted to remove Alaska and Hawaii; the "Annual Electric Utility Report," Form EIA-861, 1986, 1987, 1988; and "Annual Report of Major Electric Utilities, Licensees and Others," FERC Form No. 1, 1986, 1987, and 1988.

Note: Totals may not equal sum of components due to independent rounding.

In summary, the approach that the Department proposes to determine the total electricity generated and sold at each plant will require the reporting utility to:

(1) sum each owner's adjustment for "sales to ultimate consumer" and "sales for resale" (terms defined in the following sections);

(2) multiply this summation by each owner's respective share of the plant, to calculate each owner's weighted energy adjustment factor;

(3) sum the owner's weighted energy adjustment factors to obtain the nuclear powerplant's total energy adjustment factor; and

(4) multiply the total energy adjustment factor by the "net electricity generated" as currently reported on the Annex A form submitted to the Department.

C. Calculation Methodology

The Department proposes that to calculate the amount of electricity generated and sold for a specific nuclear plant, the net electricity generated must be decreased by a factor to account for the amount of nuclear generation lost in transmission and distribution or otherwise not ultimately sold. This calculation is represented by the following formula:

Electricity Generated and Sold = Net Electricity Generated × Total Energy Adjustment Factor

1. Net Electricity Generated

This proposed rule does not alter the basic methodology used to calculate "net electricity generated" as defined in the final rule published on September 18, 1987 (i.e., "the gross electrical output produced by a civilian nuclear power reactor measured at the output terminals of the turbine generator, minus the normal onsite nuclear station service loads during the time electricity is being generated"). The calculation of "net electricity generated" will now be used as an intermediate value in the determination of "electricity generated and sold."

In calculating "net electricity generated" the DOE has determined, however, that all onsite use can be deducted from the gross generation if the onsite use came from a nuclear power reactor and is not double counted in any other energy loss term of the calculation methodology proposed below. This determination would revoke the DOE Contracting Officer's letter, dated February 1, 1988, focusing on the deduction of service loads during startup testing. The calculated "net electricity generated" is to be recorded on a revised "Annex A" of the "Remittance Advice," Form NWPA-830G.

2. Total Energy Adjustment Factor

The Total Energy Adjustment Factor (TEAF) is the sum of all the Weighted Energy Adjustment Factors (WEAF) for each of a plant's owners. The WEAF is derived by multiplying the Owner's Energy Adjustment Factor (OEAF) by the Owner's Share (OS) of the plant (or share of metered sales). The OEAF is calculated by adding an owner's adjustment for "sales to ultimate consumers" to an owner's adjustment for "sales for resale." The TEAF is represented by the following formula:

$$TEAF = \sum_{i=1}^{NO} WEAF_i,$$

where:

$WEAF = OEAF \times OS$
$= (ASC + ASR)OS$
$= [(FSC \times SCAF) + (FSR \times NAF)]OS$

where:

TEAF = Total Energy Adjustment Factor
NO = Number of Owners
WEAF = Weighted Energy Adjustment Factor for each plant owner
OS = Owner's Share of the plant (station) or share of metered sales
OEAF = Owner's Energy Adjustment Factor
ASC = Adjustment for Sales to ultimate Consumer
ASR = Adjustment for Sales for Resale

FSC=Fraction of Sales to ultimate Consumer
SCAF=Sales to ultimate Consumer Adjustment Factor
FSR=Fraction of Sales for Resale
NAF=National average Adjustment Factor, currently defined as 0.940

In developing these adjustment factors, as detailed below, utilities will use the following information from the FERC Form No. 1 (page 401), or Form EIA-861 (Schedule 2, question 9):

FERC Form No. 1	Category	Form EIA-861
Line:		Line:
19	Total sources of energy	j
21	Sales to ultimate consumers.	k
22	Sales for resale	l
23	Energy furnished w/o charge.	m
25	Energy used by the company.	n
30	Total energy losses	o

(a) Owner's Adjustment for Sales to the ultimate Consumer

The owner's Adjustment for Sales to the ultimate Consumer (ASC) is the product of the owner's Fraction of Sales to ultimate Consumer (FSC) and the owner's Sales to ultimate Consumer Adjustment Factor (SCAF), calculated as follows:

ASC=FSC×SCAF
where:

ASC=Adjustment for Sales to ultimate Consumer
FSC=Fraction of Sales to ultimate Consumer, calculated as either:

FERC Form No. 1 or Form EIA-861

$$\frac{\text{line 21}}{\text{line 21}+\text{line 22}} \quad \text{or} \quad \frac{\text{line k}}{\text{line k}+\text{line l}}$$

SCAF=Sales to ultimate Consumer Adjustment Factor, calculated as either:

FERC Form No. 1 or Form EIA-861

$$1.-\frac{\text{line 23}+\text{line 25}+\text{line 30}}{\text{line 19}} \quad \text{or} \quad 1.-\frac{\text{line m}+\text{line n}+\text{line o}}{\text{line j}}$$

(b) Owner's Adjustment for Sales for Resale

The owner's Adjustment for Sales for Resale (ASR) is the product of the owner's Fraction of Sales for Resale (FSR) and the sales for resale National average Adjustment Factor (NAF), calculated as:

ASR=FSR×NAF
where:

ASR=Adjustment for Sales For Resale
FSR=Fraction of Sales For Resale, calculated as either:

FERC Form No. 1 or Form EIA-861

$$\frac{\text{line 22}}{\text{line 21}+\text{line 22}} \quad \text{or} \quad \frac{\text{line l}}{\text{line k}+\text{line l}}$$

NAF=National average Adjustment Factor, currently defined as 0.940

(c) Owner's Share of the Plant

The Owner's Share (OS) of the plant is based on either the fraction of plant ownership or the fraction of metered sales. The sum of all owner's shares must equal 1.00. For a nuclear station with more than one reactor and different ownerships for each reactor, a separate Annex A will be required for each reactor.

D. Sample Calculations

Two sample calculations based on the Department's proposed rule for adjusting net electricity generated are detailed below. The first example illustrates a sample case for a single owner, while the second example details the TEAF calculation for a plant with multiple owners.

EXAMPLE 1—SINGLE OWNER

Owner Data	
Owner's share	1.0000
Total sources of energy	26,167,838 MWh.
Sales to ultimate consumer	24,248,986 MWh.
Sales for resale	582,437 MWh.
Energy furnished w/o charge	4,410 MWh.
Energy used by the company	40,045 MWh.
Total energy losses	1,291,960 MWh.

Since the utility owns 100% of the net electricity generated, the Owner's Share (OS) of the plant (station) or share of metered sales is equal to 1.00, and the Total Energy Adjustment Factor (TEAF) is equal to the Weighted Energy Adjustment Factor (WEAF). Using the methodology developed above, the TEAF would be calculated as follows (expressed to four significant digits):

OEAF=ASC+ASR
ASC=FSC×SCAF

$$FSC=\frac{24{,}248{,}986}{24{,}248{,}986+582{,}437}=.9765$$

$$SCAF=1.-\frac{4{,}410+40{,}045+1{,}291{,}960}{26{,}167{,}838}=.9489$$

ASC=.9765×.9489=.9266
ASR=FSR×NAF

$$FSR=\frac{582{,}437}{24{,}248{,}986+582{,}437}=.0235$$

NAF=.940
ASR=.0235×.940=.0221
OEAF=ASC+ASR=.9266+.0221=.9487
WEAF=OEAF×OS=.9487×1.0000=.9487
TEAF=(sum) WEAF=.9487

Table 2 illustrates how the TEAF would be reported on the revised Annex A. The net electricity generated value would then be multiplied by the TEAF resulting in the amount of nuclear electricity generated and sold.

TABLE 2.—EXAMPLE OF REPORTING TEAF ON ANNEX A FOR A SINGLE OWNER

Name(s) of owners	Adjustment for Sales to ultimate Consumer (ASC)			Adjustment for Sales for Resale (ASR)				Owner's Energy Adjustment Factor (OEAF)		Owner's Share (OS)		Weighted Energy Adjustment Factor (WEAF)
	Fraction of Sales to ultimate Consumer (FSC)		Sales to ultimate Consumer Adjustment Factor (SCAF)		Fraction of Sales for Resale (FSR)		National average Adjustment Factor (NAF)					
Owner	(0.9765	×	0.9489)	+	(0.0235	×	0.940) =	0.9487	×	1.0000	=	0.9487
	(	×	)	+	(	×	0.940) =		×		=	
	(	×	)	+	(	×	0.940) =		×		=	
	(	×	)	+	(	×	0.940) =		×		=	
Total Energy Adjustment Factor (TEAF=sum of WEAF)												0.9487

Example 2—Multiple Owners

Three utilities, A, B, and C, own 41.2%, 41.0% and 17.8% of a nuclear powerplant, respectively. As in Example 1, the WEAF must be calculated for each of the plant owners before the plant TEAF can be calculated.

Owner A Data	
Owner's Share	.4120
Total Sources of Energy	8,942,417 MWh.
Sales to ultimate Consumer	6,650,363 MWh.
Sales for Resale	1,700,699 MWh.
Energy Furnished w/o Charge	0 MWh.
Energy Used by the Company	22,580 MWh.
Total Energy Losses	568,776 MWh.

OEAF=ASC+ASR

ASC=FSC×SCAF

$$FSC=\frac{6,650,363}{6,650,363+1,700,699}=0.7963$$

$$SCAF=1.-\frac{0+22,580+568,776}{8,942,417}=.9339$$

ASC=.7963×.9339=.7437

ASR=FSR×NAF

$$FSR=\frac{1,700,699}{6,650,363+1,700,699}=.2037$$

NAF=.940

ASR=.2037×.940=.1915

OEAF=ASC+ASR=.7437+.1915=.9352

WEAF=OEAF×OS=.9352×.4120=.3853

Owner B Data	
Owner's Share	.4100
Total Sources of Energy	9,611,602 MWh.
Sales to ultimate Consumer	6,441,439 MWh.
Sales for Resale	2,617,181 MWh.
Energy Furnished w/o Charge	0 MWh.
Energy Used by the Company	11,111 MWh.
Total Energy Losses	541,871 MWh.

OEAF=ASC+ASR

ASC=FSC×SCAF

$$FSC=\frac{6,441,439}{6,441,439+2,617,181}=.7111$$

$$SCAF=1.-\frac{0+11,111+541,871}{9,611,602}=.9425$$

ASC=.7111×.9425=.6702

ASR=FSR×NAF

$$FSR=\frac{2,617,181}{6,441,439+2,617,181}=.2889$$

NAF=.940

ASR=.2889×.940=.2716

OEAF=ASC+ASR=.6702+.2716=.9418

WEAF=OEAF×OS=.9418×.4100=.3861

Owner C Data	
Owner's Share	.1780
Total Sources of Energy	2,204,391 MWh.
Sales to ultimate Consumer	2,068,231 MWh.
Sales for Resale	22,288 MWh.
Energy Furnished w/o Charge	0 MWh.
Energy Used by the Company	414 MWh.
Total Energy Losses	113,458 MWh.

OEAF=ASC+ASR

ASC=FSC×SCAF

$$FSC=\frac{2,068,231}{2,068,231+22,288}=.9893$$

$$SCAF=1.-\frac{0+414+113,458}{2,204,391}=.9483$$

ASC=.9893×.9483=.9382

ASR=FSR×NAF

$$FSR=\frac{22,288}{2,068,231+22,288}=.0107$$

NAF=.940

ASR=.0107×.940=.0101

OEAF=ASC+ASR=.9382+.0101=.9483

WEAF=OEAF×OS=.9483×.1780=.1688

In the above example, the TEAF for this station is the sum of each owner's WEAF, calculated as:

Owner	WEAF
A	.3853
B	.3861
C	.1688
TEAF	.9402

Table 3 illustrates how the TEAF would be reported on the revised Annex A. The net electricity generated value would then be multiplied by the TEAF resulting in the amount of nuclear electricity generated and sold.

TABLE 3.—EXAMPLE OF REPORTING TEAF ON ANNEX A FOR MULTIPLE OWNERS

Name(s) of Owners	Adjustment for Sales to ultimate Consumer (ASC)				Adjustment for Sales for Resale (ASR)				Owner's Energy Adjust. Factor (OEAF)		Owner's Share (OS)		Weighted Energy Adjust. Factor (WEAF)
	Fraction of Sales to ultimate Consumer (FSC)		Sales to ultimate Consumer Adjust. Factor (SCAF)		Fraction of Sales for Resale (FSR)		National average Adust. Factor (NAF)						
Owner A	(0.7963	X	0.9339)	+	(0.2037	X	0.940)	=	0.9352	X	0.4120	=	0.3853
Owner B	(0.7111	X	0.9425)	+	(0.2889	X	0.940)	=	0.9418	X	0.4100	=	0.3861
Owner C	(0.9893	X	0.9483)	+	(0.0107	X	0.940)	=	0.9483	X	0.1780	=	0.1688
	(	X	)	+	(	X	0.940)	=		X		=	
	(	X	)	+	(	X	0.940)	=		X		=	
Total Energy Adjustment Factor (TEAF=sum of WEAF)													0.9402

E. Supporting Documentation

All documentation submitted to support the calculations are subject to verification and audit as allowed under Article VIII E.2 of the Standard Contract. The Department intends that a single reporting utility represent all parties to the Standard Contract, and be responsible for completing the entire Appendix G and Annex A. The supporting documentation needed for the fee verification process includes, but is not limited to, having the following records available: station diagrams showing meter locations; a table comparing the net electricity generated reported on: (a) "Annex A of Appendix G," Form NWPA–830G; (b) "Electric Power Monthly," Form EIA–759; (c) the Nuclear Regulatory Commission's (NRC) Operating Data Report; and (d) the NRC's Average Daily Unit Power Level Report (complete with footnotes explaining any inconsistencies); and annual data displaying and comparing the net electricity generated reported on the Annex A with the data reported on the "Annual Report of Major Electric Utilities, Licensees and Others," FERC Form No. 1, and with the data reported on the "Annual Electric Utility Report," Form EIA–861 (complete with footnotes explaining any inconsistencies).

F. Credit for Past Overpayments

Once this ruling becomes final, the Department intends to issue specific procedures to allow utilities to take credits for past overpayments on their subsequent quarterly payments. The Department has determined that the Congressional authorization to pay interest on utility overpayments resulting from the *Wisconsin Electric Power Co. et. al.* v. *Hodel*, 778 F.2d 1 (D.C. Cir. 1985) decision does not apply to the latest court decision. Therefore, the Department is seeking separate statutory authorization from Congress which will allow the payment of interest.

G. Interim Guidance

Until this rule becomes final, utilities are to continue to follow the existing procedures to make their quarterly payments.

III. Proposed Rule

As set forth below, the purpose of this proposed rule is to amend the Standard Contract consistent with the court ruling that the ongoing fee should be based on nuclear electricity generated and sold. Electricity which is generated and intended for sale, as metered at the station busbar, will be adjusted for losses prior to ultimate sale, hereafter referred to as "electricity generated and sold."

Proposed 961.11 (amended) sets forth changes to the contract necessary to implement the payment of the ongoing fee based on electricity generated and sold as follows:

Article I—Definitions—Remove the revised definition of "net kilowatt hours generated" and add a new definition of "electricity (kilowatt hours) generated and sold."

Article VIII.A.1—Fees—Remove the term "net kilowatt hour generated" and add in its place the term "kilowatt hour generated and sold."

Article VIII.B.1—Payment—Remove the term "net electricity generated" and add in its place the term "electricity generated and sold."

Appendix G—Standard Remittance Advice for Payment of Fees—Revise the Annex A to Appendix G form currently used by utilities to reflect payment based on electricity generated and sold. The Annex A form instructions have also been changed to reflect the proposed calculation procedures for identifying net generation for fee calculation purposes, for identifying and calculating the energy adjustment factor and for reporting electricity generated and sold.

IV. Comment Procedures

A. Written Comments

Interested persons are invited to participate in this proposed rulemaking by submitting comments no later than (30 days following publication date) to the address indicated in the "ADDRESS" section of this notice and should identify submissions by marking on the outside envelope and on the document the designation: "Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste." Ten copies should be submitted.

All comments received will be available for public inspection in the DOE Reading Room, room 1E–190, James E. Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, between the hours of 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Any information or data considered confidential by the person furnishing them must be so identified by individual data element and submitted in writing. DOE reserves the right to determine the confidential status of the information or data and to treat the information or data in accordance with its determination. Specific company information will be kept confidential to the maximum extent allowed by law.

B. Public Hearing

DOE believes that the amendments proposed in this Notice present no substantial issues of fact or law and are unlikely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses. Accordingly, DOE is not scheduling a public hearing as provided by section 501(c) of the Department of Energy

Organization Act (Pub. L. No. 95–91, 42 U.S.C. 7191(c)) and the Administrative Procedure Act (Pub. L. No. 89–554, 5 U.S.C. 553). If a significant number of persons request an opportunity for oral presentation of views, data and arguments, a public hearing could be held after public notice.

V. Procedural Requirements

A. Executive Order No. 12291.

Under Executive Order No. 12291, agencies are required to determine whether proposed rules are major rules as defined in the Order. DOE has reviewed this proposed rule and has determined that it is not a major rule because: it will not have an annual effect on the economy of $100 million or more; it will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and it will not have any significantly adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises. This notice was submitted to the Office of Management and Budget (OMB) for review under Executive Order 12291. OMB has completed its review.

B. Executive Order No. 12612

Under Executive Order No. 12612, agencies are required to ensure adequate consideration and respect for the institutional interests of States and their subdivisions when an agency is formulating or implementing proposed policies that have federalism implications. DOE has reviewed this proposed rule and has determined that the rule is unlikely to have a substantial direct effect on the States, the relationship between the States and Federal Government, or distribution of the power and responsibilities among various levels of government.

C. Regulatory Flexibility Act

In accordance with section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, DOE finds that sections 603 and 604 of that Act do not apply to this rule because, if promulgated, it will not have a significant economic impact on a substantial number of small entities. This finding is based on the fact that the parties to the contract, who are owners and generators of spent nuclear fuel or high-level radioactive waste, are not small entities.

D. National Environmental Policy Act

Execution of amendments to the standard contract proposed in this rulemaking will not result in any activities which could cause environmental impacts. Therefore, this rulemaking is not a proposal for a major Federal action significantly affecting the quality of the human environment. Accordingly, preparation of either an environmental assessment or an environmental impact statement is not required.

E. Paperwork Reduction Act

In accordance with section 3504(h) of the Paperwork Reduction Act of 1980 (Pub. L. 96–511), this proposed rule has been submitted to OMB. The current Remittance Advice and Annex A were previously approved by OMB under control number 1901–0260. Comments on the information collection requirements of this proposal should be submitted both to the DOE address noted above and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attention: Ronald Minsk.

List of Subjects in 10 CFR Part 961

Government contracts, Nuclear materials, Nuclear powerplants and reactors, Radiation protection, Waste treatment and disposal.

In consideration of the foregoing, it is proposed that part 961, chapter III of title 10, Code of Federal Regulations be amended as set forth below.

Berton J. Roth,
Acting Director, Office of Procurement, Assistance and Program Management.

PART 961—STANDARD CONTRACT FOR DISPOSAL OF SPENT NUCLEAR FUEL AND/OR HIGH-LEVEL RADIOACTIVE WASTE

1. The authority citation for part 961 continues to read as follows:

Authority: Sec. 644, Pub. L. 95–91, 91 Stat. 599 (42 U.S.C. 7254) and sec. 302, Pub. L. 97–425, 96 Stat. 2257 (42 U.S.C. 10222).

2. The Standard Contract in § 961.11 is proposed to be amended by revising in Article I, paragraph 13, and Articles VIII.A.1, and B.1, and Appendix G to the Standard Contract, including Annex A to Appendix G as set forth below. Annex B to Appendix G remains unchanged.

§ 961.11 Text of the contract.

* * * * *

Article 1—Definitions

* * * * *

13. The term "electricity (kilowatt hours) generated and sold" means gross electrical output produced by a civilian nuclear power reactor measured at the output terminals of the turbine generator minus the normal onsite nuclear station service loads during the time electricity is being generated, multiplied by the total energy adjustment factor;

where,

a. The term *Total Energy Adjustment Factor (TEAF)* means the sum of individual owners' weighted energy adjustment factors;

b. The term *Weighted Energy Adjustment Factor (WEAF)* means the product of an owner's energy adjustment factor times the owner's share of the plant (station) or share of metered sales;

c. The term *Owner's Energy Adjustment Factor (OEAF)* means the owner's share of plant times the sum of the individual owner's adjustment for sales to ultimate consumer and adjustment for sales for resale;

d. The term *Owner's Share of plant (OS)* means the owner's fraction of metered electricity sales or fraction of plant ownership;

e. The term *Adjustment for Sales to ultimate Consumer (ASC)* means the owner's fraction of sales to the ultimate consumer multiplied by the owner's sales to ultimate consumer adjustment factor;

f. The term *Fraction of Sales to ultimate Consumer (FSC)* means the owner's fractional quantity of electricity sold to the ultimate consumer, relative to the total of electricity sales (sales to ultimate consumers plus the sales for resale).

g. The term *Sales to ultimate Consumer Adjustment Factor (SCAF)* means one minus the quotient of all electricity lost or otherwise not sold for each owner, divided by the total electricity available for sale; electricity lost or otherwise not sold includes:

(a) Energy furnished without charge;

(b) Energy used by the company;

(c) Transmission losses;

(d) Distribution losses; and

(e) Other unaccounted losses as reported to the Federal Government ("Annual Report of Major Electric Utilities, Licensees and Others", Federal Energy Regulatory Commission (FERC) Form No. 1; or the "Annual Electric Utility Report", Energy Information Administration (EIA) Form EIA-861.)

h. The term *Total Electricity Available* means the reporting year total of all of a utility's electricity supply which is available for disposition, expressed in kilowatt hours, and is equal to the sum of the energy sources.

i. The term *Adjustment for Sales for Resale (ASR)* means the owner's fraction of sales for resale multiplied by the National Average Adjustment Factor;

j. The term *Fraction of Sales for Resale (FSR)* means the owner's fractional quantity of electricity sold to other utilities with all of the electricity being subsequently resold, except for energy losses occurring after the original sale;

k. The term *National average Adjustment Factor (NAF)* means identical to the *"Sales to ultimate Consumer Adjustment Factor"* except on a national, rather than owner specific basis and is currently set at .940.

Instructions to Annex A to Appendix G provide the necessary information to calculate the energy adjustment factor.

* * * * *

Article VIII—Fees and Terms of Payment

A. Fees

1. Effective April 7, 1983, Purchaser shall be charged a fee in the amount of 1.0 mill per kilowatt hour (1M/kWh) generated and sold.

* * * * *

B. Payment

1. For electricity generated and sold by the Purchaser's civilian nuclear power reactor(s) on or after April 7, 1983, fees shall be paid quarterly by the Purchaser and must be received by DOE not later than the close of the last business day of the month following the end of each assigned 3-month period. The first payment shall be due on July 31, 1983, for the period April 7, 1983, to June 30, 1983. (Add as applicable: A one-time adjustment period payment shall be due on __________, for the period __________ to __________.) The assigned 3-month period, for purposes of payment and reporting of kilowatt hours generated and sold shall begin __________.

* * * * *

BILLING CODE 6450-01-M

NWPA-830G

U.S. DEPARTMENT OF ENERGY
Germantown, MD 20874

APPENDIX G - STANDARD REMITTANCE ADVICE FOR PAYMENT OF FEES

This information is being collected under mandatory authorities vested in the U.S. Department of Energy under Public Law 97-425. Late filing; failure to file or to otherwise comply with the instructions provided may result in interest penalties as provided by Article VIII.C of the Standard Contract for Disposal of Spent Nuclear Fuel and/or High Level Radioactive Waste.

For information concerning confidentiality of information see Item 6 of the instructions.

1.0 IDENTIFICATION INFORMATION

1.1 Purchaser Information
(a) Name ______
(b) Address ______
(c) City, State & Zip Code ______

1.2 Contact Person
(a) Name ______
(b) Telephone (Include Area Code) ______

1.3 Standard Contract Identification Number: ______

1.4 Period Covered by this Remittance Advice
(a) From ______ (Month/Day/Year) to ______ (Month/Day/Year)
(b) Date of This Payment: ______ (Month/Day/Year)

2.0 SPENT NUCLEAR FUEL (SNF) FEE

2.1 Number of Reactors Covered ______

2.2 Total Purchaser Obligation as of April 7, 1983 $ ______

2.3 Date of First Payment:

Month	Day	Year

2.4 10-Year Treasury Note Rate as of the Date of First Payment ______ %

2.5 Unpaid Balance Prior to this Payment $ ______

2.6 Option Chosen ______

2.7 Fee Data
(a) Principal ______
(b) Interest ______
(c) Total Spent Nuclear Fuel Fee Transmitted with this Payment $ ______

3.0 FEE FOR ELECTRICITY GENERATED AND SOLD (MILLS PER KILOWATTHOUR, M/KWh)

3.1 Number of Reactors Covered: ______

3.2 **Total Electricity Generated and Sold (Megawatthours) (Sum of Line 4.2 from all Annex A's)** ______

3.3 Current Fee Rate ______ (M/KWh)

3.4 **Total Fee for Electricity Generated and Sold (M/KWh) Transmitted with this Payment** $ ______

4.0 UNDERPAYMENT/LATE PAYMENT (As notified by DOE)

Type of Payment (a)	Date of Notification (Month/Day/Year) (b)	DOE Invoice Number (c)	Date of Payment Transmittal (Month/Day/Year) (d)	Interest Paid (e)	Amount Transmitted (f)
4.1 SNF Underpayment					
4.2 Electricity Generation Underpayment					
4.3 TOTAL UNDERPAYMENT					
4.4 SNF Late Payment					
4.5 Electricity Generation Late Payment					
4.6 TOTAL LATE PAYMENT					

5.0 OTHER CREDITS CLAIMED (Attach Explanation)

Enter the Total Amount Claimed for All Credits $ (______)

6.0 TOTAL REMITTANCE

6.1 Total Spent Nuclear Fuel Fee Transmitted (from 2.7(c)) $ ______
6.2 **Total Fee for Electricity Generated and Sold (from 3.4)** $ ______
6.3 Total Underpayment (from 4.3(f)) $ ______
6.4 Total Late Payment (from 4.6(f)) $ ______
6.5 Total Credits (from 5.0) $ ______
6.6 TOTAL REMITTANCE (Sum of 6.1 through 6.4 less 6.5) $ ______

7.0 CERTIFICATION

I certify that the Total Remittance is true and accurate to the best of my knowledge.

Name ______ Date ______ Signature ______

TITLE 18 USC 1001 makes it a crime for any person to knowingly and willfully make to any department or agency of the United States any false, fictitious, or fraudulent statements as to any matter within its jurisdiction.

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*GPO: 193-122

BILLING CODE 6450-01-C

Department of Energy,
Germantown, MD 20874.

Appendix G—Standard Remittance Advice for Payment of Fees

General Information

1. Purpose.

Standard Remittance Advice (RA) form is designed to serve as the source document for entities into the Department's accounting records to transmit data from Purchasers concerning payment of their contribution to the Nuclear Waste Fund.

2. Who Shall Submit.

The RA must be submitted by Purchasers who signed the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste. Submit Copy 1, 2, and 3 to DOE, Office of the Controller, Special Accounts and Payroll Division and retain Copy 4.

3. Where to Submit.

Purchasers shall forward completed RA to:

U.S. Department of Energy
Office of the Controller
Special Accounts and Payroll Division (C-216 GTN)
Box 500
Germantown, Md 20874-0500

Request for further information, additional forms, and instructions may be directed in writing to the address above or by telephone to (301) 353-4014.

4. When to Submit.

For electricity generated on or after 4-7-83 fees shall be paid quarterly by the Purchaser and must be received by DOE not later than the close of business on the last business day of the month following the end of each assigned three month period. Payment is by electronic wire transfer only.

5. Sanctions.

The timely submission of RA by a Purchaser is mandatory. Failure to file may result in late penalty fees as provided by Article VIII C of the contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste.

6. Provisions Regarding the Confidentiality of Information.

The information contained in these forms may be (i) information which is exempt from disclosure to the public under the exemption for trade secrets confidential commercial information specified in the Freedom of Information Act of 5 USC 552(b)(4)(FOIA) or (ii) prohibited from public release by 18 USC 1905. However, before a determination can be made that particular information is within the coverage of either of these statutory provisions, the person submitting the information must make a showing satisfactory to the Department concerning its confidential nature.

Therefore, respondents should state briefly and specifically (on an element-by-element basis if possible), in a letter accompanying submission of the form why they consider the information concerned to be a trade secret or other proprietary information, whether such information is customarily treated as confidential information by their companies and the industry, and the type of competitive hardship that would result from disclosure of the information in accordance with the provisions of 10 CFR 1004.11 of DOE's FOIA regulations. DOE will determine whether any information submitted should be withheld from public disclosure.

If DOE receives a response and does not receive a request, with substantive justification, that the information submitted should not be released to the public, DOE may assume that the respondent does not object to disclosure to the public of any information submitted on the form.

A new written justification need not be submitted each time the NWPA-830G is submitted if:

a. views concerning information items identified as privileged or confidential have not changed and

b. a written justification setting forth respondent's views in this regard was previously submitted.

In accordance with the cited statutes and other applicable authority, the information must be made available, upon request, to the Congress or any committee of Congress, the General Accounting Office, and other Federal agencies authorized by law to receive such information.

Instructions for Completing Standard Remittance Advice for Payment of Fees

Section 1.0 Identification Information

1.1 Name of Purchaser as it appears on the Standard Contract, the mailing address, state and zip code.

1.2 Name and telephone number of person responsible for the completion of this form.

1.3 Standard Contract identification number as assigned by DOE.

1.4 Period covered by this advice and date of this payment. Any period different from the assigned three month period should be explained on a separate attachment.

Section 2.0 Spent Nuclear Fuel (SNF) Fee

2.1 Enter the number of reactors for which the Purchaser had irradiated fuel as of midnight between 6/7 April 1983 (equal to the number of Annex B Forms attached).

2.2 Total amount owed to the Nuclear Waste Fund for spent fuel used to generate electricity prior to April 7, 1983. (See Annex B for calculation).

2.3 Self explanatory.

2.4 Ten year Treasury Note rate on the date the payment is made, to be used if payments are being made using the 40 quarter option, or if lump sum payment is made after June 30, 1985.

2.5 Unpaid balance before this payment is made.

2.6 Enter the payment option (1, 2, or 3) chosen. The selection of payment option must be made within two years of Standard Contract execution.

2.7 Total payment of fee which this advice represents. Show principal, interest, and total.

Section 3.0 Fee for Electricity Generated and Sold (M/KWh)

3.1 Enter the number of reactors the Purchaser is reporting on during this reporting period.

3.2 Enter total electricity generated and sold during the reporting period from all reactors being reported. This is the sum of Station Total figures of line 4.2 from all Annex A forms attached, expressed in megawatthours.

3.3 Current Fee Rate as provided by DOE (initially 1.0 M/KWh which is equal to 1.0 $/MWh).

3.4 Total Fee for Electricity Generated and sold (M/KWh) represented by this advice.

Section 4.0 Underpayment/Late Payment (as notified by DOE)

4.1-4.6 Self explanatory.

Section 5.0 Other Credits Claimed

Represents all items for which a Purchaser may receive credit, as specified in the Standard Contract.

Section 6.0 Total Remittance

6.1-6.6 This section is a summary of the payments made in the previously mentioned categories with this remittance.

Section 7.0 Certification

Enter the name and title of the individual your company has designated to certify the accuracy of the data. Sign the "Certification" block and enter the current date.

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U.S. Department of Energy
Energy Information Administration
Form NWPA-830G

ANNEX A to APPENDIX G

Standard Remittance Advice for Payment of Fees

Section 1. Identification Information: Please first read the Instructions on the back.

1.1 Purchaser Information:
1.11 Name:..... ______
1.12 Address:. ______
1.13 Attention: ______
1.14 City:......... ______
1.15 State:....... ____ 1.16 Zip Code: ______
1.16 Utility ID Number: _ _

1.2 Contact Person:
1.21 Name: ______
1.22 Title: ______
1.23 Phone No.:(____)(____-______) Ext:______

1.3 Station Name: ______

1.4 Standard Disposal Contract Identification Number: ______

1.5 Period Covered (MM/DD/YY):
1.51 From:___/___/___ To:___/___/___
1.52 Date of This Submission:___/___/___

Section 2. Net Electricity Generated Calculation

Item	Unit 1	Unit 2	Unit 3	Station Total*
2.1 Unit ID Codes:				
2.2 Gross Thermal Energy Generated (MWh):				
2.3 Gross Electricity Generated (MWh):				
2.4 Nuclear Station Use While At Least One Nuclear Unit Is In Service** (MWh):				
2.5 Nuclear Station Use While All Nuclear Units Are Out Of Service** (MWh):				
2.6 Net Electricity Generated (MWh) (Item 2.3 minus Item 2.4):				

*For a nuclear station with more than one reactor and different ownerships for each reactor, a separate Annex A will be required.
**Utilities unable to meter individual unit use shall report estimated unit use and shall explain in a footnote how the unit data were estimated.

2.7 Footnote (if any):

Section 3. Total Energy Adjustment Factor Calculation

3.1 Weighted Energy Adjustment Factor Calculation Name of Nuclear Station Owner(s)	Adj. for Sales to ultimate Consumer (ASC) Fraction of Sales to ult. Consumer (FSC)	Sales to ultimate Consumer Adj. Factor (SCAF)	Adjustment for Sales for Resale (ASR) Fraction of Sales for Resale (FSR)	National average Adj. Factor (NAF)	Owner's Energy Adj. Factor (OEAF)	Owner's Share (OS)	Weighted Energy Adj. Factor (WEAF)
1.	(.	X .)+	(.	X .)=	.	X .	= .
2.	(.	X .)+	(.	X .)=	.	X .	= .
3.	(.	X .)+	(.	X .)=	.	X .	= .
4.	(.	X .)+	(.	X .)=	.	X .	= .
5.	(.	X .)+	(.	X .)=	.	X .	= .
6.	(.	X .)+	(.	X .)=	.	X .	= .
7.	(.	X .)+	(.	X .)=	.	X .	= .
8.	(.	X .)+	(.	X .)=	.	X .	= .
9.	(.	X .)+	(.	X .)=	.	X .	= .
10.	(.	X .)+	(.	X .)=	.	X .	= .
11.	(.	X .)+	(.	X .)=	.	X .	= .
12.	(.	X .)+	(.	X .)=	.	X .	= .
3.2 Total Energy Adjustment Factor (TEAF = sum of WEAF)							.

Section 4. Fee Calculation for Electricity Generated and Sold

Item	Station Total
4.1 Total Energy Adjustment Factor (Enter value from 3.2 above):	
4.2 Electricity Generated and Sold (Item in 4.1 times Item in 2.6 - Station Total):	
--- Current Fee Rate (1 mill/KWh = $1/MWh):	$1.00/MWh
4.3 Current Fee Due (Dollars) (4.2 times $1.00): Transfer Item 4.3 to line 3.4 of Appendix G	

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U.S. Department of Energy
Energy Information Administration
Form NWPA-830G

Annex A to Appendix G

Standard Remittance Advice for Payment of Fees

Annex A Instructions

0. General Information:

0.1 Purpose: To report the calculation of fees due the Department of Energy's Nuclear Waste Fund.

0.2 Please read all instructions before completing this form.

0.3 Complete a separate Annex A for each nuclear station. For a nuclear station with more than one reactor and different ownerships for each reactor, a separate Annex A will be required for each reactor.

0.4 Submit Annex A Quarterly with Appendix G.

0.5 Where to Submit:

U.S. DOE, Office of the Controller
Special Accounts & Payroll Division
(C-216 GTN), Box 500
Germantown, MD 20874-0500

Section 1. Identification Information: (Self explanatory)

Section 2. Net Electricity Generated Calculation:

2.1 Unit ID Code: Enter the Reactor Unit Identification (ID) Code as assigned by DOE, for each reactor in the station.

2.2 Gross Thermal Energy Generated (MWh): Utility shall report the thermal output of the nuclear steam supply system during the gross hours of the reporting period.

2.3 Gross Electricity Generated (MWh): Utility shall report this amount for each unit in the appropriate column, and the total in the column labeled "Station Total." This amount is measured at the output terminals of the generator during the reporting period.

2.4 Nuclear Station Use While At Least One Nuclear Unit Is In Service (MWh): Utility shall report this amount for each unit in the appropriate column, and the total in the column called "Station Total." The utility is to report consumption of electricity by the nuclear portion of the station during days in which at least one of the station's nuclear units was on-line and producing electricity. A utility unable to meter an individual unit shall report the estimated unit use, and shall explain in item 2.7 how the unit data were estimated. **Note that:**

A. During days in which nuclear station use exceeds nuclear station generation, the utility shall treat all resulting negative values as zero for fee calculation purposes.

B. A utility that has multiple nuclear units at one station:

o when at least 1 nuclear unit is operating and when generation from that unit exceeds the nuclear station's use, the utility may assume that the operating unit is supplying electricity for nuclear station use whether or not the electricity has been metered separately or the units terminate to a common electrical busbar; and

o shall report under Item 2.5 any electricity use by the nuclear portion of the station during the days in which all nuclear units at the station were out of service simultaneously.

C. A utility that has a metered transmission line connecting an off-station nuclear reactor with another nuclear station may treat the off-station plant as part of this station for fee calculation purposes if it is not double counted as part of Section 3.

D. Utility may deduct small quantities of unmetered non-nuclear electricity generation included in "Gross Electricity Generated," provided that it is identified and explained in Item 2.7.

E. A utility may deduct nuclear electricity generation which is not sold and does not pass the busbar, provided they identify and explain the deduction in Item 2.7 and that the deduction is not double counted as part of Section 3.

2.5 Nuclear Station Use While All Nuclear Units Are Out of Service (MWh): Utility shall report this amount for each unit in the appropriate column, and the total in the "Station Total" column. In this row, the utility shall report the consumption of electricity by the nuclear portion of the station during days in which total nuclear unit use exceeds nuclear generation (e.g., a day in which all nuclear units at the station were out of service at once). Note that a utility unable to meter individual unit use will report estimated unit use, and shall explain in Item 2.7 how the unit data were estimated.

2.6 Net Electricity Generated (MWh): The utility shall report this amount for each unit in the appropriate column, and the total in the "Station Total" column. This amount is the result of subtracting Items 2.4 from Items 2.3.

2.7 Footnote (if any): Utilities that are unable to meter individual unit use shall explain here how the unit data were estimated.

Section 3. Total Energy Adjustment Factor Calculation:

The reporting utility shall obtain necessary data from all owners to calculate the Total Energy Adjustment Factor and maintain consistent, accurate, and complete records to support these submissions. The values provided in this section must be accurate to 4 significant digits. If there are more than 12 owners, use a continuation sheet. For a nuclear station with more than one reactor and different ownerships for each reactor, a separate Annex A will be required for each reactor.

3.1 Weighted Energy Adjustment Factor Calculation:

Name of Nuclear Station Owner(s): provide the name(s) in Items 1. thru 12. of 3.1. If more than 12 names, use a continuation sheet.

Adjustment for Sales to ultimate Consumer (ASC): is the product of Fraction of Sales to ultimate Consumer (FSC) and the Sales to ultimate Consumer Adjustment Factor (SCAF).

Fraction of Sales to ultimate Consumer (FSC): is determined by dividing the owner's previous years' annual sales to the ultimate consumer by the sum of the owner's previous years' annual sales to the ultimate consumer plus the owner's previous years' annual sales for resale. These figures can be found on the Federal Energy Regulatory Commission (FERC) Form No. 1 or the Energy Infomation Administration (EIA) Form EIA-861.

Sales to ultimate Consumer Adjustment Factor (SCAF): is equal to one minus the quotient of all electricity lost or otherwise not sold for each owner, divided by the total electricity available for sale by that owner. The total electricity available is the reporting year total of all of an owner's electricity supply which is available for disposition, expressed in kilowatt hours. Electricity lost or otherwise not sold includes: (a) energy furnished without charge; (b) energy used by the company; (c) transmission losses; (d) distribution losses; and (e) other unaccounted losses as reported on the FERC Form No. 1 or Form EIA-861.

Adjustment for Sales for Resale (ASR): is the product of Fraction of Sales for Resale (FSR) and National average Adjustment Factor (NAF).

Fraction of Sales for Resale (FSR): is determined by dividing the owner's previous years' annual sales for resale by the sum of the owner's previous years annual sales to the ultimate consumer plus the owner's previous years' annual sales for resale. These figures can be found on the FERC Form No. 1 or the Form EIA-861.

Owner's Energy Adjustment Factor (OEAF): is the product of ASC and ASR.

Owner's Share (OS): is the fraction of ownership of a nuclear plant or station , or the fraction of metered sales.

Weighted Energy Adjustment Factor (WEAF): is the product of OEAF and OS.

3.2 Total Energy Adjustment Factor (TEAF): is sum of WEAFs.

Section 4. Fee Calculation for Electricity Generated and Sold:

4.1 Total Energy Adjustment Factor: Enter the value from Item 3.2 as appropriate.

4.2 Electricity Generated and Sold: Multiply the value in Item 4.1 by the "Station Total" value in Items 2.6 to calculate this value for the reporting station.

4.3 Current Fee Due (Dollars): Multiply the values in Item 4.2 by one (1) dollar/megawatthour (or 1.0 mill/kwh), which is the current fee. Add this station fee to the current fee due for all other reactors operated by the Purchaser, and then enter the sum on Line 3.4 of the Appendix G, Remittance Advice.

[FR Doc. 90-17384 Filed 9-6-90; 8:45 am]

BILLING CODE 6450-01-C

federal register

Friday,
September 7, 1990

Part VII

Department of Education

34 CFR Part 105

Enforcement of Nondiscrimination on Basis of Handicap in Programs or Activities Conducted by the Department of Education; Final Regulations

DEPARTMENT OF EDUCATION

34 CFR Part 105

Enforcement of Nondiscrimination on Basis of Handicap in Programs or Activities Conducted by the Department of Education

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: These regulations require that the Department of Education operate all of its programs and activities to ensure nondiscrimination against qualified individuals with handicaps. They set forth standards for what constitutes discrimination on the basis of mental or physical handicap, provide definitions for "individual with handicaps" and "qualified individual with handicaps," establish a complaint mechanism for resolving allegations of discrimination that do not relate to employment, and adopt the procedures established in the Equal Employment Opportunity Commission regulations at 29 CFR part 1613 for processing complaints alleging discrimination on the basis of handicap with respect to employment.

EFFECTIVE DATE: October 9, 1990.

FOR FURTHER INFORMATION CONTACT: Robert Kilpatrick, U.S. Department of Education, Equal Employment Opportunity Office, 400 Maryland Avenue, SW., Washington, DC 20202-4550. Telephone: (202) 401-3560.

Copies of these regulations will be made available on tape for persons with impaired vision who request them. They will be provided by the Equal Employment Opportunity Office, U.S. Department of Education, 400 Maryland Avenue, SW., (room 1167, Federal Office Building No. 6), Washington, DC 20202-4550, (202) 401-3560 (voice) or (202) 401-1126 (TDD).

SUPPLEMENTARY INFORMATION: On April 1, 1988, the Secretary published a notice of proposed rulemaking (NPRM) in the **Federal Register**, 53 FR 10808. The period for receiving public comment expired May 31, 1988.

The purpose of these final regulations is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), as it applies to programs and activities conducted by the Department of Education (hereinafter "the Department"). These regulations do not provide for implementation or enforcement of the Americans with Disabilities Act of 1990, Public law 101-336, 104 Stat. 327.

As amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Section 119, Pub. L. 95-602, 92 Stat. 2982), the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810), and the Civil Rights Restoration Act of 1987 (Pub. L. 100-259, 102 Stat. 28), section 504 of the Rehabilitation Act of 1973 states the following:

> No otherwise qualified individual with handicaps in the United States, * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by an Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.*

(29 U.S.C. 794 (1978 amendment italicized).)

The substantive nondiscrimination obligations of the Department, as set forth in these final regulations, are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. (See 28 CFR part 41, the section 504 coordination regulation for federally assisted programs.) This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal Government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) *id.*; 124 Cong. Rec. 13,897 (remarks of Rep. Brademas); *id.* at 38,552 (remarks of Rep. Sarasin).

This final rule has been reviewed by the Department of Justice. It is an adaptation of a prototype prepared by the Department of Justice pursuant to Executive Order 12250 (45 FR 72995, 3 CFR, 1980 Comp., p. 298) and distributed to Executive agenciès. These regulations have also been reviewed by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206).

Analysis of Comments and Responses

In response to the Secretary's invitation in the NPRM, four groups, whose organizational purposes include protecting the civil rights of individuals with handicaps, submitted comments on the proposed regulations. An analysis of the comments follows.

Substantive issues are discussed under the section of the regulations to which they pertain. Technical and other minor changes are not addressed.

General

One issue was raised that addressed the entire NPRM rather than any specific section of the regulations.

Comment: Two commenters objected to language differences between these regulations and the Department's section 504 regulations for federally assisted programs.

Discussion: The language changes in these final regulations are based on the Supreme Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), and subsequent U.S. courts of appeals decisions interpreting *Davis* and section 504. See *Dopico* v. *Goldschmidt*, 687 F.2d 1272 (D.C. Cir. 1981) (APTA); see also *Rhode Island Handicapped Action Committee* v. *Rhode Island Public Transit Authority*, 718 F.2d 490 (1st Cir. 1983).

These language differences are also supported by the decision of the Supreme Court in *Alexander* v. *Choate*, 469 U.S. 287 (1985), in which the Court held that the regulations for federally assisted programs did not require a recipient to modify its durational limitation on Medicaid coverage of inpatient hospital care for handicapped persons. Clarifying its *Davis* decision, the Court explained that section 504 requires only "reasonable" modifications, *id.* at 300, and explicitly noted "(t)he regulations implementing section 504 (for federally assisted programs) are consistent with the view that *reasonable* adjustments in the nature of the benefit offered must at times be made to assure meaningful access." *Id.* at 301 n.21 (emphasis added).

Incorporation of these changes, therefore, makes the regulations implementing section 504 for federally conducted programs consistent with the Federal Government's regulations implementing section 504 for federally assisted programs as they have been interpreted by the Supreme Court. Many of these federally assisted program regulations were issued prior to the interpretations of section 504 by the Supreme Court in *Davis*, by lower courts interpreting *Davis*, and by the Supreme Court in *Alexander*; therefore, their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various

U.S. courts of appeals. The Secretary interprets the federally assisted program regulations to reflect the judicial rulings described earlier and, therefore, believes that there are no significant differences between the final regulations for federally conducted programs and the Department's interpretation of the section 504 regulations for federally assisted programs.

Change: None.

Section 105.3 Definition of "Auxiliary Aids"

Comment: One commenter suggested that the definition of auxiliary aids should include attendant services that may be needed to aid handicapped persons to travel to and from their place of employment in a Departmental program or activity.

Discussion: This recommendation is not adopted because the services of an attendant for a handicapped person's travel to and from that person's place of employment are personal in nature. These attendant services do not serve an auxiliary purpose for direct participation in programs or activities conducted by the Department, whereas the types of auxiliary aids listed in the definition are necessary for actual participation in those programs.

Change: None.

Section 105.3 Definition of "Qualified Individual With Handicaps"

Comment: One commenter stated that the aspect of the definition pertaining to "fundamental alteration" of a program or activity should be clarified. In this regard, the commenter suggested that the definition should be more specifically delineated to address when modifications to a program must occur.

Discussion: The Secretary believes that the obligation to make appropriate modifications or adjustments to enable individuals with handicaps to participate in a program conducted by the Department is made sufficiently clear in §§ 105.32, 105.33, and 105.40 of these regulations, so that a reference to it in the definition is unnecessary.

Change: None.

Section 105.10 Self-Evaluation

Comment: One commenter suggested that the Department take steps to ensure that input from interested persons, including individuals with handicaps or organizations representing individuals with handicaps, be considered in the self-evaluation process. The commenter also suggested that the self-evaluation include the following: An assurance that the effects of any discriminatory policy will be eliminated; a plan of corrective action for achieving compliance; and specific modification requirements especially for the hearing and visually impaired.

Discussion: The Secretary is committed to expeditiously dismantling the effects of any policy that has a discriminatory impact on handicapped persons, including those with impaired vision or hearing. Therefore, this section requires the Department to provide an opportunity for all interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to submit either oral or written comments during the self-evaluation period. The Secretary will determine whether a written transition plan is necessary based on the results of and the recommendations obtained from the Department's self-evaluation.

Change: None.

Section 105.11 Notice

Comment: One commenter suggested that the regulations should specify that recruitment materials include information apprising handicapped individuals of their rights.

Discussion: The Secretary does not consider this suggested modification to the regulations to be necessary. The recruitment materials inform the public that the Department does not engage in prohibited discrimination.

Change: None.

Section 105.20 General Prohibitions Against Discrimination

Comment: One commenter objected to the omission of a paragraph from the regulations for federally conducted programs that prohibits a recipient from providing significant assistance to an organization that discriminates.

Discussion: Assistance from the Department to an organization would constitute Federal financial assistance. The organization, as a recipient of that assistance, would be covered by the Department's section 504 regulations for federally assisted programs. The Secretary believes the "significant assistance" provision contained in the federally assisted regulations, therefore, would be inappropriate in a regulation applying only to federally conducted programs or activities.

Change: None.

Comment: One commenter suggested that the regulations should extend to the activities of licensees or certified entities, citing *Community Television of Southern California* v. *Gottfried*, 459 U.S. 498 (1983).

Discussion: In *Gottfried*, the Supreme Court held that section 504 as applied to federally assisted programs did not require the Federal Communications Commission to prohibit discrimination on the basis of handicap by licensed broadcasters, but that "the policies underlying the Communications Act" might authorize the Commission to issue a regulation governing that discrimination. The Court did not, however, indicate that section 504 itself could serve as the source of that regulatory authority.

The Supreme Court has held that "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather the words take meaning from the purpose of the regulatory legislation." *National Association for the Advancement of Colored People* v. *Federal Power Commission*, 425 U.S. 602, 669 (1976). Accordingly, the Secretary does not believe section 504, in itself, can extend the Department's regulatory authority to the actions of licensees or certified entities. If an agency has existing regulatory authority that is broad enough to enable it to establish a nondiscrimination requirement for its licensees or certified entities, section 504 may support the exercise of that authority. Because the Department has no such underlying authority, it cannot prohibit discrimination by licensees.

Change: None.

Section 105.32 Program Accessibility: Existing Facilities

Comment: Two commenters suggested that the decision as to whether an action would result in undue burdens should be based on the resources of the Department as a whole.

Discussion: The Secretary believes that the Department's entire budget is an inappropriate basis for making determinations as to undue financial and administrative burdens. Most of the Department's budget is statutorily earmarked for specific purposes and cannot be used for other purposes, including making the Department's programs accessible to individuals with handicaps.

Change: None.

Comment: One of the commenters also recommended listing in the regulations factors to be taken into account in determining undue burdens.

Discussion: The Secretary believes such a listing is impractical because the Secretary will determine, on a case-by-case basis, if adjustments or modifications would fundamentally alter the nature of a Departmental program or activity or would result in undue financial or administrative burden. Moreover, if the Secretary makes such a determination, it will be accompanied by a written statement setting forth the reasons for the determination.

Change: None.

Section 105.40 Communications

Comment: One commenter recommended that the Department add a provision to the communications section that would require the Department to provide captioning on films and videotapes it produces.

Discussion: The regulations require effective communication, and captioning is one such method. The Secretary reserves the right to utilize the most effective communication method, including captioning, depending on the particular situation.

Change: None.

Comment: One commenter recommended that the Department add a paragraph to § 105.40, Communications, requiring the Department to provide handicapped persons with information about their rights under section 504.

Discussion: Such a paragraph is unnecessary because it would duplicate § 105.11, Notice.

Change: None.

Section 105.41 Compliance Procedures

Comment: One commenter suggested that the Department should be required to refer a complaint to the appropriate agency if it does not have jurisdiction over it.

Discussion: The regulations require the Department to make reasonable efforts to make an appropriate complaint referral. There are circumstances in which the Department might not be able to successfully refer a complaint. For example, the Department might receive a complaint over which no Federal agency would have jurisdiction.

Change: None.

Comment: A commenter also suggested that the regulations should include procedures for handling complaints that are incomplete.

Discussion: The Department believes that it is not necessary to include its internal procedures for handling incomplete complaints in the text of the regulations themselves. To do so would deprive the Department of the flexibility to respond to circumstances not included in the regulations.

Change: None.

Comment: A commenter suggested that the regulations should include a provision for judicial review.

Discussion: It is beyond the Department's jurisdiction to specify the availability or scope of judicial review of agency actions.

Change: None.

Comment: One commenter recommended the addition of provisions whereby the Department would award attorneys fees to complainants and whereby compensation would be awarded to the prevailing parties in administrative proceedings.

Discussion: There is no statutory authorization in title V of the Rehabilitation Act for the Department to award compensation or attorneys fees to prevailing parties in agency administrative proceedings covered by this section.

Change: None.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Paperwork Reduction Act of 1980

These regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

List of Subjects in 34 CFR Part 105

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Handicapped, Historic places, Historic preservation, National register of historic places, Nondiscrimination, Physically handicapped.

Dated: March 16, 1990.

Lauro F. Cavazos,

Secretary of Education.

The Secretary amends title 34 of the Code of Federal Regulations by adding a new part 105 to read as follows:

PART 105—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE DEPARTMENT OF EDUCATION

Authority: 29 U.S.C. 794, unless otherwise noted.

§ 105.1 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 105.2 Application.

This part applies to all programs or activities conducted by the Department, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§ 105.3 Definitions.

For purposes of this part, the following definitions apply:

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the Department. For example, auxiliary aids useful for persons with impaired vision include readers, materials in braille, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDDs), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the Department's alleged discriminatory action in sufficient detail to inform the Department of the nature and date of the alleged violation of section 504. It must be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties must describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Historic preservation programs means programs conducted by the Department that have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

Individual with handicaps means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase—

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction, and alcoholism;

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working;

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities; and

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the Department as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward the impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the Department as having such an impairment.

Qualified individual with handicaps means—

(1) With respect to preschool, elementary, or secondary education services provided by the Department, an individual with handicaps who is a member of a class of persons otherwise entitled by statute, regulation, or Department policy to receive education services from the Department;

(2) With respect to any other Department program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the Department can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other Department program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) *Qualified handicapped person* as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 105.30

Secretary means the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955); the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810); and the Civil Rights Restoration Act of 1987 (Pub. L. 100-259, 102 Stat. 28). As used in this part, section 504 applies only to programs or activities conducted by the Department and not to federally assisted programs.

Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

§§ 105.4-105.9 [Reserved]

§ 105.10 Self-evaluation.

(a) The Department shall, within one year of the effective date of this part, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any of those policies and practices is required, the Department shall proceed to make the necessary modifications.

(b) The Department shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The Department shall, for at least 3 years following completion of the self-evaluation, maintain on file, and make available for public inspection—

(1) A description of areas examined and any problems identified; and

(2) A description of any modifications made.

§ 105.11 Notice.

The Department shall make available, to employees, applicants, participants, beneficiaries, and other interested persons, information regarding the provisions of this part and its applicability to the programs or activities conducted by the Department, and make that information available to them in such manner as the Secretary finds necessary to apprise those persons of the protections against discrimination assured them by section 504 and the regulations in this part.

§§ 105.12-105.19 [Reserved]

§ 105.20 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under, any program or activity conducted by the Department.

(b)(1) The Department, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless that action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The Department may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The Department may not, directly or through contractual or other arrangements, use criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The Department may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under, any program or activity conducted by the Department; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The Department, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The Department may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the Department establish requirements for the program or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the Department are not, themselves, covered by this part.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive Order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive Order to a different class of individuals with handicaps is not prohibited by this part.

(d) The Department shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 105.21-105.29 [Reserved]

§ 105.30 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the Department. As provided in § 105.41(b), the definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§ 105.31 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 105.32, no qualified individual with handicaps shall, because the Department's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the Department.

§ 105.32 Program accessibility: Existing facilities.

(a) *General.* The Department shall operate each program or activity so that the program or activity, viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the Department to make each of its existing facilities accessible to and usable by individuals with handicaps;

(2) In the case of historic preservation programs, require the Department to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) (i) Require the Department to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens.

(ii) The Department has the burden of proving that compliance with § 105.32(a) would result in that alteration or those burdens.

(iii) The decision that compliance would result in that alteration or those burdens must be made by the Secretary after considering all of the Department's resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion.

(iv) If an action would result in that alteration or those burdens, the Department shall take any other action that would not result in the alteration or burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General.* (i) The Department may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignments of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps.

(ii) The Department is not required to make structural changes in existing facilities if other methods are effective in achieving compliance with this section.

(iii) The Department, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing that Act.

(iv) In choosing among available methods for meeting the requirements of this section, the Department shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of § 105.32(a) in historic preservation programs, the

Department shall give priority to methods that provide physical access to individuals with handicaps. In cases were a physical alteration to an historic property is not required because of § 105.32 (a)(2) or (a)(3), alternative methods of achieving program accessibility include—

(i) Using audiovisual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance.* The Department shall comply with the obligations established under this section within 60 days of the effective date of this part except that if structural changes in facilities are undertaken, the changes shall be made within 3 years of the effective date of this part, but in any event as expeditiously as possible.

(d) *Transition plan.* (1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, the Department shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete those changes.

(2) The Department shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan must be made available for public inspection.

(3) The plan must, at a minimum—

(i) Identify physical obstacles in the Department's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

§ 105.33 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of, the Department must be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 105.34–105.39 [Reserved]

§ 105.40 Communications.

(a) The Department shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public, as follows:

(1) (i) The Department shall furnish appropriate auxiliary aids if necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the Department.

(ii) In determining what type of auxiliary aid is necessary, the Department shall give primary consideration to the request of the individual with handicaps.

(iii) The Department need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) If the Department communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDDs) or equally effective telecommunication systems must be used.

(b) The Department shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The Department shall provide signs at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility must be used at each primary entrance of an accessible facility.

(d) (1) This section does not require the Department to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens.

(2) The Department has the burden of proving that compliance with § 105.40 would result in that alteration or those burdens.

(3) The decision that compliance would result in that alteration or those burdens must be made by the Secretary after considering all Department resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion.

(4) If an action required to comply with this section would result in that alteration or those burdens, the Department shall take any other action that would not result in the alteration or burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§ 105.41 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs and activities conducted by the Department.

(b) As provided in § 105.30, the Department shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Deputy Under Secretary for Management is responsible for coordinating implementation of this section. Complaints may be sent to the U.S. Department of Education, Office of Management, Federal Building No. 6, 400 Maryland Avenue SW., Washington, DC 20202.

(d) The Department shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The Department may extend this time period for good cause.

(e) If the Department receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The Department shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157) is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the Department shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the Department of the letter required by § 105.41(g). The Department may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Secretary.

(j) If the Secretary determines that additional information is needed for the complainant, he or she shall notify the complainant of the additional information needed to make his or her determination on the appeal.

(k) The Secretary shall notify the complainant of the results of the appeal.

(l) The time limit in paragraph (g) of this section may be extended by the Secretary.

(m) The Secretary may delegate the authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated.

§ 105.42 Effective date.

The effective date of this part is October 9, 1990.

[FR Doc. 90-21025 Filed 9-6-90; 8:45 am]

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